IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BILLY STEPHEN MCKISSACK — **APPELLANT**

VERSUS — **CAUSE NO. 2009-CA-00259**

TERRI MCKISSACK — **APPELLEE**

APPEAL FROM THE CHANCERY COURT
OF LOWNDES COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT/BRIEF OF CROSS-APPELLEE

ORAL ARGUMENT REQUESTED

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STANDARD OF REVIEW

A chancellor should only be reversed in a domestic relations case in one of several situations: (1) his findings were manifestly wrong; (2) his findings were clearly erroneous; or (3) he applied an incorrect legal standard. Though the clearly erroneous standard of review applies to the chancellor's findings of fact, matters of law are reviewed *de novo*. *Dix v. Dix*, 941 So. 2d 913, 915 (Miss. Ct. App. 2006). "[I]f we determine that the chancellor applied an incorrect legal standard, we must reverse." *Dix*, 941 So. 2d at 915-16 (citing *Morreale v. Morreale*, 646 So. 2d 1264, 1267 (Miss. 1994)).

In the instant case, the chancellor applied the family use doctrine, rather than a commingling analysis, in order to determine whether Steve's separate property was converted to marital property and thus subject to equitable distribution. R. 250-51, RES-015 through RES-016. As thoroughly discussed in Steve's Brief of Appellant, and as reiterated herein, the chancellor should have considered whether Steve's separate property had been commingled with marital property to an extent that it was no longer traceable. The lower court, however, considered only whether any portion of $500,000.00 held in certificates of deposit at the Bank of Vernon (the "Bank of Vernon CD") was used for family purposes and ignored the fact that Mississippi has adopted tracing. Thus, the chancellor applied an incorrect legal standard as to classification and division of marital assets and should be reversed.

As to the award of alimony, the clearly erroneous/manifest error standard applies. *Tilley v. Tilley*, 610 So. 2d 348, 351 (Miss. 1992). In his consideration of alimony, the chancellor committed manifest error based upon his award of permanent, rather than rehabilitative alimony. Alternatively, the chancellor committed manifest error in his award of $6,000 per month in permanent periodic

alimony. The lower court's award of permanent alimony in the amount of $6,000 per month should therefore be reversed.

ARGUMENT

I. CERTIFICATES OF DEPOSIT

The two specific issues raised by Steve with regard to the chancellor's classification of the Bank of Vernon CD are as follows: (1) the lower court erred in applying the family use doctrine to determine whether the Bank of Vernon Certificates of Deposit should be classified as non-marital property; or (2) alternatively, the lower court erred in determining that the principal of the Bank of Vernon Certificates of Deposit is marital property. Steve replies to the counter arguments raised by Terri in the Brief of Appellee below.

A. Recent Case Law Developments Demonstrate That Mississippi Has Adopted Tracing To Determine Whether Separate Assets Commingled With Marital Property Are Converted To Marital Property.

The Brief of the Appellant provides a great deal of background related to the concepts of commingling, transmutation and tracing as well as addressing the distinctions between family use of tangible personal property and commingling of intangible personal property. Therefore such concepts are not discussed at length here. What must be addressed here is Terri's allegation that there is absolutely no case law which supports this distinction between family use of tangible property and commingling of intangible personal property.

As Professor Bell stated, the Mississippi appellate courts have "move[d] away from the [minority] strict commingling" rule to the majority rule, allowing tracing with regard to separate property interest. DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW, §6.04 (1st ed. 2007 Supp.) (citing *Brock v. Brock*, 906 So. 2d 879 (Miss. Ct. App. 2005) and *Parker v. Parker*, 929 So. 2d 940 (Miss. Ct. App. 2005). Professor Bell discussed the concept of commingling and tracing:

> ***It is a basic rule of equitable distribution that property retains its character even though it takes another form. . . . Conversion is not caused by the act of commingling but by the inability to trace and identify the separate property.***

BELL, §6.05 (1st ed. 2005).(citations omitted) (emphasis added). Thus, the question of whether separate property has transmuted to marital property by virtue of commingling depends upon one primary issue - *can the separate property be traced?*

Recent case law handed down by this Court, and completely overlooked by Terri in her brief, confirms that Mississippi allows tracing. For example, in *Brock*, the husband argued on appeal that the property, intended as a gift to the wife and originally her separate property, had been transmuted into marital property by virtue of the fact that he paid taxes on the property and made repairs to the home during the course of the marriage. *Brock*, 906 So. 2d at 888. This Court, however, disagreed based upon the ability to trace and therefore identify the separate property:

> "***When separate property and marital property are mixed to such a degree that the elements cannot be distinguished, i.e., that the separate element cannot be traced, then the entire property is considered marital property: the separate property has transmuted by commingling into marital property. Consequently, the key to determining when there has been transmutation by commingling is whether the marital interests can be identified, i.e., can be traced.***" Laura W. Morgan & Edward S. Snyder, 18 J. AM. ACAD. MATRIM. LAW. 335, 341 (2003). In the present case, J.D. made a minimal number of repairs to the house, and ***his contributions to the home by paying property taxes are readily traceable.***

Brock at 888 (emphasis added).

In a case decided by this Court several years following *Brock*, the wife argued that the chancellor erred in classifying husband's business as his separate property. *Dorsey v. Dorsey*, 972 So. 2d 48, 51 (Miss. App. 2008) This Court disagreed, again based on the fact that the separate property was traceable and therefore identifiable:

> The chancellor found that ***while some personal funds may have been used to pay business debts, those amounts are easily traceable and have not become so commingled as to have become unidentifiable.*** Further, the chancellor determined

> that the evidence presented by [the wife] was insufficient to convince the court that personal and business expenses were so interwoven as to have caused the stock of ESI to have transmuted into marital property.

Dorsey, 972 So. 2d at 51 (emphasis added).

Terri asserts that there is no Mississippi case law which demonstrates any distinction between commingling and family use, and in turn between conversion of separate tangible and separate intangible property. Yet, she cites the case of *Spahn v. Sphan*, 959 So. 2d 8 (Miss. Ct. App. 2006), which supports that very proposition. In determining that a warehouse and adjoining lot was the husband's separate property, the Court stated:

> ***separate assets may lose their non-marital classification if commingled with marital assets or if used for familial purposes***. *Johnson v. Johnson*, 650 So. 2d, 650 So. 2d 1281, 1286 (Miss. 1994). . . . Because Joseph acquired the warehouse prior to the marriage and ***did not commingle the proceeds from the warehouse, nor use the warehouse for family purposes***, we find that the chancellor was correct in classifying the warehouse as Joseph's nonmarital property.

Spahn, 959 So. 2d at 12 (emphasis added). Terri argues that *Spahn* indicates no distinction between family use and commingling. But, the court made that very distinction: *whether the husband commingled any proceeds from the warehouse or used the warehouse for family purposes.*

The focus of these cases was not how the non-marital assets were used, *i.e.*, whether they were used for a family-related purpose. Instead, the primary consideration was whether the marital assets could be traced and separated from any non-marital assets with which they had been commingled. These cases dealt not with household items, but with intangible property, such as corporate stock and spouse's intangible investments in separately owned real property - in other words, *traceable* separate assets. *See also A & L, Inc. v. Grantham*, 747 So. 2d 832, 839 (Miss. 1999) (considering whether corporate stock was converted from separate to marital property based upon the concept of commingling).

In other cases, the Court has considered the *family use* of a particular asset, *i.e.*, assets which, once commingled, could not be traced or separated from the marital property with which they were commingled. For example, in *Pittman v. Pittman*, 791 So. 2d 857, 866-67(Miss. App. 2001), the Court applied the *family use* doctrine to determine whether tangibles such as furniture, china and antiques were converted from separate to marital property by virtue of use in the family home while applying a *commingling* analysis to determine whether the wife's trust was converted from separate to marital property. Despite the clear distinction between the two concepts made in that case between how one converts separate tangible and separate intangible property, the chancellor relied upon the family use analysis from *Pittman*, rather than a commingling analysis to determine whether the Bank of Vernon CD was converted to marital property pursuant to a commingling analysis.[1] R. 251, RES-016.

Thus, Mississippi appellate courts have made a clear distinction between family use and commingling, utilizing the family use doctrine to determine whether separate tangible assets have been converted to marital property while utilizing a commingling analysis when considering whether intangible assets have been converted to marital property. However, even if no such distinction was apparent within our case law and we assume that the distinction between "family use" and commingling is merely one of semantics, what Mississippi appellate courts have made abundantly clear, is that tracing is allowed to determine whether a spouse's separate property has become so indistinguishable from marital property with which it was commingled to have converted to marital property.

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1 For a complete discussion of *Grantham*, *see* Subsection B of the Reply Brief below. *See* complete discussion of these cases in Brief of Appellant at 24-25.

B. The Corpus Of The Bank Of Vernon CD Was Never Used For Family Purposes And Thus Was Never Converted To Marital Property.

Relying on the family use doctrine and the chancellor's analysis under *Pittman*, Terri asserts that the chancellor correctly classified the Bank of Vernon CD as marital property based upon "Steve's purpose and intent" to use the $900,000 draw down from State Termite for "family purposes." *See* Brief of Appellee at 18. In support of her contention, she cites to two cases, one of which was discussed at length in Steve's brief. First Terri refers to *A&L, Inc. v. Grantham*, 747 So. 2d 832 (Miss. 1998). In that case, the chancellor held that the husband's corporations and properties owned by corporations had been commingled to such a degree that they became marital assets, and the Supreme Court affirmed reasoning as follows:

> Throughout the marriage, John and Lynn used corporate funds from accounts of the companies to pay for personal expenses, documenting the monies as loans to shareholders instead of income. Often times, the funds used for personal expenses were deposited directly into Lynn and John's joint checking account. . . . Corporate income was co-mingled with marital income and thereby became marital assets. *Tillman v. Tillman*, 716 So. 2d 1090, 1093-94 (Miss. 1998). Clearly the corporations were simply alter egos of John, and the chancellor justifiably pierced the corporate veil. While this does not necessarily co-mingle ***the corporations themselves or all of their assets such that the principal, as opposed to the income used becomes a marital asset, the evidence before the court in this case made it difficult to draw a precise line of demarcation.***

Grantham, 747 So. 2d at 839 (emphasis added).

Another case cited by Terri with regard to conversion of marital property is *Sanderson v. Sanderson*, 1999-CA-00915-COA (Miss. Ct. App. 2000), *affirmed* 824 So. 2d 623 (Miss. 2002)[2], a case which Terri argues is distinguishable from the facts of the instant case. In that case, the Sandersons had been married for a little over twenty years at the time of the divorce. *Sanderson* at

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2 The Supreme Court did not address issues related to stock holdings on appeal, but only addressed issues related to alimony.

¶4. During the course of the marriage, the parties relied on the Mr. Sanderson's income from his employment with Sanderson Farms as well as dividend income from the husband's stock holdings in that company. *Id.* The stock was publicly traded and had a value of approximately $4,000,000 at the time of the divorce. Mr. Sanderson's earnings were in excess of $100,000 annually, which included both his salary and stock dividends from Sanderson Farms. *Id.* The chancellor determined the Sanderson Farms stock was non-marital property of Mr. Sanderson and therefore not subject to equitable distribution. *Id.* at ¶7.

Mrs. Sanderson appealed, raising several issues, one of which was whether the Sanderson Farm stock was a marital asset. *Id.* at ¶8. One of the reasons Mrs. Sanderson argued the stock was marital property was "the uncontested fact that the stock was used to meet normal recurring family obligations. . . ." *Id.* at ¶11. Specifically, she contended that the decision to use stock dividends for family purposes evidenced her husband's intent to convert the principal of the stock to marital property, that such intent constituted an act of commingling the stock itself and thus converted the stock to marital property. *Id.* at ¶12. The Court, however, found her argument to be unsupported and held that the Sanderson Farms stock was not converted to marital property by virtue of the use of stock dividends for marital purposes. *Id.* at ¶14. The Court reasoned that "***something more***," beyond the mere use of the stock dividends for marital purposes, would have to be shown in order to demonstrate that "Mr. Sanderson intended to, or by his actions, inadvertently did in fact, so convert the use of his shares of Sanderson Farms as to change its character from nonmarital to marital property." *Id.* (emphasis added).

Once again, the focus in *Grantham* and *Sanderson* was whether the marital assets could be traced from any non-marital assets with which they had been commingled, *i.e.*, whether there was

a "precise line of demarcation" so that the non-marital assets could be traced. Terri argues there was no "precise line of demarcation," based upon the following:

> The Supreme Court ***makes a distinction between just using the interest income or dividends of an asset and using the corpus of the asset.*** In [*Grantham*], because the husband had obviously used the corpus of the asset, as was done in the instant case, and not just the interest or dividend, the court said that it became a marital asset.

Brief of Appellee at 23 (emphasis added). The "asset" to which Terri refers here is the $900,000 draw down taken from State Termite.[3] At some time in 2006, Steve placed $500,000 into certificates . of deposit at the Bank of Vernon (the "Bank of Vernon CD"), the funds for which originated from a "draw down" recommended by Steve's attorney and accountants. Trial Transcript ("Tr.") 39-40, 447-48, 449; RES044-45; 053-054; 055. The complete "draw down" totaled $900,000, and was done for tax-related purposes, as well as to reduce the company's potential liability for punitive damages in the event of a lawsuit. Tr. 447-48, RES053-54. In order to fully explain certain issues related to the Bank of Vernon CD, which are discussed below.

1. Original Source Of $500,000 Certificates Of Deposit.

The lower court correctly determined that State Termite and Pest Control, Inc. was Steve's separate property. R. 246-48, RES-011 through RES-013. Since Terri does not contest the classification of State Termite on appeal, *see* Brief of Appellee at 3,[4] the facts related to Steve's

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3 Terri asserts that the chancellor "looked at the $900,000 as a whole and saw what Steve's purpose and intent was with the $900,000, which was to provide for family purposes." Brief of Appellee at 18.

4 Though Terri filed a Notice of Cross Appeal on February 26, 2009. R. 301, she presents no issues for cross appeal in her brief. However, to the extent that Terri raises any issues on cross appeal, Steve herein files his Reply Brief of Appellant/Brief of Cross Appellee.

acquisition of State Termite during the final years of the marriage are not reiterated here.[5] At some time in 2006, Steve placed $500,000 into certificates of deposit at the Bank of Vernon (the "Bank of Vernon CD"), the funds for which originated from a "draw down" recommended by Steve's attorney and accountants. Trial Transcript ("Tr.") 39-40, 447-48, 449; RES044-45; 053-054; 055. The complete "draw down" totaled $900,000, and was done for tax-related purposes, as well as to reduce the company's potential liability for punitive damages in the event of a lawsuit. Tr. 447-48, RES053-54. Steve testified as follows regarding the $900,000 draw down:

> Q. After receiving those, you know, hundred shares of stock, Steve, what amount of ownership did that give you to State Termite?
>
> A. 100 percent.
>
> Q. Okay. Then being 100 percent owner of State Termite, did you discuss with anyone the legal and accounting principles that might be applicable?
>
> A. Yes, I did.
>
> Q. Having discussed that, not saying what they told you, but tell the Court who you discussed such with.
>
> A. The legal aspects of it, I discussed with a friend of mine, attorney, Mr. Tommy Wallace. The tax ramifications or possibilities or ideas that we might try, I discussed with my CPA, Wanda Holley, and her boss and partner, Lee Stafford.
>
> Q. Okay. Now, as a result of discussing certain things, tell the Court what actions you took in regards to the assets of the corporation.
>
> A. The corporation had some certificates of deposit in the bank, matured at different points in time. The – from the accounting standpoint, they felt like they had some exposure to the internal revenue for retained earnings tax. The attorneys thought I might have some exposure in the case – in the event of a lawsuit from punitive damages. The more that's available, the more likely or the larger a punitive award could possibly be. So they both – both of them, and not together, but recommended drawing down some of the cash to leave myself less exposure. As the certificates of

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5 For a detailed discussion of Steve's acquisition of State Termite & Pest Control, *see* Brief of Appellant at 3-4; *see also* trial court's Opinion R. 246-48; RES 011-012).

deposit matured, I withdrew them from the company, put them in the bank in my name alone. I did this also at the recommendation of Mr. Wallace saying it would just be a good business practice to maintain this separately to – so I can keep up with my business and the receipts and cash and such, the assets of the business, so to speak.

Q. Okay. Now, once you moved the monies out of State Termite, did you ever place any of those monies into any type of joint accounts with your wife?

A. No.

Q. Have those monies been placed into any account jointly with anyone?

A. No.

Q. Now, backing up to where we're talking about the monies coming out, you mentioned they were on a staggered type situation; is that correct?

A. Yes.

Q. Tell the Judge and explain to him how you handled that.

A. I'm not sure, just as they matured. It was not an organized staggered plan where they would come due every three months, just some of them would just come due at various times.

Q. Okay.

A. And I would – as they matured, I would withdraw them. I did not – it was not a crisis situation, so to speak. I would just withdraw them as they would mature to avoid the early withdrawal penalty and deposit them in a separate account.

Q. Okay. And where would that account be located?

A. It was at the Bank of Vernon.

Q. Okay. Now, over in the Bank of Vernon, there's been some testimony about certain funds you have over there now. I believe that there was testimony there's a checking account somewhere between 20 and $40,000 there; is that correct?

A. Yes. That's the – well, actually a money market type account.

Q. Where did that monies in that account come from?

A. It came from State Termite & Pest Control.

Q. ***Okay. Now, there was testimony about a $500,000 CD; is that correct?***

A. ***Yes.***

Q. ***Where did those monies come from?***

A. ***State Termite & Pest Control.***

Tr. 447-49, RES053-RES055 (emphasis added).

2. Loan To Millie Rollins.

Terri's argument that the Bank of Vernon CD was commingled with marital funds puts a great deal of emphasis on a loan Steve made to Millie Rollins, the source of which was a portion of the $900,000 draw down from State Termite. Tr. 450, RES056. Steve testified as follows with regard to the loan to Millie:

Q. Okay. Now, did you have at one point, $500,000 over there or a little over and you loaned monies to Millie Rollins?

A. I did not all exactly at one time.

Q. Okay.

A. Did not have the 5 or 600 or 900 or any of it all at one particular point in time.
Q. Okay. Did you loan monies to Millie Rollins in the amount of roughly $600,000 over a period of time?

A. Yes.

Q. ***Where did that money come from that you loaned her?***

A. ***State Termite & Pest Control.***

Q. ***All right. At any point in time, did you wife have any ownership in any of those monies?***

A. ***No.***

Q. ***Were those monies ever commingled into any account with your wife?***

A. ***No.***

Tr. 449-50, RES055-RES056.

3. Use Of Remaining Funds From State Termite Draw Down.

Terri also puts a great deal of emphasis on her assertion that "Steve testified that he had been using more than just the interest for the $900,000 for family purposes; he admitted using a very substantial amount of the $900,000 for family purposes." Brief of Appellee at 8 (citing Tr. 451-52). Steve testified as follows regarding the remaining approximately $400,000 from the draw down and the use of the same:

> Q. Okay. What is your best estimate as to the money spent on your daughters and their education?
>
> A. I have not actually added it up. I was asked that question in a deposition, and I roughly guesstimated $200,000. It might be $120,000, but a substantial amount of money for that.
>
> Q. Okay. During that time period, you've also used - you know - now, when you pulled the monies out, Steve, of the State Termite, did you run them through a flushing account, so to speak? Did they go directly into a family account, or did they go into another independent account?
>
> A. They went to another independent account.
>
> Q. Okay. So then your monies, even the ones that were used, i.e., to buy things that were enjoyed by the family were actually placed into an independent account, and then that account monies went to pay for them; is that a true statement?
>
> A. It went to the independent account, and then if I needed some for my personal use, I would withdraw some and put that in my - what I termed my real estate account - but pay bills out of and support children and spend money at the lake house or whatever. . . .
>
> * * *
>
> Q. Okay. Well, we know you've got 500,000 plus at the Bank of Vernon, correct?
>
> A. Yes.
>
> Q. Okay. I want you to tell the Judge . . . where did the other $350,000 go.

A. To give an exact accounting, I can't. I would use it to - before I had permanent financing at my lake house, it was just on an annual note. I would pay the interest and reduce principal. Most of the time would put 10 or $15,000 on that. I added a, I believe, $12,000 boathouse to store my boat at the lake. I had bought a Corvette, was making payments on it. Some of it went to that. I would use it for the girls, use some for the girls' college education. My oldest daughter had a scholarship, so tuition was not very much, but her extracurricular's were still there, buying vehicles a couple of times. My children were beginning driving age. The second year I believe my oldest child was in school, roommate problems came up. I bought a condominium over there in Starkville for her to live in. I'm not exactly sure what year, but it would be somewhere along in there. . . .

Tr. 451-52, RES057-RES058.

Terri confuses whether any of the "corpus" of the $900,000 draw down was used for family purposes with whether any of the "corpus" or principal of the Bank of Vernon CD was used for family purposes. Steve never testified, nor did he suggest in his Brief, that he only used interest from the $900,000 draw down. His testimony is clear that some of the corpus of the draw down was used for family-related purposes, and he clearly stated that the remaining portion of the $900,000 used for family purposes he considered to be marital property. Tr. 451, RES 057. However, the use of the $900,000 is not at issue here. In fact, in the chancellor's opinion, he found that the property purchased with the remaining $350,000 to $400,000 was marital property and divided those assets accordingly. Specifically, Steve testified that he used some of that money for college-related expenses of the couple's daughters; to purchase family; to build a boat house at the Lake House as well as purchasing other items related to the Lake house; and to purchase a Corvette. Tr. 452, RES058. Those items were classified as marital property. R. 259, 261; RES024, RES026. The asset which is at issue on appeal is the Bank of Vernon CD; and the record is clear that no part of the principle of the Bank of Vernon CD was ever used for family-related purposes. The "corpus" of the

$900,000 which Steve used for marital purposes was either already used for that purpose, i.e., the college expenses of the children, or was classified as marital property by the lower court.

4. Use Of Interest Income From Bank Of Vernon CD.

As the Court can appreciate, the certificates of deposit purchased by Steve did generate some interest income. Steve testified that he earned interest income of approximately $3,000.00 per month, and that some of the interest income was used for family-related purposes. Tr. 80-81; 90-91, RES046-47; RES048-49. Terri makes the bare assertion that the corpus of the assets, the Bank of Vernon CD, were commingled with marital funds but points to absolutely no facts in the record which contradict those set forth herein. Instead, the corpus of the funds in the Bank of Vernon CD remained separate, intact, and completely isolated from any marital property.

5. Analysis Of Facts Under *Grantham* And *Sanderson*.

Terri argues that *Grantham* supports her analysis that the $900,00 was converted to marital property. Her analysis is as follows:

> The Supreme Court has made a distinction between using the interest or dividends of an asset and using the ***corpus of the asset***. In A&L, Inc., because the husband had obviously used the ***corpus of the asset, as was done in the instant case, and not just the interest or dividend***, the court said that it became a marital asset.

Brief of Appellee at 23 (emphasis added). Here, the asset to which Terri refers, alleging that Steve used the corpus of the asset for family purposes, is the $900,000 draw down. *See* Brief of Appellee at 18. What Terri overlooks in her analysis, is that Steve does not dispute having used portions of the corpus of the $900,000 draw down for family-related purposes as discussed in subsection 3 *supra*. Terri also fails to consider the fact that the chancellor determined that the portions of the $900,000 which Steve used for family purposes, was marital property and already distributed the same. Further, Steve admits that those portions of the $900,000 which remained, approximately $350,000 to

$400,000, became commingled with marital property to the extent that tracing the separate and marital assets would be very difficult. However, there is no such evidence in the record, nor does Terri point to any, which confirms use of the principal or corpus of the Bank of Vernon CD for family purposes. And, that is the asset at issue on appeal.

Consider then the Bank of Vernon CD under a *Grantham* analysis. In that case, there was evidence in the record that husband and wife were living out of the corporation during the course of their marriage - routinely paying living expenses out of various corporate accounts. There, the Court determined that the corporations were merely alter egos of the husband and that the separate property converted to marital property because "the corporations themselves or all of their assets such that principal, as opposed to the income used" became so commingled so as to make the tracing of separate from marital property virtually impossible. *Grantham* at 839. Here, that is simply not the case. Steve's testimony was clear: the only portion of the Bank of Vernon CD ever used for family-related purposes was the interest income earned from the same. *See* subsection 4, *supra*. There is absolutely no evidence in the record, nor does Terri point to any such evidence, to the contrary.

Terri also attempts to distinguish the facts of *Sanderson* from the instant case, yet there is no distinction to be made. There, the wife argued on appeal that the decision to use stock dividends for family-related expenses demonstrated the obvious intent of the husband to convert the entirety of his stock holdings to marital property. Terri argues:

> Steve has implied that he only used the interest from the certificates of deposit (Appellant's Brief at p. 5-6). Steve's obvious intent to use the $900,000 for family purposes cleared the way for the Chancellor to find that this was not a situation in which Steve merely intended to use the interest or dividends from the funds but had, in fact, used almost half of the corpus of the $099,000 which Steve had withdrawn from the company for family purposes.

Brief of Appellee at 23-24. Terri overlooks the clear holding of *Sanderson* that there must be ***"something more,"*** something beyond the intent to use interest or income earned from a separate asset for family use in order to convert the principal of that separate asset to marital property. And, here again, Terri fails to consider the fact that the chancellor determined the $350,000 to $400,000 which remained from the $900,000 draw down to be marital property and distributed assets purchased with those funds through equitable distribution. Therefore, her attempts to distinguish *Sanderson* are without merit.

Based upon the foregoing, Terri has failed to demonstrate that the Bank of Vernon CD was converted from Steve's separate property to marital property. Alternatively, only interest income from the Bank of Vernon CD could conceivably be classified as marital property, and the principal of the CD was never converted from Steve's separate property to marital property.

C. Steve Did Not Misrepresent Facts Associated With The Bank Of Vernon CD, Nor Did He Make Material Misrepresentations To The Lower Court.

In her Brief of Appellee, Terri puts a great deal of emphasis on facts she claims Steve misrepresented to the Court. However, a consideration of the facts in the record indicates Steve made no such misrepresentations and that those alleged misrepresentations have no effect on the legal issues before this Court.

First, Terri argues that Steve misrepresented the fact that the "funds withdrawn from his corporation 'were always maintained in Steve's separate account.'" Brief of Appellee at 8. To support her allegations of misrepresentation on Steve's part with regard to this fact, Terri asserts that because he loaned money to Millie Rollins, "[h]e commingled these funds with funds that Millie Rollins had and was using to repair the apartments." *Id.* at 10. Thus, Terri contends, it cannot be said that Steve always maintained these funds separately. *Id.* Whether or not Steve "commingled" any

funds from the $900,000 draw down, the source of which was his separate property, with funds of another individual has absolutely no bearing on a commingling analysis and whether the funds were commingled with marital property. Terri provides no case law to support her argument that by virtue of "commingling" his separate property with a friend in a joint business venture, Steve thus "commingled" separate and marital funds. Furthermore, Steve made no misrepresentations to the lower court or to this Court related to the funds he loaned to Millie Rollins. He clearly testified about the loans and the source of those loans, the draw down from State Termite. Tr. 449-50, RES055-RES056.

Next, Terri argues that Steve misrepresented that "of the $900,000 draw down, Steve placed $500,000 in certificates of deposit in the Bank of Vernon." *Id.* at 11. She relies on two charts to demonstrate how, allegedly, Steve suggested to the trial court and this Court that he placed $500,000 in the Bank of Vernon CD immediately following the withdrawal of the funds from State Termite. *Id.* During the course of the trial, Steve testified at length about the $900,000 draw down and the use of those funds following the draw down. Tr. 447-52, RES053-RES058. At no point during that testimony did he state that he took the funds out of State Termite and immediately placed them into the Bank of Vernon CD.

Finally, Terri makes two very serious allegations, which like the other alleged misrepresentations, she raises for the first time on appeal. She asserts that (1) Steve did not act with clean hands, making efforts to "hide" assets from Terri; and (2) Steve perjured himself during the trial. *Id.* at 12, 15. These final two issues related to alleged misrepresentation, just as all issues Terri raises related to alleged misrepresentations, are not properly before this Court and are without merit. Terri failed to raise the instances of alleged misrepresentation before the trial court and is therefore

procedurally barred from raising them for the first time on appeal. *Luse v. Luse*, 992 So. 2d 659, 663 (Miss. Ct. App. 2008).

II. ALIMONY

The remaining two issues raised by Steve relate to the lower court's awarding Terri $6,000 per month in permanent alimony. Steve argues that (1) the lower court erred in awarding permanent, rather than rehabilitative, alimony, or, alternatively, (2) the lower court erred in awarding $6000 per month in permanent alimony. Terri's counter arguments to Steve's points of error related to both permanent and rehabilitative alimony are addressed below.

A. Terri suffered no deficit in equitable distribution, and the lower court's award of $6,000.00 per month in permanent periodic alimony is improper.

In its determination of marital property division, the lower court awarded the marital home to Steve and the couple's lake house to Terri. R. 254, RES019. Additionally, Steve was ordered to pay Terri one half of the equity in the marital home in the amount of $111,808.00 at the time of the transfer of the deed to the marital home in June of 2009. R. 255, RES020.[6] After addressing the issue of division of real property, the lower court "proceed[ed] to analyze the division of the ***more liquid assets*** of the parties." R. 259, RES024 (emphasis added). The chancellor considered the following the "more liquid assets:"

> The parties are the owners of various ***certificates of deposit, IRAs, mutual funds, a real estate investment trust, 401K, checking accounts and insurance contracts.*** They are listed with values as follows: 1) Four Certificates of Deposit totaling $175,000; 2) American Fund - $19,000.00; 3) American IRA - $4,000; 4) Oppenheimer Fund - $19,813.67; 5) Oppenheimer Fund - $11,334.95; 6) Oppenheimer Fund (Wife) - $37,491.16; 7) Well REIT - $22,000.00; 8) State Termite 409K - $201,209.15; 9) Husband's Regions Bank Real Estate account - $30,000.00; 10) Wife's Bancorp South interior design business account - $9,800.00; 11) Wife's

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6 Steve complied with the lower court's order related to payment of one half of the equity in the marital home to Terri on June 15, 2009.

> Citizens Bank account - $4,000.00; 12) Mass Mutual Insurance - $38,731.74; 13) Mass Mutual Insurance - $42,135.30; 14) Corvette - $27,680.00; 15) Cadillac Convertible - $20,680.00; 16) Lincoln LS - $6,700.00; 17) 2000 Infiniti 130 - $11,305.00; 18) Motor home - $3,500.00; 19) Ski boat - $3,000.00; 20) Three jet skis valued at $4,000.00, $1,500.00 and $2,500.00, respectively; 21) Horse trailer - $5,000.00; 22) Horses - $4,500; and 23) Furniture in marital home and lake house - $5,500.00.

Id. (emphasis added). The lower court also included in its list of liquid assets the Bank of Vernon CD and Terri's personal bank accounts. *Id.* Following classification and valuation of property, the chancellor distributed the property, resulting in Steve's receiving only $152,000.00 in liquid assets while Terri was awarded 1.2 million dollars in assets, approximately ***$915,000.00*** of which are ***liquid assets***, including the following:

> ***Marital Home - $111,808.00***
> ***CDs - $175,000.00***
> ***Am. Fund - $19,000.00***
> ***Am. IRA - $4,000.00***
> ***Oppenheimer - $19,813.67***
> ***Oppenheimer - $11,334.95***
> ***Oppenheimer - $37,491.16***
> ***Well REIT - $22,000.00***
> ***Cadence Bank - $1,200.00***
> ***BancorpSouth - $9,800.00***
> ***Citizens Bank - $4,000.00***
> ***Bank of Vernon CD - $500,000.00***

R. 261, RES026 (emphasis added).

In her Brief, Terri alleges that she only she received liquid assets in the amount of $675,000, rather than the roughly $915,000.00 as Steve calculated in his Brief. Brief of Appellee at 33. Terri supports her argument, stating that "[t]he Court found that Terri received $675,000 in liquid assets. *Id.* (citing R. 260). Furthermore, she states that the only liquid assets she was awarded through property division, which are income producing, are the $675,000.00 worth of CD's. Brief of Appellee at 33. That statement, however, is a misrepresentation of the lower courts findings. The lower court

clearly defined the liquid assets of the parties to include not only the certificates of deposit, but the *IRA 's, mutual funds, real estate investment trust, 401K, checking accounts and insurance contracts*. R.259, RES 024. In calculating the liquid assets awarded Terri, Steve only considered the liquid assets which were labeled as such by the lower court, with the exception of Terri's award of one-half of the 401k (not considered in Steve's calculations).

Based on the lower court's determination of which assets were ***liquid***, Terri received almost ***one million dollars in liquid assets***, and the award of $6,000.00 per month in permanent alimony to Terri is therefore clearly excessive.[7] Alternatively, if this Court agrees with Terri that only $675,000 worth of assets awarded her are liquid, then the Court must also consider the fact that the remaining retirement assets become liquid once Terri reaches the age of 59 ½. Terri is currently fifty-three years of age, with a date of birth of October 22, 1956. *See* R. 270 (P-3). Given the fact that all retirement-related assets can be cashed in with no penalty within six and one-half years, rehabilitative alimony is an appropriate and equitable remedy to provide for Terri until such time as she reaches retirement age.

B. Terri's estimated monthly expenses are inaccurate and/or unreasonable.

Terri alleges that the chancellor recognized that her income alone was not sufficient to maintain her lifestyle and pay her bills. Brief of Appellee at 32. Terri asserts that her monthly expenses total $9,750.00 per month, referencing her 8.05 financial statement, which was entered into

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7 The award of $6,000.00 of permanent alimony to Terri is excessive in light of the liquid assets awarded to her, *including* the $500,000.00 Bank of Vernon CD. Steve should certainly should not be forced to pay twice, *i.e*, Terri is not entitled to *both* a $500,000 liquid asset and $6,000 per month in permanent alimony. Therefore, Steve respectfully requests that this Court reverse and render the decision of the lower court with regard to the Bank of Vernon CD, awarding the same in total to Steve, and remand the alimony issues to the lower court for determination as to an appropriate amount of alimony based upon this Court's findings that the Bank of Vernon CD remained Steve's separate property.

evidence at the trial. R. 270 (P-3), Tr. Index 2, RES005. According to Terri, the figures contained in her financial statement were never challenged. Though Terri's financial statement may not have been questioned, many of her monthly expenses should never have been considered by the lower court in its alimony determination given the fact that some of those expenses were either being paid by Steve at that time or were, in essence, provided for through equitable distribution. The amounts of other monthly expenses Terri asserts are totally unreasonable. The various expenses are discussed below.

1. Mortgage payment

One of the expenses projected by Terri on her financial statement is $1,420.00 per month for her mortgage payment. R. 270 (P-3). However, Terri either has no mortgage payment or has one of her own choosing. When the chancellor distributed the real property, he not only awarded Terri the lake house, but also awarded her one-half of the equity in the marital home. R. 255, RES020. At the time of the trial, the lake house was valued at $320,000.00, with a mortgage balance of $122,717.00 and equity of $197, 283.00, R. 254, RES019. One-half of the equity in the marital home, which Steve paid to Terri on June 15, 2009, totaled $111,808.00. R. 255, RES020. Therefore, after Steve paid to Terri her one-half equity in the marital home, she was potentially left with a mortgage of $10,909.00 on the lake house. She had the choice to pay off the majority of the mortgage on the lake house, and give the historically low interest rates, could have refinanced the lake house mortgage and paid off the entire balance with the equity awarded her from the marital home.

Here again, Steve should not be punished twice. It is simply not equitable to order Steve to pay Terri one-half the equity in the marital home, which left her with the ability to pay off the mortgage on the lake house, and then also order him to pay a periodic alimony payment which takes into account the $1,420.00 mortgage Terri projected she would have post divorce.

2. Auto payment and tags

Terri projected a car payment of $600 per month auto payment and auto tag payment of $91 per month on her financial statement. R. 270 (P-3). These are expenses she did not have previously, because Steve made all auto payments, totaling $557.00, as indicated by his 8.05 financial statement entered into evidence at trial. R. 271 (D-1); Tr. Index 2, RES005. During the course of equitable distribution, Terri was awarded the Lincoln LS automobile debt free. R. 260-61, RES025-26. Therefore, Terri is expecting an alimony payment that takes into account a $600.00 per month car payment she either does not have or has of her own choosing. This is simply an inequitable result.

3. Children's Allowance

Another expense Terri projected on her financial statement is children's allowance in the amount of $400 per month. R. 270 (P-3). At the time of the trial, this was, yet again, an expense Steve was currently paying in the amount of $600 per month. R. 271 (D-1). Despite the fact that Steve was already paying the children's allowance and never indicated he would not continue to do so, Terri projected this as an expense post divorce. Moreover, at the time of the trial, one of the couple's daughters was married, and therefore emancipated, and the younger daughters were twenty-one and twenty-two but still in college. R. 270 (P-3). Since the time of the divorce, both of the younger children have graduated from college and no longer require an allowance. Based upon the foregoing, the lower court should not have considered the $400 children's allowance as part of Terri's total monthly expenses for an alimony determination.

4. Church donations and charitable donations

Terri claimed to have monthly church donations in the amount of $350 per month and charitable donations in the amount of $75 per month at the time of divorce and projected the same expenses post-divorce. R. 270 (P-3). Steve's financial statement also reflects monthly charitable

donations at the time of divorce in the amount of $250. R. 271 (D-1). With Terri's church and charitable donations totaling $425 per month, and Steve's totaling $250, the total of Terri's projected church and charitable donations should have been reduced by $175 per month and thus total only $175.00 per month.

5. Entertainment

In addition to the expenses that Terri simply does not have, which she included in her monthly projected expenses, there are a number of expenses which are simply unreasonable. Steve does not discount the standard under our law that a wife is entitled to periodic alimony where she cannot maintain the standard of living to which she was accustomed during the marriage with her income alone. *See e.g., Heigle v. Heigle*, 654 So. 2d 895, 898 (Miss. 1995). However, a divorced spouse's projected expenses must still be reasonable and not reduce the payor spouse's ability to maintain a lifestyle similar to that enjoyed during the marriage.

Terri projected monthly entertainment expenses of $800 per month or $9,600 per year. R. 270 (P-3). On the other hand, Steve projected entertainment expenses of only one-half of Terri's projection, in the amount of $400 per month or $4,800 per year. It seems both unreasonable and inequitable that Terri's alimony award took into account her outrageous estimation of entertainment expenses. Based upon Steve's projection related to entertainment expenses, Terri's yearly entertainment expenses could be reduced to a reasonable amount of $4,800 per year or $400 per month.

6. Other expenses

There are a number of other expenses Terri lists on her financial statement which also are unreasonable. Those include gifts in the amount of $200 per month and birthday gifts in the amount of $150 per month, with a yearly gift total of $4,200 (not including her projection of $3,000 per year

for Christmas gifts); football and Bulldog Club expenses in the amount of $250 per month for a total of $3,000 per year; and travel expenses in the amount of $1,000 per month for a yearly travel expense of $12,000. R. 270 (P-3). Steve did not project such expenses on his financial statement. R. 271 (D-1). Again, the lower court's award of permanent periodic alimony based upon such large amounts of luxury type expenses produces an equitable result to Steve. Even if we assume that Terri will maintain her membership in the Bulldog Club, with an annual total of $3,000, these other expenses can be reduced to one-half of her projection. That would leave Terri with a monthly budget of $175 for gifts and travel expenses in the amount of $500 per month.

In summary, there are a number of expenses, projected by Terri, which simply should not have been considered in her estimated monthly expenses and thus award of alimony. If those expenses are deducted from her total alleged monthly expenses, the following is the result:

$9,750.00
-1,420.00 (mortgage)
- 600.00 (auto payment and auto tags)
- 400.00 (children's allowance)
- 175.00 (church and charitable donations)
$7,064

When these expenses are deducted, Terri's monthly expenses are reduced by approximately $2,700 per year. Moreover, if Terri's entertainment, travel and gift expenses are reduced by one-half, and thus constitute a reasonable monthly expenditure, the following results:

$7,064.00
- 400.00 (entertainment)
- 175.00 (gifts)
- 500.00 (travel)
$5,989.00

Therefore, a more reasonable estimation of Terri's monthly expenses is some $3,700 less than what she projected or approximately $5,989.00 per month.

C. Steve's monthly income and ability to continue to pay permanent periodic alimony is dependent upon his continued ability to work.

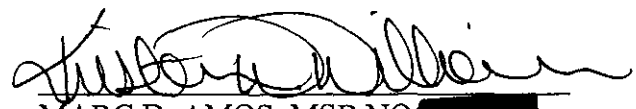
Finally, Terri argues that "Steve makes ample income to pay $6,000 per month in alimony. Brief of Appellee at 30. As discussed in Steve's Brief, the lower court failed to consider Steve's post-distribution income, reduced by virtue of his loss of interest income, in its award of alimony. *See* Brief of Appellant at 27-28. Moreover, Terri relies on *Sanderson v. Sanderson*, 1999-CA-00915-COA (Miss. Ct. App. 2000), *affirmed* 824 So. 2d 623 (Miss. 2002), for the proposition that the $6,000.00 per month in periodic alimony is reasonable. Yet, Terri's argument fails to consider one major difference between *Sanderson* and the instant case - Steve's ability to pay alimony depends upon his continued ability to work and maintain the good will of a business.

In *Sanderson*, the Court in considering the large alimony award to Mrs. Sanderson stated: "[c]ertainly, by taking into account Mr. Sanderson's substantial nonmarital estate . . . it would appear that ***Mr. Sanderson enjoys a high level of financial security for the future that does not depend upon his own continued employment.***" *Sanderson*, 1999-CA-00915-COA at ¶22 (emphasis added). However, Steve's income is not based upon stock dividends. To the contrary, Steve's income is based upon a business he worked very hard to build and his ability to continue to work in that business. Given Steve's age of fifty-four, how long must he be expected to work in order to provide alimony payments to Terri? Assuming Steve remains healthy and can continue to work for many years to come, Steve can continue earning a substantial salary through State Termite. But, there is no way the lower court, or Steve himself, can project Steve's ability to continue working for a given period of time. And, unlike Mr. Sanderson, Steve simply does not have the stock portfolio from his business with which to support Terri's elaborate lifestyle.

CONCLUSION

Based upon the Brief of the Appellant as well as the foregoing Reply, Steve requests that this Court enter an order reversing the chancellor's findings with regard to all issues raised herein. Steve further requests that this Court remand this matter to the Chancery Court of Lowndes County, Mississippi for further proceedings consistent with this Court's opinion and order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Undersigned attorneys of record for appellant Billy Stephen McKissack do hereby certify that they have this date mailed, via United States first class mail, postage prepaid, a true and correct copy of the foregoing **Reply Brief of Appellant / Response of Cross-Appellee** to the following:

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SO CERTIFIED, this the 30th day of December, 2009.

KRISTEN WOOD WILLIAMS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BILLY STEPHEN MCKISSACK **APPELLANT**

VERSUS **CAUSE NO. 2009-CA-00259**

TERRI MCKISSACK **APPELLEE**

CERTIFICATE OF MAILING

The undersigned, Michelle Z. Walden, certifies that, pursuant to Rule 25(a) of the MISSISSIPPI RULES OF APPELLATE PROCEDURE, on the 30th day of December, 2009, I mailed by United States first class mail, postage prepaid, the original and three (3) copies of the Reply Brief of Appellant / Response of Cross-Appellee to:

Betty W. Sephton
Mississippi Supreme Court Clerk
Post Office Box 249
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and further certifies that a true and correct copy of the Reply Brief of Appellant / Response of Cross-Appellee was mailed by United States first class mail, postage prepaid, to the following:

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