

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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DARIAN DYE

APPELLANT

V.

FILED

NO. 2008-~~TS~~^{CA}00712

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FRANCES DYE

APPELLEE

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPEAL FROM THE CHANCERY COURT OF PONTOTOC COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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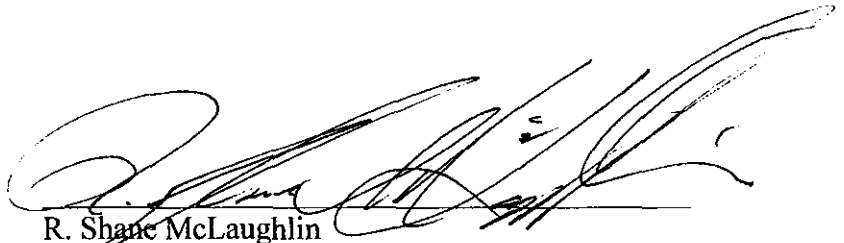
ATTORNEYS FOR APPELLANT

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

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

1. Darian Dye, Appellant
2. Frances Dye, Appellee
3. William R. Ford, counsel for Appellee
4. William L. Griffin, Jr., counsel for Appellee
5. R. Shane McLaughlin, counsel for Appellant
6. Nicole H. McLaughlin, counsel for Appellant



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STATEMENT OF THE ISSUES

1. Whether the Chancellor erred in considering property which had been expended during the Parties' marriage, where the expenditure was for reasonable and necessary expenses and was not the result of a wasteful dissipation of marital assets.
2. Whether the Chancellor erred in failing to find that a substantial portion of Darian's retirement account had been his separate property since it was accumulated prior to the Parties' marriage.
3. Whether the Chancellor abused his discretion by ordering Darian to provide COBRA health insurance for Frances for so long as allowed by law, where Darian had already provided Frances with such insurance for twenty-seven months after the Parties' separation.
4. Whether the Chancellor committed clear error by classifying certain pieces of equipment as marital property when the evidence established that third parties owned the equipment.

STATEMENT OF THE CASE

Frances Dye (“Frances”) instituted these proceedings by filing a “Motion for Emergency Custody and Other Relief” on October 7, 2005. (R. Vol. 1 p. 9). Frances subsequently filed a Complaint for Divorce on November 1, 2005. (R. Vol. 1 p. 19). Darian Dye (“Darian”) answered and filed a counterclaim. (R. Vol. 1 p. 28).

The Parties eventually withdrew the fault-based grounds alleged in the pleadings, consented to a divorce on grounds of irreconcilable differences and submitted the remaining issues to the Court. (R. Vol. 1 p. 87). The Trial Court entered a Judgment allowing the withdrawal of all fault grounds and submitting certain issues to the Court. (R. Vol. 1, p. 90).

The remaining issues were tried on July 12, 2006, August 1, 2007, November 2, 2007 and November 15, 2007. (*See, e.g.*, T. Vol. 1, p. i). The Court rendered its ruling on December 14, 2007, and entered a Final Judgment on February 28, 2008. (T. Vol. 4 p. 386-437; R. Vol. 1, p. 152). Darian filed a Motion for Reconsideration and An Amendment of Judgment on March 5, 2008. (R. Vol. 1, p. 157). The Trial Court entered an Order clarifying the Final Judgment and denying Darian’s post-trial Motion on March 24, 2008. (R. Vol. 1, p. 168).

Darian timely perfected this appeal. (R. Vol. 1, p. 170).

STATEMENT OF FACTS

Darian and Frances were married on June 6, 1995. (R. Vol. 1, p. 19). The couple owned a home and two acres of land, and another tract of thirty-one acres, in Pontotoc County, Mississippi. (R. Vol. 2, p. 183-84). Frances had two children, Justin and Chasity, from a previous marriage to Teddy Null. (See T. Vol. 3, p. 269). After her separation from Null, Frances sought to have Null's parental rights terminated as to the two children and was ultimately successful. (T. Vol. 3, p. 269-70). Darian adopted both Justin and Chasity after his marriage to Frances. (*Id.*). Another child, Anna Grace Dye, was born to Frances' and Darian's marriage on July 22, 1998. (*Id.*).

During the marriage Darian was employed by Day-Brite. (T. Vol. 1, p. 17). Darian started working for Day-Brite in 1987, prior to the Parties' marriage, and worked until 2000. (*Id.*). Darian had a retirement account by virtue of his employment with Day-Brite. (T. Vol. 1, p. 74). Darian accumulated his retirement account over his thirteen year employment with the company. (*Id.* at 75). Darian and Frances were married during only the last five years of Darian's employment with Day-Brite. (*Id.*). At the start of the proceedings in this case, Darian's Day-Brite retirement account was valued at \$68,803. (T. Vol. 1, p. 16). After leaving Day-Brite Darian began working for the University of Mississippi, and began accruing retirement benefits from this employment. (R. Vol. 1, p. 17).

In addition to working for Day-Brite, Darian also operated TEC Services, a heating and cooling business, during the marriage. (T. Vol. 1, p. 7). Darian also occasionally helped his father in purchasing automobiles for resale under the business name Don Dye and Sons. (T. Vol. 1, p. 40). However, Darian testified that he did not have an ownership interest in Don Dye and

Sons. (T. Vol. 1, p.10, 40). Frances testified that Don Dye and Sons was owned by Don Dye, Sr. (Darian's father), Don Dye, Jr. (Darian's brother) and Darian. (T. Vol. 2, p. 200).

At all times during the marriage Frances was employed as an office manager for Horizon Sales, in Tupelo, Mississippi. (T. Vol. 2, p. 126). Frances also had a retirement account from her employment. (T. Vol. 2, p. 157). At the start of the proceedings in this case, Frances' account was valued at \$25,000. (*Id.*).

In October 2005, Frances and Chasity alleged that Darian had sexually molested Chasity, who was thirteen years old at the time. (*See, e.g.*, T. Vol. 3, p. 344, 354). Immediately after the horrific allegations surfaced, Frances sought emergency custody of the children in this action. (R. Vol 1 p. 9). The Trial Court entered a Temporary Emergency Order granting Frances custody of the children and use of the Parties' marital home on the same day, October 7, 2005. (R. Vol. 1, p. 13).

Based on Frances' allegations, Darian was indicted on charges of sexual battery and fondling of Chasity in the Circuit Court of Pontotoc County, Mississippi. (*See* R. Vol. 1, p. 114-15). Darian was not allowed any contact whatsoever with any of the minor children after the allegations that he had molested Chasity surfaced. (*See* R. Vol. 1, p. 13; 47-48). Darian did not see Anna Grace, his own biological child, for over two years after the allegations of sexual battery were made. (*See* T. Vol. 4, p. 420). As the child's guardian *ad litem* noted in his report, Frances' conduct after the allegations, and during the Chancery Court proceedings, caused Anna Grace to be afraid of her father and Darian's relationship with Anna Grace suffered greatly. (R. Vol. 1, p. 142-44).

In addition to destroying his relationships with his children, Darian's legal defense against the felony charges was also financially devastating. Darian was represented in the felony

prosecution by Tupelo Attorney Jason D. Herring and the Jackson law firm Butler, Snow, Stevens, O'Mara and Cannada. (*See* R. Vol. 1, p. 84). At the July 12, 2006, trial setting in this matter, with his felony prosecution ongoing, Darian had already expended approximately \$23,500 in legal expenses. (T. Vol. 1, p. 36). Darian sold property, obtained cash advances on credit cards and borrowed from his family to pay for legal expenses associated with the felony prosecution. (*See, e.g.*, T. Vol. 1, p. 8, 13, 23).

Darian continued to expend significant amounts in his defense of the charges against him during the divorce proceedings in Chancery Court. (*See* T. Vol. 3, p. 345-46). The felony prosecution ended on April 15, 2007, when Darian was acquitted of all charges by a Pontotoc County jury. (R. Vol. 1, p. 114-15; T. Vol. 3, p. 344). By the end of the trial Darian had incurred approximately \$120,000 in legal expenses. (*Id.*). Darian had actually paid approximately \$100,000 toward the legal expenses, and still owed over \$20,000 as of the conclusion of the Trial in this case in November 2007. (*Id.*). Darian had spent his entire life savings, including his retirement account, to pay legal expenses associated with the felony charges. (*Id.*).

At the conclusion of the proof in this case the Chancellor undertook a thorough analysis of property classification and division. (*See* T. Vol. 4, p. 409). The Court found various small items of personalty to be Darian's separate property, which were cumulatively valued at \$5,500. (*Id.*). The Court found that Frances had an essentially equal amount of separate property, having personalty valued at \$5,000. The Court found that all of Darian's retirement account, valued at \$68,803 was marital property, even though all of the funds had been expended in Darian's criminal defense during the marriage. (T. Vol. 4, p. 410; R. Vol. 1, p. 155).

The Chancellor classified the following property as marital and distributed the marital property as shown below:

MARITAL PROPERTY DISTRIBUTED TO DARIAN

Property	Trial Court's Determined Value
Darian's Day-Brite retirement	\$68,803
Darian's State of Mississippi retirement	\$12,000
Two tractors, bush hog, finishing mower	\$30,000
Cash value life insurance	\$8,000
TEC Services equipment	\$29,750
TEC Services	\$7,500
Pontiac Grand Prix	\$2,885
Cash	\$5,850
Lawnmower	\$500
Push mower	\$100
Personal property items	\$6,500
Polaris 4-wheeler	\$3,250
Hay payment	\$600
Propane refund	\$1,300
TOTAL	\$177,038

MARITAL PROPERTY DISTRIBUTED TO FRANCES

Property	Trial Court's Determined Value
Marital residence and two acres	\$75,000

Thirty one acres	\$93,000
Honda automobile	\$4,039
Household goods	\$10,375
Emerson stock	\$1,153
TOTAL	\$183,567

The Chancellor also held that Frances owed Darian \$12,500 representing her cashed-in IRA, less \$2,500 for a Jimmy vehicle sold by Darian to pay his legal expenses, \$5,770 for shares of stock held by Darian and \$1,701.05 for Darian's half of the children's medical bills. (T. Vol. 4, p. 412). Thus, in the final analysis, the Chancellor found that he had awarded Frances marital property valued at \$183,567 had awarded Darian marital property valued at \$182,451.95. (T. Vol. 4, p. 412).

However, the proof at trial showed that the majority of the significant property awarded to Darian had been expended during the marriage and no longer existed. Specifically, Darian's Day-Brite retirement account, the largest single asset awarded to him, had been completely depleted in his criminal defense. (T. Vol. 4, p. 344-45). Likewise, the Jimmy automobile had been sold to gather funds for his defense. (T. Vol. 1, p. 13). The overwhelming evidence also showed that the tractors, bush hog and mower, valued at \$30,000 were owned by Don Dye and Sons, rather than Darian. (See T. Vol. 85-86; 199-200). This phantom property awarded to Darian represents \$103,803, or over fifty-six percent (56%), of the total property the Chancellor distributed to Darian.

In contrast to awarding Darian such non-existent property, Frances was awarded the vast majority of the Parties remaining valuable property. (See R. Vol. 1, p. 152-56). Specifically, the

Court awarded Frances all of the real property (the marital home with two acres and the thirty-one acre parcel) amounting to equity of \$168,000. (*Id.*).

Darian appeals the Chancellor's classification and division of property. As described fully below, the Trial Court's decision should be reversed.

STANDARD OF REVIEW

This Court employs a limited standard of review of property division and distribution in divorce cases. *Owen v. Owen*, 928 So. 2d 156, 160 (Miss. 2006). A Chancellor's decision as to property distribution is upheld so long as it is supported by "substantial credible evidence." *Carrow v. Carrow*, 642 So.2d 901, 904 (Miss. 1994). Similarly, an Appellate Court will not disturb a Chancellor's factual findings "unless they are manifestly wrong, clearly erroneous, or not supported by substantial credible evidence." *In re Estate of Holmes*, 961 So. 2d 674, 679 (Miss. 2007).

However, such deference is not afforded to the Chancellor's conclusions of law. *Marshall v. Gipson Steel, Inc.*, 806 So. 2d 266 (Miss. 2002). The Court reviews the Chancellor's interpretation and application of the law *de novo*. *Singley v. Singley*, 846 So. 2d 1004, 1006 (Miss. 2002).

SUMMARY OF THE ARGUMENTS

Darian Dye expended approximately \$120,000 in legal expenses defending himself from criminal charges of sexual battery and fondling after Frances Dye accused him of molesting his adopted daughter. Darian was eventually acquitted of all of the charges by a jury.

Most of the assets awarded to Darian following the trial in this case had already been expended on Darian's criminal defense during the marriage. The largest single asset awarded to Darian, a retirement account valued at \$68,803, had been entirely depleted prior to the divorce by

reasonable and necessary legal expenses. While Darian was awarded assets which no longer existed, Frances was awarded all of the Parties' real property, with equity totaling \$168,000.

The Chancellor did not find that Darian's legal expenditures had been a wasteful dissipation of marital property. In fact, all of the evidence showed that the expenses were reasonable and necessary. Nevertheless, the Chancellor essentially treated the expenditures as a wasteful dissipation by crediting Darian with receiving all of the funds in the property distribution analysis.

The Trial Court erred by considering marital assets which had been depleted by Darian's legal expenses, and by charging Darian with receipt of the property, since the expenditures were not in the nature of a wasteful dissipation of marital assets. Accordingly, the Trial Court's decision should be reversed.

Additionally, in the alternative, the Trial Court committed reversible error by treating all of Darian's retirement account as marital property where the evidence showed that most of the funds were accumulated prior to the Parties' marriage. Even if the Court could have properly considered the retirement account, the portion accumulated before the marriage was Darian's separate property.

Next, the Trial Court abused its discretion by ordering Darian to provide COBRA health insurance coverage for Frances for thirty-six months after the divorce. Darian had already provided health insurance to Frances for approximately twenty-seven months. In light of Frances' higher income, and far greater portion of the existing marital property awarded to her, the Court's ordering Darian to provide her health insurance for over five years amounts to an abuse of discretion.

Finally, the Trial Court committed clear error by finding that the Parties had owned certain pieces of farm equipment valued at \$30,000. The only credible evidence established that the equipment was owned by the Don Dye and Sons partnership, a non-party to this action. At most, even crediting Frances' testimony, Darian owned a one-third interest in the tractors and equipment. The Chancellor clearly erred by finding that the entire value of the subject equipment was marital property.

ARGUMENT I.

THE TRIAL COURT ERRED IN CONSIDERING DARIAN'S DAY-BRITE RETIREMENT AS A MARITAL ASSET SINCE THE FUNDS HAD BEEN DEPLETED AND THE DEPLETION WAS NOT IN THE NATURE OF A WASTEFUL DISSIPATION OF MARITAL PROPERTY.

A. The applicable framework of equitable distribution.

The equitable distribution analysis involves the following steps: 1) classifying assets as either marital or separate; 2) valuation of the assets; 3) division of marital property equitably; 4) awarding alimony as needed following the division of marital assets. *See, e.g., Ferguson v. Ferguson*, 639 So. 2d 921, 925 (Miss. 1994). The Supreme Court in *Ferguson* held that Chancery Courts should look to the following factors in making an equitable division:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
 - a. Direct or indirect economic contribution to the acquisition of the property;
 - b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and
 - c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
3. The market value and the emotional value of the assets subject to distribution.
4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the

- parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;
5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution
 6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
 7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
 8. Any other factor which in equity should be considered.

Ferguson, 639 So. 2d at 928 (Miss. 1994). Equitable division does not necessarily mean an equal division. *Gray v. Gray*, 745 So. 2d 234, 239 (Miss. 1999). However, spouses are entitled to support sufficient to maintain the lifestyle to which they were accustomed during the marriage. *Box v. Box*, 622 So. 2d 284, 288 (Miss. 1993).

In classifying marital property, there is a presumption that any property acquired during the marriage is marital property. *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (1994). Property acquired before the marriage is generally separate property. *See Hemsley*, 639 So. 2d at 915.

B. Dissipation of marital property

The *Ferguson* Court held that the Trial Court should consider the degree to which the parties disposed or expended marital property in making its equitable distribution. *Ferguson*, 639 So. 2d at 928 (Miss. 1994). It is firmly established that a spouse's wasteful dissipation of marital property is properly considered against that party in the Court's equitable division. *See Childs v. Childs*, 806 So. 2d 273, 275 (Miss. Ct. App. 2000); *Dunaway v. Dunaway*, 749 So. 2d 1112, 1115 (Miss. Ct. App. 1999). In *Dunaway*, for instance, the husband had dissipated \$81,000 in marital assets for the benefit of his new romantic partner. *Dunaway*, 749 So. 2d at 1115. The Court stated that the husband's "conduct in disposing of these assets certainly warranted some relief" and held that the wife should be entitled to a judgment for one-half of the dissipated assets. *Id.* at 1118.

However, not every expenditure of marital property prior to an equitable distribution is such a wasteful dissipation. Professor Deborah Bell's treatise notes that "[u]se of assets for ordinary and reasonable living expenses during separation is not a dissipation." DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW § 6.08(2) (1st ed. 2005) citing *Pittman v. Pittman*, 791 So. 2d 857, 865 (Miss. Ct. App. 2001). See also *Barnett v. Barnett*, 908 So. 2d 833, 842 (Miss. Ct. App. 2005) (affirming Chancellor's decision not to charge husband with post-separation expenditures as proof insufficient to show wasteful dissipation of marital assets).

A similar result was reached in *Turnley v. Turnley*, 726 So. 2d 1258, 1266 (Miss. Ct. App. 1998), where the Court found that reasonable expenditures of marital funds after the parties' separation did not amount to a wasteful dissipation. In *Turnley* the wife negotiated her disabled husband's disability benefit checks, totaling \$18,900, after the parties separated and she was no longer caring for the husband. *Turnley*, 726 So. 2d at 1260. The Court, in considering an alimony award, held that the wife's unilateral spending of the funds to support herself and children was not a wasteful dissipation of marital assets. *Id.* at 1266.

The Court in this case did not find that Darian's expenditure of his Day-Brite retirement savings of \$68,803 constituted a wasteful dissipation of marital property. The Court found as follows regarding the dissipation prong of *Ferguson*:

Secondly, the degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise. I note that the Jimmy vehicle was sold for \$5,000. There's a question about the title and all that, as I've already noted. That was a disposal of marital property because it was commingled and used. In the course of the marriage, there was a distribution of the marital property withdrawn or otherwise disposed of by Frances when she cashed in or used \$25,000 as part of her IRA.

(T. Vol. 4, p. 404). Even though the Court did not find that Darian expending his retirement savings constituted a wasteful dissipation, the Court nevertheless placed the entire burden of the

expenditure on Darian, as it credited him with receiving the value of \$68,803 in its property distribution.

The proof at trial showed that the proceeds from the sale of the Jimmy vehicle (which the Court did find to be a dissipation) and the funds from Darian's Day-Brite retirement account (which the Court did not find to be a dissipation) were all used to pay for attorneys' fees associated with Darian's criminal prosecution. (*See, e.g.*, T. Vol. 1, p. 13, 84, 345). There is no dispute that these expenditures were completely reasonable and necessary. Darian's uncontraverted testimony was as follows:

Q. Were these legal expenses reasonable and necessary?

A. Absolutely.

Q. Was the legal expenses a way of you trying to inappropriately dispose of marital property?

A. I don't like lawyers, sir, no offense. I'd just as soon not pay them.

Q. Yes, sir. But, again, to answer my question, Mr. Dye - -

A. No, sir. I was not trying to illegally dispose of anything; I was trying to come up with money from any way I could to pay.

Q. I understand.

A. I tried to go to the bank and borrow it and I could not. I had no property to put up.

Q. My question again, was those expenses reasonable and necessary, both of those parts reasonable and necessary, both being very important?

A. Yes, sir.

(T. Vol. 1, p. 84-85).

The record shows that Darian ultimately spent everything he had, including the \$68,803 Day-Brite retirement, to defend himself against the "horrible lies from Frances." (T. Vol. 3, p. 345). Darian incurred \$120,000 in legal expenses to be acquitted of the allegations. (T. Vol. 3, p. 345-36).

The Trial Court's decision to credit Darian with receiving the retirement benefits of \$68,803 and \$5,000 representing the vehicle Darian sold to pay for his legal expenses was erroneous since the expenditures were not wasteful dissipations of marital assets. Rather, the

uncontraverted evidence showed that the expenditures were reasonable and necessary. The assets should not have been considered existent marital property since they were used to pay reasonable and necessary expenses during the marriage. Accordingly, under the reasoning of authorities such as *Turnley*, Darian should not have been credited with receiving the assets.

The Trial Court's decision to award Darian the retirement account and the Jimmy vehicle, even though these assets had been reasonably expended during the marriage, resulted in an inequitable distribution of assets. Therefore, the Trial Court's decision should be reversed, and this case remanded for a distribution of marital property without consideration of the depleted assets.

ARGUMENT II.

THE CHANCELLOR ERRED IN FAILING TO FIND THAT THE PRE-MARITAL INTEREST IN DARIAN'S DAY-BRITE RETIREMENT ACCOUNT WAS HIS SEPARATE PROPERTY.

Generally, property acquired before a marriage amounts to separate property of the acquiring spouse. *See generally Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994); *Bunyard v. Bunyard*, 828 So. 2d 775, 778 (Miss. 2002). The Supreme Court has held that retirement benefits accumulated prior to the marriage are separate property, while retirement benefits accumulated during the marriage are marital property subject to equitable distribution. *Arthur v. Arthur*, 691 So. 2d 997, 1003-1004 (Miss. 1997).

The Court's discussion of this issue in *Arthur* merits repeating in its entirety, as it is directly on-point in this case:

In this assignment of error, Jerry Arthur does not contest the entire award of one-half of his retirement fund to Peggy Arthur, but rather he appeals only from the award of one-half of his retirement funds which were accumulated prior to his marriage to Peggy. Jerry's pension profit sharing fund at Peoples Construction Company had been accumulating funds since he began working there in 1969. Although Jerry and Peggy were not married until 1978, the chancellor awarded to

Peggy one-half of all of Jerry's retirement funds accumulated at the time of divorce. Jerry argues that the chancellor had no authority to award any portion of those funds which were accumulated prior to the parties' marriage.

Indeed, the retirement funds at issue not having been "acquired or accumulated during the marriage," they do not fall within Hemsley's definition of marital assets subject to equitable distribution. The evidence indicates instead that these funds are "attributable to one of the parties' separate estates prior to the marriage." ***Jerry's retirement funds which were accumulated prior to the parties' marriage are therefore clearly the type of assets this Court determined in Hemsley would not be subject to equitable distribution upon divorce.*** Peggy Arthur thus was not entitled to one-half of Jerry's pension funds accumulated prior to the marriage, nor to any portion of the interest thereon. There having been no evidence at trial as to what portion of the funds was accumulated prior to the marriage, we reverse this award and remand for a determination thereof.

Arthur v. Arthur, 691 So. 2d at 1003-1004. (internal citations omitted) (emphasis added).

In this case, the Chancellor treated all of Darian's Day-Brite retirement account as marital property subject to equitable distribution. Thus, even if the Chancellor was correct in distributing the retirement account, notwithstanding that it was entirely depleted during the marriage, the Chancellor nevertheless manifestly erred by treating the pre-marital portion of the retirement account as marital property.

The evidence established that Darian started working at Day-Brite and began accumulating retirement benefits in 1987. (T. Vol. 1, p. 75). Darian worked at Day-Brite for thirteen years, until 2000. (*Id.*). Darian and Frances were not married until 1995. (R. Vol. 1, p. 19). Thus, Darian accumulated retirement benefits for eight years prior to his marriage to Frances. (T. Vol. 1, p. 75). Only the last five years were accumulated during the marriage. (*Id.*).

Pursuant to the reasoning of *Hemsley* and *Arthur*, Darian's retirement benefits accrued from 1987 until the Parties' marriage in 1995 would have been his separate property.

Accordingly, the Court should remand this case for a determination of Darian's separate interest in the retirement account.

ARGUMENT III.

THE CHANCELLOR ABUSED HIS DISCRETION BY ORDERING DARIAN TO PROVIDE COBRA HEALTH INSURANCE COVERAGE FOR FRANCES FOLLOWING THE DIVORCE.

A former spouse is eligible for continued health insurance coverage for thirty-six (36) months following a divorce under the Consolidated Omnibus Budget Reconciliation Act, commonly referred to as COBRA. *See* 29 U.S.C. § 1162(2)(A)(iv) (1993); 29 U.S.C. § 1163(3) (1993). A Chancellor has broad discretion to order a spouse to provide health insurance for the other party following a divorce. *See, e.g., Ferguson*, 639 So. 2d at 936. However, that discretion is not limitless; a Chancellor's decision to order the provision of insurance may be reversed if it amounts to an abuse of discretion. *See Bumpous v. Bumpous*, 770 So. 2d 558, 561 (Miss. Ct. App. 2000).

In this case the Chancellor's decision for Darian to provide Frances with thirty-six more months of COBRA insurance, notwithstanding insurance he provided during the pendency of this action, is inequitable and amounts to an abuse of discretion.

Darian provided COBRA health insurance for Frances from the commencement of the action in October 2005. (R. Vol. 1, p. 97). Darian cancelled Frances as a named insured on or about January 1, 2007. (*Id.*). Frances sought "emergency relief" based on the cancellation of her COBRA coverage. (*Id.*). In an Agreed Interim Order of February 2, 2008, the Chancery Court ordered Darian to reinstate Frances as an insured on his health insurance coverage, with a retroactive date of January 1, 2007. (R. Vol. 1, p. 105).

By the time the trial of this case concluded, Darian had provided Frances with health insurance, at his sole expense, for approximately twenty-seven (27) months after the Parties' separation. The Chancery Court ordered that Darian provide Frances with continued COBRA coverage for "so long as allowed by law" beginning on January 1, 2008. (T. Vol. 1, p. 154). This amounts to Darian providing Frances with approximately sixty-three (63) months of health insurance coverage following the Parties' separation.

The Chancery Court abused its discretion by ordering Darian to provide Frances' health insurance coverage for over five (5) years after the Parties' separation. The abuse of discretion is particularly acute considering that Frances has a higher income than does Darian. The Chancellor found that Darian earns \$3,076.48 per month. (R. Vol. 2, p. 15). The Chancellor found that Frances earns \$3,916.92 per month. (T. Vol. 2, p. 153). Moreover, Darian was ordered to pay child support to Frances of \$485.55 per month until September 1, 2008, and to then pay \$536.01 as child support. (R. Vol. 1, p. 153).¹ Additionally, this further compounds the inequitable property distribution awarded to Darian, as discussed above.

The Chancellor's decision to award Frances an additional thirty-six months of COBRA insurance coverage should be reversed and rendered as an abuse of discretion.

ARGUMENT IV.

THE COURT ERRED BY FINDING THAT THE TRACTORS AND EQUIPMENT WERE MARITAL PROPERTY.

The Chancellor ruled that two Ford tractors, a bush hog and a finishing mower, cumulatively valued at \$30,000, were items among the Parties' marital property available to be equitably distributed. (T. Vol. 4, p. 399). Darian testified that this equipment belonged to his father, Don Dye, Sr., but that they were insured under his Homeowner's insurance policy to

¹ Darian's child support obligation was also made retroactive to the date of the Parties separation in October 2005. (R. Vol. 1, p. 153).

realize a cost savings. (T. Vol. 1, p. 53-54). Darian repeatedly testified that he and Frances did not own the tractors and equipment. (*Id.*; T. Vol. 1, p. 85-86).

Frances, on the other hand, testified to two different versions of ownership of the tractors. In one breath Frances testified that Darian had once told her that his father had given her and Darian the tractors. (T. Vol. 2, p. 168). Thus, Frances claimed that she “believed” they owned the tractors. (*Id.*). However, when confronted with an invoice and bill of sale for two Ford tractors, Frances changed her story and ostensibly testified that the tractors were owned by Don Dye and Sons, a family partnership. (T. Vol. 2, p. 200). Frances testified that Darian was a partner in Don Dye and Sons. (*Id.*). Darian, on the other hand, maintained that he had no ownership interest in Don Dye and Sons, nor in the tractors and equipment. (T. Vol. 1, p. 40).

A Chancery Court’s factual finding as to the owner of property is subject to review for clear error. *See Burns v. Burns*, 789 So. 2d 94, 98 (Miss. Ct. App. 2000). A Chancellor’s finding that the parties owned particular property may be reversed where it is manifestly wrong. *Burns*, 789 So. 2d at 98.

The testimony of Darian and Frances was inconsistent regarding both ownership of the tractors and equipment, and Darian’s interest in the Don Dye, Sr. and Sons partnership. Indeed, Frances’ testimony is inconsistent with itself. However, even if Frances’ testimony were credited by the Chancellor the tractors were owned by the Don Dye and Sons, Sr. partnership. Thus, at most, Darian owned a one-third interest in the tractors. Frances readily admitted as much after being confronted with the invoice and bill of sale, claiming that perhaps Darian owned an interest in even more tractors which could be equitably distributed:

Q. Okay. The point being, Mrs. Dye, is most of those tractors if not all of those tractors that were on your premises out there were in the name of Don Dye & Sons; correct?

A. Yes.

Q. And you understand that Don Dye & Sons was made up of Don Dye, Sr., Don Dye, Jr. and Darian Dye; correct?

A. That's correct.

Q. So, at best, he [Darian] owned a third interest in the tractor; correct?

A. If we're going that way with it, then he would own a third interest in all the tractors that were there.

(T. Vol. 2, p. 200-201).

Despite Frances' testimony, the Trial Court found that the *entire* value of the tractors and equipment, amounting to \$30,000, was marital property. This was clear error and unsupported by substantial credible evidence. No more than \$10,000 (one-third of the value) should have been considered as marital property. This Court should reverse the Trial Court's decision on this basis.

CONCLUSION

The majority of the marital property purportedly distributed to Darian Dye in this case was property which had already been expended during the marriage on Darian's reasonable expenses associated with his unfounded criminal prosecution. As a result, Frances received almost all of the remaining property, and Darian received almost none. The distribution of marital property was therefore inequitable. As Darian's expenditure of the funds was not in the nature of a wasteful dissipation of marital assets, the Trial Court erred in considering the alienated assets.

Additionally, even if Darian's depleted retirement account could be considered as marital property, the Trial Court erred in any event by failing to find that a portion of the account was Darian's separate property. A significant amount of the retirement account was accumulated prior to the Parties' marriage. This was Darian's separate property and was not subject to equitable distribution.

Finally, as discussed above, the Court abused its discretion by ordering Darian to maintain COBRA insurance for Frances for a total of over five years, and the Court committed clear error as to the ownership of the tractors and equipment.

Accordingly, based on the above and foregoing, Appellant Darian Dye respectfully requests the Court to reverse the Trial Court's decision.

RESPECTFULLY SUBMITTED, this the 5th day of December, 2008.

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CERTIFICATE OF SERVICE

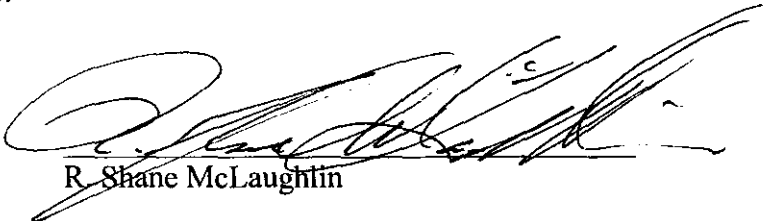
I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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**Hon. Talmadge Littlejohn
Chancellor
P.O. Box 869
New Albany, MS 38652**

This the 5 day of December, 2008.


R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

**Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248**

\ This, the 5 day of December, 2008.


R. Shane McLaughlin