

IN THE SUPREME COURT OF MISSISSIPPI

CYNTHIA G. OWEN

APPELLANT

VS.

CAUSE NO. 2008-TS-00734

WILLIAM SHURDEN OWEN

APPELLEE

*On Appeal from the Chancery Court of Sunflower County, Mississippi
Chancery Court No. 2006-0119*

BRIEF OF APPELLEE

[Oral Argument Not Requested]

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee 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. The Honorable Jane R. Weathersby, Chancery Judge, Sunflower County Chancery Court, Indianola, Mississippi.
2. Appellant, Cynthia G. Owen.
3. Appellee, William Shurden Owen.
4. S. Todd Jeffreys, Povall & Jeffreys, P.A., Cleveland, Mississippi, Attorney for Appellee, William Shurden Owen.
5. David M. Sessums, Varner, Parker & Sessums, P.A., Vicksburg, Mississippi, Attorney for Appellant, Cynthia G. Owen.

CERTIFIED this the 23rd day of February, 2009.

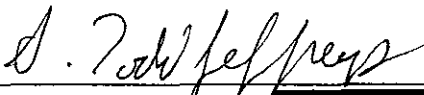
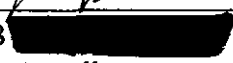

S. Todd Jeffreys, MSB 
Attorney of Record for Appellee,
William Shurden Owen

TABLE OF CONTENTS

	<u>Page</u>
Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
I. Statement of the Case	1-14
A. Nature of the Case	1
B. Course of Proceedings and Disposition in Court Below	1-2
C. Statement of the Facts	2-15
II. Summary of the Argument	15-16
III. Argument	16-17
A. The Chancellor did not err in its division of marital assets.	17-20
B. The Chancellor did not err in ruling that Cynthia Owen was not entitled to alimony.	20-22
C. The Chancellor did not err in setting child support.	22-23
D. The Chancellor did not err in ordering that Cynthia Owen was not entitled to her attorney's fees and costs.	23
IV. Conclusion	24
Certificate of Service	25

TABLE OF AUTHORITIES

Table of Cases:	<u>Page</u>
<u>Armstrong v. Armstrong</u> , 618 So.2d 1278, 1280-81 (Miss. 1993)	21
<u>Ferguson v. Ferguson</u> , 639 So.2d 921, 928 (Miss. 1994)	17
<u>Hemsley v. Hemsley</u> , 639 So.2d 909, 914-15 (Miss. 1994)	17
<u>Johnson v. Johnson</u> , 823 So.2d 1156, 1160-61 (Miss. 2002)	17
<u>Lauro v. Lauro</u> , 847 So.2d 843, 848 (Miss. 2003)	20
<u>Philips v. Philips</u> , 904 So.2d 999, 1001 (Miss. 2004)	16, 17
<u>Tilley v. Tilley</u> , 610 So.2d 348, 350 (Miss. 1992)	17
<u>Tynes v. Tynes</u> , 860 So.2d 325, 331 (Miss. 2003)	23
Statutes and Rules of Civil Procedure:	<u>Page</u>
Miss. Code Ann. § 43-19-101	14, 16, 22

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BRIEF OF APPELLEE

I. Statement of the Case

A. Nature of the Case

This is an appeal from a Order entered by the Chancery Court of Sunflower County, Mississippi entering its Findings of Fact and Conclusions of Law on January 25, 2008 following a trial held on June 22, 2007, in reference to the divorce of the parties on the grounds of irreconcilable differences. (R.1, Pgs. 69-85).

B. Course of Proceedings and Disposition in Court Below

On February 27, 2006, Cynthia G. Owen (hereafter "Cindy") filed her Complaint for Divorce and Other Relief against William Shurden Owen (hereafter "Shurden") on the grounds of habitual cruel and inhuman treatment, addiction to alcohol, adultery and claimed that in the alternative the marriage of the parties had been met with irreconcilable differences. (R.1, Pg. 8).

Shurden filed his Answer and Counter-Complaint for Divorce on April 27, 2006, wherein he denied Cindy's allegations and alleged that Cindy was guilty of habitual cruel and inhuman treatment, adultery and addiction to drugs and alcohol. (R.1, Pg. 27).

On May 23, 2007, the parties filed their Joint Motion to Bifurcate and requested the court to proceed to entry of a Final Judgment of Divorce between the parties on the grounds of irreconcilable differences. (R.1, Pg. 59). The parties further agreed that Cindy would have primary physical

custody of the parties' minor child, Meredith, with Shurden enjoying reasonable rights of visitation. (R.1, Pg. 59). All other issues between the parties were reserved for evidentiary proceedings and testimony.

On May 23, 2007, the Court entered its Final Judgment of Divorce in accordance with the Joint Motion of the parties. (R.1, Pg. 63).

The matter was tried before the Chancellor on June 22, 2007, and after taking evidence and exhibits from the parties and having heard testimony, the court entered its Findings of Fact and Conclusions of Law on January 25, 2008. (R.1, Pgs. 69-85).

On February 5, 2008, Cindy filed a Motion to Reconsider requesting that the court modify its ruling regarding alimony and assets of the marriage of the parties as well as her request for attorney's fees. (R.1, Pg. 86). Shurden filed a Response to the Motion to Reconsider on February 8, 2008. (R.1, Pg. 89). On March 31, 2008, the Chancellor entered an Order denying Cindy's Motion to Reconsider in all respects. (R.1, Pg. 110).

On April 28, 2008, Cindy filed her Notice of Appeal from the Judgment of January 25, 2008 and the court's Order denying her Motion for Reconsideration dated March 31, 2008. (R.1, Pg. 111).

C. Statement of the Facts

Shurden and Cindy were married on August 5, 1989. (R.2, Pg. 11). There is conflicting testimony as to when the parties separated. Cindy testified that the parties separated in July of 2006, but acknowledged that her husband was away from home from October of 2005 through May of 2006. (R.2, Pg. 15). Shurden contended that the parties separated in October of 2005, and the Court noted that Cindy initially filed for a divorce on February 27, 2006. (R.2, Pg. 129). The trial court therefore found that the approximate date of the parties' separation was in October of 2005. (R.1,

Pg. 69). One (1) child was born to the marriage, Meredith Kristen Owen, born March 16, 1995. (R.2, Pg. 14). At the time of the trial, Cindy was forty-two (42) years of age and Shurden was forty (40) years of age. (R.2, Pg. 8, R.2, Pg. 125). Both parties were in relatively good health. (R.2, Pgs. 14-15).

After the parties were married, they moved to Drew, Mississippi. (R.2, Pg. 12). Shurden began farming and has farmed ever since. (R.2, Pg. 126). Shurden does not have a college degree. (R.2, Pg. 126). Cindy has a nursing degree from Mississippi Delta Community College and a Radiology associates degree. (R.2, Pg. 71). Over the course of the marriage, Cindy worked at various healthcare facilities. (R.2, Pgs. 12-14). She also assisted for a time in bookkeeping for Shurden's farming operations. (R.2, Pgs. 30-32). She currently works for the State of Mississippi as a utility investigator. (R.2, Pgs. 18-19). Cindy testified that she has a stable job and has no plans to seek other employment or to retire. (R.2, Pg. 19). Cindy makes \$27,000.00 plus a \$6,000.00 travel allowance annually. (R.2, Pg. 72). During the course of the marriage, Cindy was primarily responsible for the household and childcare duties. (R.2, Pgs. 35-36).

Shurden and Cindy both testified that the early years of their marriage were fairly happy times, and that they liked to socialize and have a good time. (R.2, Pgs. 72, 127). Cindy admitted that she had a nine-month affair in 1997 which resulted in a fourteen-day separation. (R.2, Pg. 72). Shurden likewise admitted that after Cindy's affair, he had a short-lived affair. (R.2, Pg. 132). Both testified that the couple reconciled after this period. (R.2, Pgs. 72, 132).

The parties testified that they had some financial problems in the late 1990's, but that they got control of their credit card debt situation at that time. (R2, Pgs. 34, 130-131). Cindy testified that the parties ultimately separated because Shurden was drinking too much and because he left to go

work on the Mississippi Gulf Coast in the fall of 2005. (R.2, Pgs. 73-76). While Cindy suspected at that time that Shurden was having an affair, she admitted that this was not why the parties separated. (R.2, Pgs. 26-27).

Cindy testified that later during the marriage the parties continued to have money problems and that Shurden was concerned with her spending habits. (R.2, Pg. 34). She testified that she always did “whatever” when it came to spending money and/or using credit cards. (R.2, Pg. 34). At the time of trial, the parties’ credit card balances totaled approximately \$93,000.00. (R.2, Pg. 76). Cindy admitted making all of the charges but stated that the charges were made for the family’s benefit and that she and Shurden both enjoyed the purchases made on credit. (R.2, Pg. 76). Cindy had two (2) breast augmentations during the marriage, as well as liposuction and botox procedures. (R.2, Pg. 78). Cindy also leased a car, through W & C Owen Partnership, a farming entity discussed *infra*, which carried a monthly lease payment of \$1,200.00. (R.2, Pgs. 23, 80). Shurden acknowledged that he spent money on hunting equipment and hunting trips out West and to South America. (R.2, Pg. 132).

Shurden testified that during the summer of 2005, he believed that Cindy was having an affair. (R.2, Pg. 129). He testified that during this time Cindy left the marital home and stayed elsewhere for extended periods of time. (R.2, Pgs. 129-130). He asserted that Cindy sometimes drank alcohol to excess and smoked marijuana. (R.2, Pg. 74). Shurden admitted that he drank too much alcohol during this time, which may have, in part, led to the parties’ separation. (R.2, Pg. 130).

The trial court found that the parties’ separation was due to fault on behalf of both of the parties, including past affairs and the appearance of possible affairs during the course of their marriage. (R.1, Pg. 71). Additionally, the separation of the parties was also due to money problems

to which both of the parties contributed. (R.1, Pg. 71). Finally, the trial court found that Shurden's alcohol use, and to a lesser extent, Cindy's alcohol and drug use, played a role in the parties' separation. (R.1, Pg. 71).

During the course of the marriage, the parties accumulated certain assets and/or certain interests in assets. Shurden has a 20% interest in Owen Planting Company which conducts farming operations. (R.3, Pg. 172). He has a 50% interest in both S & T Farms, Inc. and S & H Farms, Inc., which are shell corporations set up for the purposes of receiving farming subsidies. (R.3, Pg. 172, 178). Shurden and Cindy each have a 50% interest in W & C Partnership, which owns farming equipment.¹ (R.3, Pgs. 178-180). Shurden testified that the entity was set up in that fashion to draw government payments. (R.2, Pgs. 142-143). The trial court found that the interest and value of all of the aforementioned entities must be considered together to get an accurate financial picture of the overall farming operations. (R.1, Pg. 72).

Shurden has a 19.12% undivided interest in Shurden Land Partnership. (R.2, Pg. 136). He acquired this interest through inheritance when his mother passed away in 1998. (R.2, Pg. 133). The other ownership interests comprising the partnership are his sister, Tracy Crossland, and two (2) trusts established by Shurden's grandfather and mother at the time of their deaths. (R.3, Pgs. 189-192). This land partnership owns farmland, the parties' marital home, a cabin at Gore Springs, Mississippi, a home on Highway 49 in Drew Mississippi, previously owned by Shurden's mother, and other structures on the farmland. (R.2, Pgs. 133-136). The parties did make improvements over the years to the marital home and the cabin at Gore Springs. (R.2, Pgs. 41-44). Cindy testified that

¹Shurden's and Cindy's interests in W & C Owen Partnership, in their entirety, are pledged against notes with First National Bank of Rosedale, which is the lender for Shurden's farming operations.

her parents made improvements to the home on Highway 49. (R.2, Pgs. 44-45). Shurden's interests in the land partnership are fully pledged in connection with his farming operations. (R.3, Pgs. 179-180). He also owns fee simple interest in approximately eighty (80) acres of farmland, which is also fully pledged in connection with his farming operations. (R.3, Pgs. 179-180). Shurden owns an interest in two (2) shares of stock in a hunting conservation league, which have an estimated value of \$90,000.00. (R.2, Pgs. 139, 14). Shurden testified that his mother left certain funds in a certificate of deposit for the use and benefit of Meredith Kristen Owen, and that he invested said funds in the conservation league for Meredith's benefit. (R.3, Pg. 152).

Shurden owns a 2005 Ford F250 with an approximate value of \$20,000.00 with no debt owed. (R.2, Pg. 138).² Shurden has been making payments on a 2005 Ford Excursion, which Cindy currently drives. (R.2, Pg. 138). He estimated at trial that this vehicle was worth approximately \$27,500.00 and had approximately \$12,500.00 owed on it. (R.2, Pg. 138). Shurden has a \$1,000,000.00 term life insurance policy with Cindy as the beneficiary. (R.2, Pg. 138).

Cindy's assets consist primarily of jewelry, which was gifted to her over the course of the marriage by Shurden, with an approximate value of \$50,000.00. (R.2, Pg. 132). Cindy also has a retirement account with the State which had a balance of \$15,500.00 in 2005 and a life insurance policy, for which Shurden pays premiums, with a cash value between \$6,000.00 and \$7,000.00. (R.2, Pg. 82).

The parties submitted a list of other personal property items, which the trial court divided. (R.1, Pg. 83).

²Contrary to Cindy's argument on page 9 of her brief, Shurden has never owned or driven a Lexus automobile of his own.

Louis Jackson, CPA, testified as to the current net worth of Shurden Owen. He testified that an accurate net worth figure for Shurden is \$30,854.00. (R.3, Pg. 179). This takes into account Shurden's 19.12% undivided interest in the Shurden Land Partnership which equals \$698,556.00 (in accordance with a fair market appraisal) and his interest in eighty (80) acres of farmland appraised at \$145,600.00. (R.3, Pg. 178). Mr. Jackson utilized Defendant's Exhibit 7 to explain the valuations of the farming business interests to compute a total asset figure for Shurden in the amount of \$905,621.00.³ (R.3, Pgs. 176-179). On the liability side, Mr. Jackson listed credit card debt and accrued interest at First National Bank of Rosedale, as well as long-term debt in the amount of \$575,000.00 with First National Bank of Rosedale and a contingent liability in the amount of \$564,958.00. (R.3, Pgs. 179-180). Mr. Jackson also gave Cindy a credit, for her interest in W & C Owen Partnership, which owns farming equipment, in the amount of \$359,526.00, which reduced Shurden's overall liabilities. (R.3, Pg. 179). Thus, Shurden's liabilities are \$874,767.00, which, when subtracted from his assets, reflects a net worth of \$30,854.00. (R.3, Pg. 179). Mr. Jackson testified that this was an accurate picture of Shurden's current financial condition because if he quit farming, he would owe \$941,000.00 after he sold his crops, collected farm subsidy payments and paid off all accounts payable. (R.3, Pg. 180). Additionally, he would owe \$575,000.00 in long-term debt. If Shurden's equipment and land were liquidated at the appraised values, he would simply be left with approximately \$30,000.00. (R.3, Pg. 180).

Edward Buckner, III, testified on behalf of Cindy that Shurden Owen's net worth was \$1,990,656.00. (R.2, Pg. 107). (He had previously authored a report, D-16, which estimated

³Shurden's interest in W & C Owen Partnership was valued at \$359,526.00. His interest in Owen Planting Company was valued at -\$188,319.00. His interests in S & T Farms, Inc. and S & H Farms, Inc. were each valued at -\$94,159.00.

Shurden's net worth at \$656,530.00.) (R.2, Pg. 116). However, he used a December 31, 2005 appraisal value for farm equipment and acknowledged said equipment had depreciated since that time. (R.2, Pg. 117). Additionally, Mr. Buckner listed Shurden Owen's interest in the family trusts as an asset valued at \$1,483,241.00, when same is more properly identified and valued by the yearly income Mr. Owen receives from the trusts. (R.2, Pgs. 118-119). The trial court found trust income is exactly that - income. (R.1, Pg. 74). It should not be considered an asset. (R.1, Pg. 74). Upon Mr. Owen's death, his daughter will receive the trust income. (R.2, Pg. 118). Mr. Buckner's valuation of Mr. Owen's 19.13% interest in 2,994 acres at \$884,248.00 was incorrect because he did not take into account that Mr. Owen has an "undivided interest" in the land, which he admitted makes it worth less. (R.2, Pgs. 119-120). Mr. Buckner also did not include a \$564,958.00 contingent liability of Mr. Owen's in his net worth calculations, and he admitted Shurden was individually liable for this amount. (R.2, Pgs. 121-122). The trial court found Mr. Louis Jackson's testimony more compelling on the net worth issue. (R.1, Pg. 74). If Mr. Owen ceased farming and only had \$30,854.00 left over, such was an accurate picture of his current financial situation. (R.1, Pg. 74).

Mr. Jackson and Shurden testified that Shurden receives on average approximately \$50,000.00 annually in income from the referenced family trusts. (R.2, Pg. 137, R.3, Pg. 173). Mr. Jackson testified that in analyzing the parties' income tax returns, Shurden, on average, would make less than \$9,000.00 per year taking into account his farming operations and necessary accounting calculations on same coupled with his income from the trusts. (R.3, Pg. 184). Mr. Jackson did recognize that certain family expenses (such as car payments and car insurance) were run through the farming operations but doing so only increased Shurden Owen's debt. (R.3, Pgs. 187-188). Edward Buckner, III, testified on behalf of Cindy, and he conducted certain income calculations

pertaining to Shurden Owen to arrive at an average adjusted gross income figure for Mr. Owen. (R.2, Pgs. 99-100). However, he included Cindy Owen's income in his calculations, which was admittedly improper. (R.2, Pg. 113). Mr. Buckner likewise did not include losses from the farming operations' S corporations in his calculations, but acknowledged that same were a real loss. (R.2, Pg. 113). Additionally, capital gains from the William Owen Gift Trust were distributed in error to Shurden Owen in 2001, in the amount of \$117,651.00 and in 2002, in the amount of \$96,152.00. (R.2, Pg. 114). Mr. Buckner acknowledged that since those payments will not and cannot be made in the future, same should not have been considered in his calculations. (R.2, Pg. 114). Finally, Mr. Buckner added to Shurden and Cindy's disposable income the equipment depreciation amounts reflected on the W & C Owen income tax return. (R.2, Pg. 115). However, there was no proof that Shurden and Cindy ever used those funds as disposable income. (R.2, Pg. 115). Moreover, if the couple had used those funds, that would have decreased the value of W & C Owen Partnership. (R.2, Pg. 115). The trial court found Mr. Louis Jackson's testimony more compelling on the income issue. (R.1, Pg. 75). Due to the fact that Shurden Owen would make \$50,000.00 annually if he ceased farming, the trial court used that figure as representative of his income. (R.1, Pg. 75).

The parties consented that Cindy should be granted primary physical custody of Meredith Kristen Owen with reasonable rights of visitation granted unto Shurden. (R.1, Pg. 75). In fact, Shurden testified at trial that he felt that Cindy was a good mother, and that he understood and acknowledged that he would owe child support. (R.1, Pg. 75).

Finally, Cindy offered into evidence certain attorney's fees and other expert witness fees (one of the experts, an appraiser, never generated any work product in reference to this litigation), to which counsel for Shurden did not object on the basis of authenticity, but reserved argument on the

issue of whether said fees and costs were properly recoverable by Cindy in this action. (R.1, Pgs. 75-76).

The trial court began its analysis of the equitable division of marital assets by noting that the parties' marital assets were as follows: (1) certain items of personal property which were listed on the exhibit to the trial court's Findings of Fact and Conclusions of Law (R.1, Pgs. 76, 83-84); (2) the eighty (80) acres of farmland purchased by Shurden during the course of the marriage which was completely encumbered by long-term debt in connection with his farming operations (R.1, Pg. 76); (3) two (2) shares of stock in the hunting conservation league with the approximate value of \$90,000.00, which the court found that to the extent that same was ever a non-marital asset by virtue of inheritance, Shurden converted same to marital property when he invested in the hunting shares (R.1, Pg. 76); (4) a 2005 Ford F250 with an approximate value of \$20,000.00 and a 2005 Ford Excursion which had equity in the approximate amount of \$15,000.00 at the time of the trial (R.1, Pg. 76); (5) Cindy's retirement account with the State with an approximate balance of \$15,000.00 at the time of the trial and a whole life insurance policy in the face amount of \$150,000.00 with a cash value between \$6,000.00 and \$7,000.00 at the time of the trial (R.1, Pg. 76); (6) Shurden's \$1,000,000.00 term life insurance policy with Cindy as the beneficiary (R.1, Pg. 76); and (7) the parties had approximately \$93,000.00 in marital credit card debt at the time of the trial. (R.1, Pg. 76).

The trial court found that the parties' non-marital assets were Shurden's 19.3% inherited interest in the Shurden Land Partnership, including the land and structures owned by the partnership, which was fully encumbered by debt and which Cindy admitted was not marital property (R.1, Pg. 77); (R.2, Pg. 86). The court further found that Cindy's collection of jewelry gifted to her by Shurden in an approximate amount of \$50,000.00 was also a non-marital asset. (R.1, Pg. 77).

In analyzing the Ferguson factors, the trial court noted that both parties contributed to the accumulation of the listed marital property. (R.1, Pg. 78). Shurden conducted farming operations and Cindy worked at various jobs, including healthcare work, bookkeeping for the farming operations and worked for the State of Mississippi. Id. Cindy was also primarily responsible for the household and child care duties during the course of the marriage. Id. The trial court additionally found that both parties, through their spending habits, contributed to the marital debt, although Cindy made the charges on the credit cards. Id. The court noted that Shurden did not take steps to cancel the credit cards or otherwise take control of Cindy's spending and that both parties expended marital assets during the course of the marriage. Id.

The court further found that while the hunting shares may have held emotional value to Shurden, same were an asset that could be utilized to help balance the separate estates of the parties. Id.

The trial court referenced the fact that value of assets not orderly subject to equitable division, such as Shurden's 19.13% interest in Shurden Land Partnership, while totally encumbered by debt, did have intrinsic value to Shurden as he would have the use and benefits of the residence and structures owned by the partnership as long as he did not default on his farming loans. Id.

The trial court further found that the jewelry gifted to Cindy by Shurden had an approximate amount of \$50,000.00. Id.

The trial court further found that Shurden's eighty (80) acres of farmland owned in fee simple, which was marital property and was totally encumbered by a debt, could not be liquidated for the purposes of equitable division. Id.

The trial court therefore divided the parties' marital assets as follows: (1) Shurden was to take steps to sell/transfer the shares of hunting stock, having the approximate value of \$90,000.00 with the proceeds going to Cindy. The court found that if Shurden was unable to liquidate his shares of stock within six (6) months, he would be required to make payments to Cindy of \$15,000.00 every six (6) months for three (3) years. (R.1, Pgs. 78-79). Secondly, the trial court determined that Shurden would be responsible for all marital credit card debt in the approximate amount of \$93,000.00. (R.1, Pg. 79). The court further found that Shurden would continue to own the eight (80) acres of farmland which was currently encumbered by debt at the time of trial. Id. The court affirmatively held that Shurden would have no rights to Cindy's retirement account and that Cindy would be allowed to cash in the \$150,000.00 insurance policy with a cash value of between \$6,000.00 and \$7,000.00. Id. Each party would be entitled to the vehicle they were currently driving, with Shurden remaining responsible for the note on Cindy's vehicle, and the insurance on same, until the note was paid off. Id. The court ordered Cindy to execute any and all documentation necessary to transfer her interest in W & C Owen Partnership to Shurden and noted that Cindy would likewise be relieved of any and all liability associated with the W & C Owen Partnership. Id. With regard to the items of personal property as reflected on Exhibit "A" to the court's Findings of Fact and Conclusions of Law, the court awarded to Cindy all items of personal property which did not have a check mark by them. Id.

The court reasoned that dividing the marital property (and debt) in the manner above would help to eliminate periodic payments between the parties and potential sources of future friction. Id. Cindy would have approximately \$100,000.00 in cash or cash equivalents (in addition to her valuable jewelry collection and paid off automobile) and would be debt free. Id. She would be able

to use those funds and lack of debt to promote financial security. Id. The court further reasoned that while the division essentially awarded all of the parties' liquid and unencumbered marital assets to Cindy and transferred all of the marital credit card debt to Shurden, the court found that same was equitable given the trust income would continue to receive and Shurden's continued use and benefits of the assets of Shurden Land Partnership. Id.

As to the issue of alimony, the court specifically found that because it awarded the major liquid and unencumbered marital assets to Cindy and further ordered Shurden to be responsible for any and all marital credit card debt and in considering each parties' separate estate, neither party had suffered a deficit after equitable division. (R.1, Pg. 80). Therefore, an award of alimony was inappropriate in the particular case. Id.

In considering the Armstrong factors, the trial court found that in reference to the income and expenses of the parties, Shurden would have the capacity to make \$50,000.00 annually if he ceased farming operations. Id. Cindy currently made approximately \$30,000.00 annually in her job with the State. Id. Both parties were in fairly good health and their earning capacities appeared to be stable at the time of trial. Id. The trial court affirmatively found that the needs of each party did not dictate an award of alimony. Id. The trial court recognized that the obligations and assets of each party had already be discussed in the Findings of Fact of its opinion in the section on equitable division. (R.1, Pgs. 80-81). The court noted that the parties had been married and lived together for fifteen (15) years, but that the marriage was troubled at times. (R.1, Pg. 81).

The court recognized that the parties' minor child would remain in the primary physical custody of Cindy. Id. The court further noted the age of the parties with each party having a considerable expectant work life. Id.

In discussing the standard of living of the parties, the trial court affirmatively found that while the parties did have a fairly high standard of living during certain times of their marriage, said standard of living caused financial turmoil for the marriage and accumulated a very large credit card debt and farm debt. Id. The court specifically looked to Cindy's \$1,200.00 Lexus car payment which she sought in the form of alimony. Id. The trial court found that said car payment was totally disproportionate to the parties income and that it was time for a dramatic departure from those spending habits. Id. On the issue of fault and misconduct of the parties, the court noted that it had previously found that both parties contributed to the dissolution of the marriage in this case through extramarital affairs, through alcohol consumption and through spending habits. Id.

On the issue of child support, the court recognized that the parties stipulated that Cindy would have primary physical custody of Meredith Kristen Owen. Id. The court noted that while Shurden's adjusted gross income on average could be characterized as less than \$9,000.00 a year, if he quit farming today, he would be able to earn approximately \$50,000.00 in trust income. Id. As such, he would have an adjusted gross income of \$4,166.67 per month. Id. The court looked to Miss. Code Ann. § 43-19-101, which provides for fourteen percent (14%) of child support on a party's adjusted gross income based on that level of income. (R.1, Pgs. 81-82). The court thereby ruled that Shurden would pay unto Cindy an amount of \$582.33 per month in child support. (R.1, Pg. 82). The trial court found that Shurden was to continue to keep the \$1,000,000.00 life insurance policy in full force and effect with Cindy as the primary beneficiary. Id. Additionally, Shurden was to make payment to Cindy in an amount equal to that to keep Meredith Kristen Owen on Cindy's health insurance through her employer. Id. The trial court ordered that the parties would split equally uncovered medical expenses. Id. The trial court further affirmatively found that Shurden would be

ultimately responsible for Meredith's reasonable and necessary college tuition and related expenses.

Id.

Finally, as to the issue of attorney's fees, the trial court affirmatively found that due to its equitable division of assets and subsequent distribution of debts of the parties, and taking into consideration the parties' income, Cindy did not have an inability to pay her attorney's fees and costs and that there was not a disparity in the relevant financial positions of the parties. Id. The court therefore denied Cindy's request for an award of attorney's fees and costs. Id.

II. Summary of the Argument

The Chancellor appropriately divided marital assets as provided for by the Ferguson standard. The only assets which were not encumbered by debt with the exception of Shurden's vehicle and certain items of personal property, were awarded to Cindy. This included approximately \$100,000.00 in cash. Additionally, the court ordered that Shurden would be responsible for all marital credit card debt of the parties in the approximate amount of \$93,000.00. Moreover, Cindy was relieved of any and all liability associated with the W & C Owen Partnership. The court appropriately found that this was equitable given Shurden's continued use and benefits of the assets of Shurden Land Partnership.

The court further appropriately found that alimony was not appropriate in the present case. All major liquid and unencumbered marital assets were awarded to Cindy, and Shurden was responsible for all marital credit card debt. In considering the parties' separate estates, the court properly determined that neither party had suffered a deficit after equitable division. The court noted that if Shurden quit farming, he would have the capacity to make \$50,000.00 annually and that Cindy

would be expected to make \$30,000.00 with her job. The court further appropriately considered each Armstrong factor in deciding that alimony was not appropriate in this case.

The trial court also appropriately determined the amount of child support to be paid to Cindy by Shurden. The court noted that if Shurden quit farming, he would still earn approximately \$50,000.00 in family trust income despite the fact that his adjusted gross income on average while farming was less than \$9,000.00 a year. The court appropriately looked to Miss. Code Ann. § 43-19-101 to determine child support payable to Cindy in the amount of \$582.33. The court further required Shurden to keep a \$1,000,000.00 life insurance policy in full force and effect with Cindy as the primary beneficiary and to make a monthly payment to Cindy in an amount to keep the minor child on Cindy's health insurance through her employer. Finally, the court equitably determined that Shurden would be responsible for Meredith's reasonable and necessary college tuition and related expenses.

The court properly determined that Cindy did not have an inability to pay her attorney's fees and costs associated with this action. The court specifically found that there was not a disparity in the relevant financial positions of the parties and further considered the parties' income in denying Cindy's request for attorney's fees. Cindy was awarded approximately \$100,000.00 through equitable division and would have no problem paying her attorney.

This Court should therefore affirm the Chancellor as to the four (4) assigned issues.

III. Argument

Standard of Review

The reviewing Court employs a limited standard of review for the division and distribution of property in a divorce proceeding. See Philips v. Philips, 904 So.2d 999, 1001 (Miss. 2004). The

Mississippi Supreme Court has noted that it “will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous, or an erroneously legal standard was applied.” Philips 904 So.2d at 1001. In reviewing a chancellor’s judgment, the court does not conduct a Ferguson analysis, but will simply review the judgment to ensure that the chancellor followed the appropriate standards and did not abuse her discretion. Id.

In areas of alimony and child support, the Mississippi Supreme Court will not overturn findings on appeal unless the trial court’s findings were manifestly wrong or an erroneous legal standard was applied. See Tilley v. Tilley, 610 So.2d 348, 350 (Miss. 1992).

A. The Chancellor did not err in its division of marital assets.

Division of marital assets is now covered under the law as stated in Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994). Initially, the character of the parties’ assets, i.e., marital or non-marital must be determined pursuant to Hemsley v. Hemsley, 639 So.2d 909, 914-15 (Miss. 1994). Assets accumulated during the course of the marriage are subject to equitable division unless they are characterized as separate property. Johnson v. Johnson, 823 So.2d 1156, 1160-61 (Miss. 2002).

The factors to be considered in equitably dividing marital property as outlined by Ferguson v. Ferguson, 639 So.2d 921, 928 (Miss. 1994), are as follows:

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.

The trial court correctly characterized the parties' assets as marital and non-marital pursuant to Hemsley. The court ruled that Shurden's 19.3% inherited interest in Shurden Land Partnership, including the land and structures owned by the partnership, was not marital property. Although Cindy admitted that such interest was not marital property, the determination by the trial court on this issue did not significantly affect equitable division because Shurden's interest in the partnership was fully encumbered by debt. As a practical matter, Shurden's interest in said assets could not be awarded to Cindy as same were fully pledged on his farming loans.

The court properly accepted Louis Jackson, CPA's testimony that Mr. Owen's true net worth was approximately \$30,000.00. While this amount did not include Shurden's approximate

\$90,000.00 interest in the Coahoma County Conservation League, the issue was properly addressed by the Chancellor.⁴ All of Shurden's interest in the hunting shares were awarded to Cindy. Additionally, Shurden was made to assume approximately \$93,000.00 in marital credit card debt.

As set forth by the trial court, Cindy's expert, Mr. Buckner, made serious errors in his calculation of Shurden's net worth. Without belaboring the point, Mr. Buckner and Cindy's counsel at trial and in her brief, continue to assert that Louis Jackson, CPA used "book value" as opposed to actual appraised value when discussing land values. They even go so far as to assert that Mr. Jackson valued farm acreage at \$233.00 per acre or the equivalent of "swamp land". (See Appellants's Brief at Pgs. 16-17). This could not be further from the truth. At all times Mr. Jackson used appraised value. The misguided logic appears to stem from a failure to appreciate that undivided interests in land are worth less than outright fee simple ownership. In any event, Mr. Jackson unequivocally testified that he never valued farm land at \$233.00 per acre. The bottom line in this case which the Chancellor had to determine was what would happen to Shurden Owen if he quit farming at any particular time? Due to the immense amount of debt that he accumulated over the years, if he were to liquidate all of his assets, he would be left with \$30,000.00.⁵ Certainly,

⁴Cindy's counsel argues in brief that the hunting club owns 6,900 acres and has approximately 215 shareholders, making it one of the largest hunting clubs ever imagined. (See Appellant's Brief at p. 18). The club may well be one of the largest hunting clubs in this State, and same could have easily been verified. The numbers provided by Shurden on the hunting club are accurate.

⁵Cindy argues throughout her brief that she should be awarded \$359,260.00 which was her assigned interest in W & C Owen Partnership. What she inexplicably ignores is that this is but one of four (4) farming entities utilized by Shurden – and the only one that has a positive value. She cannot "cherry pick" which entity she would like to have an interest in and then discard the others from the analysis. Her argument on this issue is misplaced.

Shurden will continue to have the benefit of the properties owned by Shurden Land Partnership; that is, assuming he does not default on his farming loans.

Cindy also seemingly seeks to step into the shoes of her parents and recoup investments made by them into various structures now titled in Shurden Land Partnership. Frankly, if her parents want to seek recoupment of said funds, same should be through an action against the Partnership. This is not the appropriate action for her parents to seek recompense of the funds. The Chancellor considered the evidence regarding this work and awarded a large majority of the parties' liquid and unencumbered assets to Cindy.

While no proof was elicited on this issue at trial, Cindy argues that Shurden has direct access to both the income and assets of same. (See Appellant's Brief at pgs. 19-20). She first cites a predecessor trust for this principle. That trust ultimately became, in part, the William Shurden Owen Trust. (See Ex. D-8 at p. 59). Under the terms of the trust, Shurden can only receive net income of the trust. Id. The will trust would allow corpus distributions under limited circumstances which are not applicable here. (See Ex. D-9 at pg. 67). Additionally, that trust only consists of land. (R.3, Pgs. 172-174). Cindy ignores the fact that her daughter, Meredith, is a beneficiary under each trust upon Shurden's death.

The trial court conducted a proper and equitable division of marital assets.

B. The Chancellor did not err in ruling that Cynthia Owen was not entitled to alimony.

"Alimony is considered only after the marital property has been equitably divided and the chancellor determines one spouse has suffered a deficit." Lauro v. Lauro, 847 So.2d 843, 848 (Miss. 2003).

The factors to be considered by a trial court in order to justify a decision on alimony are:

1. the income and expenses of the parties;
2. the health and earning capacity of the parties;
3. the needs of each party;
4. the obligations and assets of each party;
5. the length of the marriage;
6. the presence and absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide child care;
7. the age of the parties;
8. the standard of living of the parties, both during the marriage and at the time of the support determination;
9. the tax consequences of the spousal support order;
10. any fault or misconduct;
11. wasteful dissipation of the assets by either party; or,
12. any other factor deemed by the court to be 'just and equitable' in connection with the setting of spousal support.

Armstrong v. Armstrong, 618 So.2d 1278, 1280-81 (Miss. 1993).

At the outset of its alimony determination, the trial court properly determined that after equitable division, neither party suffered a deficit. That appropriately ended the analysis. However, the trial court thereafter further considered the Armstrong factors in determining that Cindy was not entitled to alimony. The crux of this case came down to two (2) accounting experts, Mr. Buckner and Mr. Jackson. The trial court appropriately considered both experts' testimony and came to the conclusion that Mr. Jackson's testimony was more credible. Mr. Jackson simply did not take liberties with his net worth and income analysis as Mr. Buckner did.

Cindy continually argues that Shurden has a "cash flow" of \$290,000.00 annually and sits on and enjoys 3000 acres, while she struggles paycheck to paycheck to make ends meet. As testified to at trial by both Shurden and his accountant, his farming operations were in dire straits and mired in debt. Unfortunately, Cindy's lifestyle during the marriage contributed to this bleak financial

situation. Neither party will come out of this divorce smelling like a rose, but the court's determination on the alimony issue was fair and practical in light of the equitable division of assets. The fact that the parties accumulated \$93,000.00 in credit card debt highlights the condition of their finances. An individual with the net worth or income of one described by Plaintiff's expert, Mr. Buckner, would not need to incur such a large credit card debt. The stark reality is that Shurden simply does not have the available money to pay alimony unless he was allowed to increase his farming debt in perpetuity.

The trial court correctly seized upon the wasteful dissipation of assets by both parties and particularly by Cindy Owen during the course of the marriage. The court further definitively found that the parties' standard of living was inflated due to the increasing amount of farm debt which built up over time. Cindy Owen's reliance upon and request for \$1,200.00 a month for a car payment only underscored her delusions as to the parties' financial affairs. The court appropriately found that it was time for each of the parties to get their finances under control. The Chancellor's decision that Cindy was not entitled to alimony was appropriate.

C. The Chancellor did not err in setting child support.

After hearing testimony from the two (2) expert witnesses on Shurden Owen's adjusted gross income, the Chancellor properly determined that the best way to determine Shurden's income was to assume that he was not farming. At that point, he would receive trust income in the approximate amount of \$50,000.00. Given the wide variations in testimony between Mr. Buckner and Mr. Jackson regarding Mr. Owens's income, the court equitably determined the amount pursuant to Miss. Code Ann. § 43-19-101. Mr. Buckner offered testimony on the income issue which was

subsequently discredited on cross-examination. He simply was not a credible witness. The court determined that it would not punish the minor child for her father's continual losses/modest gains in farming year after year. Given the fact that Shurden most likely would continue to receive a consistent amount of trust income each year, the court further properly required him to reimburse Cindy for Meredith's health insurance and further properly required Shurden to be responsible for Meredith's reasonable and necessary college tuition and related expenses.⁶

The Chancellor did not err on this issue.

D. The Chancellor did not err in ordering that Cynthia Owen was not entitled to her attorney's fees and costs.

Although Cindy Owen was awarded approximately \$100,000.00 and her \$50,000.00 in jewelry and further had no share of the marital or farming debt, she contends she has an inability to pay her attorney. She makes this argument on the basis that Shurden has not paid to her \$90,000.00 awarded by the court in equitable division. This is obviously the case because Cindy appealed the Chancellor's decision which stayed the financial issues in this case. Once this Court affirms the Chancellor's decisions on equitable division and alimony, it should quickly come to the conclusion that Cindy Owen has the ability to pay her attorney's fees and costs in this case. The Chancellor correctly relied upon Tynes v. Tynes, 860 So.2d 325, 331 (Miss. 2003), in determining that Cindy did not have an inability to pay her attorney's fees and costs and that there was not a disparity in the relative financial positions of the parties.

⁶Despite Cindy's arguments to the contrary, neither trust would allow him to invade the corpus for payment of child support. As mentioned herein, Meredith is Shurden's sole beneficiary under the trust. (See Ex. D-8, D-9.)

IV. Conclusion


The Chancery Court of Sunflower County, Mississippi committed no reversible error. In considering the issues before this Court, the Chancellor's decision must stand. Moreover, the Chancellor did not abuse her discretion in denying Cindy's Motion for Reconsideration.

As a result of the evidence, the law, and plain common sense, each assignment of error raised by Cindy must fail. Therefore, Shurden Owen respectfully requests this Court affirm the decision of the lower court in all respects as set forth in its Findings of Fact and Conclusions of Law.

RESPECTFULLY submitted on this the 23rd day of February, 2009.

WILLIAM SHURDEN OWEN, Appellee

By:


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CERTIFICATE OF SERVICE

I, **S. TODD JEFFREYS**, attorney of record for William Shurden Owen, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee* to the following persons:

David M. Sessums, Esq.
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Honorable Jane Weathersby
Chancellor
P. O. Box 1380
Indianola, MS 38751

SO CERTIFIED on this the 23rd day of February, 2009.




S. TODD JEFFREYS

CERTIFICATE OF FILING

I, **S. TODD JEFFREYS**, do hereby certify that I have this day mailed by first class U.S. Mail, postage prepaid, the original and three (3) copies of the *Brief of Appellee* to Mrs. Betty Sephton, Mississippi Supreme Court Clerk.

SO CERTIFIED on this the 23rd day of February, 2009.



S. TODD JEFFREYS