2009-CA-00259 T

CERTIFICATE OF INTERESTED PERSONS

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

Billy Stephen McKissack	Appellant
Terri McKissack	Appellee
Marc D. Amos	Attorney of Record for Appellant
Kristen Wood Williams	Attorney of Record for Appellant
Jak M. Smith	Attorney of Record for Appellee

Respectfully submitted this the 15th day of July, 2009.

MARC D. AMOS, MSB#[redacted]
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STATEMENT OF THE CASE

A. Introduction and Procedural History

Billy Stephen McKissack ("Steve") and Terri McKissack ("Terri") were married in Hot Springs, Arkansas on January 9, 1982. Record ("R.") 243, Appellant's Record Excerpts ("RES") RES0008.[1] Steve and Terri had three children during the course of their marriage, Lauren, Rebecca and Anna, all of whom are now twenty-one years of age or older. *Id.* The parties were residing in Columbus, Mississippi at the time of their separation on December 8, 2005, and have lived separately since that time in Columbus. *Id.* Subsequent to the separation, Terri filed for divorce, and Steve filed an answer and counterclaim. R. 2-14; R. 16-32.

The parties ultimately withdrew their fault grounds, agreeing to a divorce based upon irreconcilable differences and leaving only property distribution and support issues to be determined by the Court. R. 243, RES008. A trial was held in the matter on April 7, 8, and 9, 2008. R. 1. The chancery court issued an Opinion on September 19, 2008, and entered a Final Judgment of Divorce on November 10, 2008. R. 243-67, 273-76; RES008-32; RES033-36. Following the chancery court's entry of its Final Judgment of Divorce, Steve filed a Motion for a New Trial, or Alternatively, to Amend Judgment and Motion to Stay Execution of Judgment on November 20, 2008. R. 277-82, RES059-64. On January 27, 2009, the chancery court entered an Order Denying Motion to Reconsider and Other Relief. R. 285-91, RES037-43. Steve filed his Notice of Appeal in this Court

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[1] For the Court's convenience, the Appellant's Record Excerpts, provided pursuant to Rule 30 of the Mississippi Rules of Appellate Procedure, are paginated consecutively in the lower right hand corner, and are referred to as RES001, *et seq.*

on February 12, 2009. R. 292-93, RES065-66.

B. Classification and Distribution of Property

During the course of the trial, the lower court heard testimony related to disputes over the classification of various assets and whether such assets should be classified as non-marital or marital property. The two assets involved in this appeal are State Termite stock, and $500,000 in certificates of deposit.

1. State Termite, Inc.

State Termite and Pest Control, Inc. is a Mississippi corporation ("State Termite"). R. 246, RES011. State Termite was started by Steve's father in 1971, and the stock in State Termite was owned entirely by Steve's father until his death. R 246-47, RES011-12. Steve worked in the family business throughout the marriage but had no ownership interest in the business until his father's death. R.247, RES012. Steve's father died in 2001, and, pursuant to his last will and testament, left the stock of the business to his wife, Steve's mother. *Id.* Steve's mother renounced the will in 2001, which resulted in Steve's receiving 10% of the stock. In 2002, Steve's mother gave Steve the remaining 90% of the stock in State Termite as a gift. *Id.* Thus, Steve only acquired ownership interest in State Termite during the last few years of the marriage. R. 248, RES013.

Terri did not work for State Termite during the marriage, never performed any duties related to the business and made no direct contributions to the business, monetary or otherwise. R. 247, RES012. Marital funds or property were not used in the business. *Id.* There was no attempt by either Steve's father or mother, the previous owners of the business, to vest Terri with an ownership interest in State Termite. R. 247-48, RES012-13. Based on the foregoing facts, the trial court determined State Termite to be Steve's separate property and classified the business as non-marital

property. R. 248, RES013.

2. $500,000 in Certificates of Deposit

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 that of the $900,000, $500,000 was invested in certificates of deposit with the Bank of Vernon. Additionally, draw down funds in the range of $20,000 to $40,000 were placed in a Bank of Vernon money market account. Steve's testimony regarding the use of the $500,000 was unequivocal and clear - these funds were never commingled with marital funds or accounts and were always maintained in Steve's separate account:

> Q. Up to this day, from the time that you have pulled or removed those monies out of State Termite, basically $500,000 and somewhere between 20 and $40,000, which is in the Bank of Vernon, has your wife ever had any access or any type of interest in any account where they have been located?
> A. Not any of those monies. . . .

Tr. 450, RES056.

Having testified regarding the $500,000 portion of the draw down which he placed into the Bank of Vernon CD, Steve explained his use of the approximately $350,000 to $400,000 remaining from the draw down:

> 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, RES057-58.[2]

a. Use Of Interest Income Generated By Certificates of Deposit

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[2] The Court will note that of the $350,000 to $400,000 referenced within this testimony, that the trial court determined that the assets purchased by Steve were deemed to be marital property and were split by the trial court. Thus, Terri did receive a substantial award with respect to draw down funds that were arguably used by Steve for family or marital purposes.

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; 048-49. Steve's interest income for 2006 was $37,508.00. Tr. 80, RES046. At the time of the trial, Steve had not submitted a 2007 tax return; and, since interest rates had fallen, Steve anticipated his interest income from 2007 to be less than 2006. Tr. 81, RES047. [3] Steve testified that he used some of the interest proceeds for family purposes, including the payment of his children's college expenses, as well as other familial-related expenses. Tr. 80-81, 90-91; RES046-47; 048-49. However, Steve never accessed or used the principal amounts of the certificates of deposit for any purpose. Instead, those funds remained separate, intact, and completely isolated from any marital property.

3. The Trial Court's Findings Regarding The Certificates Of Deposit

The trial court concluded that the $500,000 in certificates of deposit had been converted to marital property, and then awarded those deposits to Terri. In its analysis related to the $500,000 Bank of Vernon CD, the trial court focused on the source of the funds, as well as how the separate property was used during the marriage. R. 250-51, RES015-16. The trial court specifically found

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[3] Steve's 2006 tax return indicated interest income of $37,508.00, which is approximately $3,125.66 per month. Based on the monthly income earnings as demonstrated by the 2006 tax return and Steve's testimony at trial that his interest income was roughly $3,000 per month, Steve asserts that his interest income for 2007 was no more than $3,125 per month. Thus, for the years of 2006 and 2007, he could have conceivably earned no more than a total of $75,016.00 in interest income from the Bank of Vernon CD. Utilizing the monthly estimate of $3,125, Steve potentially earned $9,376.98 of interest income during the first three months of 2008 prior to the trial at the beginning of April, 2008. For the purposes of this appeal, Steve asserts that, up to the time of trial, he had earned no more than $84,392.98 in interest income from the Bank of Vernon CD.

that the source of the funds put into the Bank of Vernon certificates of deposit was State Termite, and that State Termite was Steve's separate asset. *Id.*

However, the trial court determined that the Bank of Vernon certificates of deposit had been converted from separate to marital property by virtue of the family use doctrine. The court awarded the entire amount of the certificates of deposit - valued at $500,000 - to Terri. R. 251, 260; RES016; 025.[4]

4. Findings Regarding The Marital Estate

Putting aside, for the moment, the issue regarding the trial court's award of the $500,000 in certificates of deposit to Terri, the Court split the marital estate in such a manner that Terri received significant liquid assets to enable her to live in style. The trial court classified the following as marital property and assigned values to each: (1) marital home valued at $223,616.00; (2) lake house valued at $197,283.00;[5] (3) rental homes in Columbus, Mississippi valued at $306,000.00; (4) M&M rental property sold in 2007 valued at $46,151.74; (5) condo in Starkville, Mississippi and commercial office building in Vernon, Alabama valued at $42,000.00; (6) Creekwood Apartments valued at $240,716.00; (7) Certificates of Deposit valued at $175,000.00; (8) American Fund valued at $19,000.00; (9) American IRA valued at $4,000.00; (10) Oppenheimer Fund valued at $19,813.67; (11) Oppenheimer Fund valued at $11,334.95; (12) Oppenheimer Fund valued at $37,491.16; (13)

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4 The court also awarded other certificates of deposit, which it valued at $175,000, to Terri. R. 259-60, RES024-25.

5 The court required Steve to continue making the principal and interest payments for both the marital home, as well as the lake house, until their youngest daughter graduated from college. Thus, Steve made principal and interest payments on *two* homes for an additional nine months, despite the fact that he was not getting the benefit of living in either home.

Well REIT valued at $22,000.00; (14) State Termite 401K valued at $201,209.15; (15) Steve's Regions Bank real estate account valued at $30,000.00; (16) Terri's Bancorp South interior design business account valued at $9,800.00; (17) Terri's Citizen's Bank account valued at $4,000.00; (18) Steve's Bank of Vernon account valued at $40,000.00; (19) Mass Mutual Insurance valued at $38,731.74; (20) Mass Mutual Insurance valued at $42,135.30; (21) Cadillac Convertible valued at $20,680.00; (22) Lincoln LS valued at $6,700.00; (23) Corvette, valued at $27,680.00; (24) 2000 Infiniti 130 valued at $11,305.00; (25) motor home valued at $3,500.00; (26) ski boat valued at $3,000.00; (27) three jet skis valued at $4,000.00, $1,500.00 and $2,500.00 respectively; (28) horse trailer valued at $5,000.00; (29) Horses valued at $4,500.00; and (30) furniture in the marital home and lake house valued at $5,500.00 each. R. 259, RES024.

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 approximately ***$915,000.00 in liquid assets***. R. 261, RES026. The court "split" the assets as follows:

Steve	Terri
Martial Home - $111,808.00	Marital Home - $111,808.00
Bank of Vernon CD - $42,000.00	Lake House - $197,283.00
Rental Houses - $306,000.00	CDs - $175,000.00
M&M Property - $46,151.74	Am. Fund - $19,000.00
Condo and Cml Bldg - $42,000.00	Am. IRA - $4,000.00
Creekwood Apartments - $240,716.00	Oppenheimer - $19,813.67
½ 401(k) - $100,604.57	Oppenheimer - $11,334.95
Real Estate Acct. - $30,000.00	Oppenheimer - $37,491.16
Mass Mutual - $38,731.74	Well REIT - $22,000.00
Mass Mutual - $42,135.00	½ 401(k) - $100,604.57
Corvette - $27,680.00	Cadence Bank - $1,200.00
Cadillac - $20,680.00	BancorpSouth - $9,800.00
Infiniti - $11,305.00	Citizens Bank - $4,000.00
Motorhome - $3,500.00	Lincoln - $6,700.00

Jet Ski - $2,500.00
Horse Trailer - $5,000.00
Horses - $4,500.00
Furniture (marital home) - $5,500.00
Ski Boat - $3,000.00
Jet Ski - $4,000.00
Jet Ski - $1,500.00
Bank of Vernon CD - $500,000.00
Furniture (lake house) - $5,500.00

Id.[6]

5. Award of Permanent Alimony

After awarding Terri $915,000 in liquid assets, as well as a paid-off lake house, a paid-off Lincoln LS, and other assets, the court then considered Terri's request for alimony. Terri testified that she has a college degree in home economics with an emphasis in interior design. Tr. 198, RES051. She is currently working part-time as an interior designer at Bella Interiors. R. 200, RES052. Though Terri started at Bella Interiors making only $800 per month, she is currently making approximately $1,500.00 per month, as she works on commission and has begun building her clientele. *Id.* Terri has continued working only on a part-time basis because that is what she wants to do, yet she has already created a substantial income for a part-time employee. Tr. 200, RES052.[7]

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6 By virtue of the lower court's distribution of property, Terri was left virtually debt free in addition to receiving an enormous amount of liquid assets. Though some of the assets Steve was awarded generate income, the income-generating assets are encumbered with debt for which Steve is responsible. For example, Steve was awarded rental properties with a total equity in the properties of approximately $306,000. R. 261, RES026. The debt on the properties, however, totals approximately $239,000. R. 256-57, RES021-22. Steve also owns a one-third interest in a partnership known as M&M Properties, and one of the holdings of the partnership is an apartment complex know as Creekwood Apartments ("Creekwood"). R. 258, RES023. Though Steve's one-third interest in the equity of Creekwood, as valued by the lower court, is $240,716.00, Creekwood is encumbered with considerable debt in the amount of $1,515,827.00, one third of which is attributable to Steve. *Id.*

7 With the exception of Steve and Terri's youngest child who has now graduated from college, the children are no longer at home. R. 265, RES030. Thus, caring for minor children is not a factor preventing Terri from obtaining full-time employment. *Id.* Terri has *chosen* to limit her work

Despite the large amount of liquid assets awarded to Terri in contrast to those awarded to Steve, and despite Terri's evidenced ability to support herself by working as an interior designer, the trial court still granted Terri's request for alimony, awarding her $6,000.00 per month in *permanent* alimony. R. 267, RES032.[8]

SUMMARY OF THE ARGUMENT

A. The Trial Court Erred By Finding The $500,000 Was Marital Property

The chancellor clearly found State Termite was Steve's separate property and not subject to equitable distribution. However, the court found that the Bank of Vernon certificates of deposit, the source of which was State Termite funds generated during a draw down, to be marital property. The chancellor erroneously relied on the family use doctrine in reaching that decision, citing to cases which have held separate household items, such as china, silver, a piano or antiques were converted to marital property by virtue of "family use" of the items in the marital home. This Court has previously distinguished the concept of the family use of intangibles, such as bank accounts or corporate stock, and family use of tangible personal property, such as furnishings in the marital home. This Court's decisions indicate that Mississippi is moving away from the strict commingling rule, recognized only in a minority of states, to the majority rule which allows for tracing of separate property interests. Based on the evidence in the record, it is clear that the interest income from the

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ethic, and her ability to earn income thereby, as a lifestyle choice.

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The trial court awarded Terri the $500,000 certificates of deposit, which includes (by definition) the interest generated by these deposits. However, in making its alimony award, the trial court specifically referenced Steve's "pre-award" income of $22,000 per month, which included the interest income generated by the $500,000 certificates of deposit. By virtue of the certificates of deposit award to Terri, Steve's income was reduced by approximately $3,000.00 per month, yet the chancellor failed to consider this reduction in income in the alimony award. R.266, RES031.

Bank of Vernon CD, small portions of which were used for family purposes, are easily traceable. Thus, the Bank of Vernon CD was never converted from separate to marital property.

Even if this Court determines that the family use doctrine is applicable to less tangible property such as bank accounts, the record clearly supports a finding that the *principal* of the Bank of Vernon certificates of deposit was never used for family purposes. Instead, only portions of the interest income generated by these certificates were ever used for family expenses. Thus, only the interest income from the Bank of Vernon CD could conceivably have been converted to marital property subject to equitable distribution.

B. The Trial Court Erred In Awarding Permanent Alimony

The lower court erred in awarding Terri permanent, rather than rehabilitative, alimony. The evidence in the record demonstrates that Terri is a college graduate capable of earning more than she earns now in a part-time job. All the children have now moved from the marital home, and she has no responsibilities in the home preventing her from seeking outside employment. She simply chooses not to do so.

C. The Trial Court Erred With Respect To The Amount Of Alimony

Alternatively, the chancellor erred in awarding Terri alimony in the amount of $6,000 per month, which is excessive given the fact that Steve's pre rather than post-distribution income was considered. The lower court's award of the Bank of Vernon CD and other certificates of deposit to Terri resulted in Steve's loss of interest income, which thus reduced his monthly income by approximately $3,000 per month. The alimony award is also excessive based upon the large amount of liquid assets awarded to Terri through equitable distribution and Steve's now having very limited liquid resources.

ARGUMENT

I. 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.

A. Mississippi Family use doctrine and commingling are two distinct concepts.

The trial court clearly determined that Steve's stock in State Termite was his separate property and therefore not subject to equitable distribution. R. 248, RES013. However, the court also found the Bank of Vernon CD, funded by the State Termite draw down, to be marital property. In doing so, the chancellor relied on the family use doctrine, stating the following:

> Mississippi has held that separate property may become marital property under what is known as the family use doctrine. This doctrine was first espoused in the case of *Brame v. Brame*, 796 So. 2d 970 (Miss. 2001). The doctrine was expanded a year later to affirm that family use can convert property from non marital to marital. *Pittman v. Pittman*, 791 So. 2d 857 (Miss. Ct. App. 2001). Both cases stood for the proposition that use of previously separate property by the family such as china, silver, piano and antiques became marital property due to this use.

R. 251, RES016.

"[S]eparate assets may lose their non-marital classification if commingled with marital assets ***or*** if used for familial purposes." *Spahn v. Spahn*, 959 So. 2d 8, 12 (Miss. Ct. App. 2006) (emphasis added) (citing *Johnson v. Johnson*, 650 So. 2d 1281, 1286 (Miss. 1994). As noted by a leading commentator on Mississippi family law, an owning spouse in this state may convert separate property to marital property ***either*** by virtue of commingling the separate and marital assets ***or*** by "extensive family use of the asset. . . ." DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW §6.04 (1st ed. 2007 Supp.) In 1999, the Mississippi Supreme Court did away with the other means recognized in most jurisdictions for conversion, joint titling, holding that the joint title presumption

does not apply in equitable distribution. *Id.* The family use doctrine and commingling are two separate and distinct means by which spouses may convert separate property to marital property. *Id.*

The Supreme Court and Court of Appeals have referenced the specific distinction, to which Professor Bell referred, between the two means of converting separate property to marital; and, in its Opinion, the lower court made reference to that distinction as well: "[*Pittman* and *Brame*,] ***stood for the proposition that use of previously separate property by the family such as china, silver, piano and antiques became marital property due to this use.***" R.251, RES016 (emphasis added). *Compare Pittman*, 791 So. 2d at 866-67 (applying 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) to *A & L, Inc. v. Grantham*, 747 So. 2d 832, 839 (Miss. 1999) and *Dorsey v. Dorsey*, 972 So. 2d 48, 52 (Miss. Ct. App. 2008) (determining whether corporate stock and business-related assets were converted to marital property by virtue of commingling). *Pittman* offers further support for family use and commingling being two separate and distinct concepts. Though the Court applied the *family use* doctrine to determine whether antiques and china were converted to marital property, the Court considered whether the wife's trust was converted to separate property pursuant to a *commingling* analysis. *Pittman* at 867. *See* complete discussion of these cases in subsection B., *infra.*

Thus, Mississippi appellate courts have applied the concept of commingling to determine whether intangible personal property, such as the Bank of Vernon CD, has been converted to marital property, while applying the family use doctrine to determine whether tangible personal property, such as furniture or dishes used in the marital home, has been converted to marital property. However, in this case, the trial court failed to consider that distinction. Instead, the trial court

incorrectly applied the family use doctrine to determine whether Steve converted the Bank of Vernon CD to marital property. The trial court should have used this Court's commingling analysis to determine how to classify these assets. Had the court used this analysis, it would have concluded that the Bank of Vernon certificates of deposit had *not* been commingled, and that they were Steve's separate property. Thus, the trial court's result-oriented analysis was contrary to this Court's prior guidance, and therefore contrary to both the law and the proof.

B. The doctrine of transmutation, transmutation by commingling and tracing separate property.

The distinction between "family use of personal items in the marital home" and "commingling of marital funds" is of great importance in this case because 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. BELL, *supra*, (citing *Brock v. Brock*, 906 So. 2d 879 (Miss. Ct. App. 2005) and *Parker v. Parker*, 929 So. 2d 940 (Miss. Ct. App. 2005). In order to fully understand this shift in Mississippi law, it is important to understand the doctrine of transmutation and the interrelated concepts of transmutation or conversion by commingling and the concept of tracing.

1. Separate Property, Marital Property, and Transmutation

Mississippi law generally realizes the concept of marital property, and makes a distinction between marital property and separate property belonging only to one spouse. The separate property belonging only to one spouse is not subject to division in connection with a divorce. Typically, property received during a marriage through gift or inheritance by one spouse remains separate property. *See Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994); *Ferguson v. Ferguson*, 639 So. 2d

921 (Miss. 1994). Thereafter, if the proceeds from the separate property are used to purchase items, then courts hold that the separate property (*i.e.* funds) have been "mutated" - nevertheless, assuming that the mutation can be traced, that property remains separate property exempt from division. *See* J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L. QUARTERLY 219, 220 (1989). Additionally, courts require that the party opposing the "marital" property designation establish (1) that the property was received pursuant to a gift or through an estate, and (2) that the property still exists at the time of the divorce. *Id.* at 221.

2. Commingling

The issue of commingling comes into play where divorcing parties have taken assets that were initially separate property, and then deposited or otherwise "mutated" that property so that the property's identity is no longer clear. In other words, if the mutated property has lost its separate identity to such a degree that it can no longer be identified, then courts will hold that the separate property has been "transmutated" into marital property. *Id.* at 221-222. It is under this scenario that the issue of "tracing" becomes relevant. To the extent that property can be "traced" to the separate property of a spouse, then that property will *not* be marital property, but will instead maintain its separate identity. *Id.* at 223-24.

In routine cases, spouses deposit separate property funds into a joint marital account, and the question of mutated funds comes into question when determining to whom the funds in the marital account belong. Along the same lines, questions routinely arise as to the ownership of other items of property purchased with funds from the marital account, and if the withdrawal of funds is used for a family purpose, then the withdrawn funds are deemed to be have been transmuted to marital property, as well as the property purchased with the transmuted funds. *Id.* at 224-25.

"Transmutation is often defined as the conversion of separate property into marital property during the marriage by express or implied acts. . . ." Laura W. Morgan & Edward S. Snyder, *When Joint Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. AM. ACAD. MATRIM. LAW 335, 340 (2003). Transmutation may occur in a number of different ways, one being

> when marital property and separate property are mixed together so that it is impossible to discern the marital and separate components, the entire mixture is deemed marital property. This is transmutation by commingling.

Id. at 340.

3. Tracing

Vital to this case is the concept that it is fundamentally impossible for separate property to be transmuted to marital property by virtue of commingling where the separate and marital property can be traced. Tracing has been defined as "the various methods or rules by which the requisite separateness can be proven (traced), and thus by negative implication what evidence will probably not be sufficient, resulting in a finding that the property has been transmuted into divisible property." Joan F. Kessler, Allen R. Koritzinsky & Marta T. Meyers, *Tracing to Avoid Transmutation*, 17 J. AM. ACAD. MATRIM. LAW 371, 371 (2001). As stated by Morgan and Snyder:

> When separate and marital property are mixed to such a degree that the elements cannot be distinguished, *i.e.*, that the separate element cannot be traced, the entire property is considered marital property: the separate property has transmuted by commingling into marital property. . . .***Consequently, the key to determining whether there has been transmutation by commingling is whether the marital and separate interests can be identified, i.e., can be traced.***

Morgan & Snyder, *supra*, at 342 (emphasis added).[9] Professor Bell also referred to this concept:

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[9] There are a variety of evidentiary methods that may be used for tracing, and the methods usually "depend upon the records available to trace old separate assets to current mixed or separate assets." *Id.* at 371.

> ***It is a basic rule of equitable distribution that property retains its character even though it takes another form.*** Most states permit an owner to trace commingled separate funds. If the separate funds can be identified, the asset is classified as mixed, partly marital and partly separate. If tracing is not possible, the marital property presumption applies and the entire asset is classified as marital. ***Conversion is not caused by the act of commingling but by the inability to trace and identify the separate property.***

DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW, §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?* Professor Bell noted the simplicity of tracing so long as separate property is the only property to be considered:

> Tracing is relatively simply when separate property is the only consideration for newly acquired property. The process becomes more difficult when an asset is purchased with both separate and marital funds. If the separate contribution is properly traced, the newly acquired property will be a mixed asset, partly marital and partly separate. For example, if a couple purchased real property for $100,000 with $40,000 of marital funds and $60,000 of the wife's separate inheritance, forty percent of the property would be marital and sixty percent the wife's separate property.

Id.

C. <u>The interest income from the Bank of Vernon CD used for family expenses was never commingled with marital property to the extent that the principal of the CD transmuted into marital property, and the CD was therefore not subject to equitable distribution.</u>

In *Brock*, the wife's father deeded a house to the wife in her name alone and retained a life estate in the property. *Brock* at 880. Husband and wife lived in the house at different times during the course of their marriage. *Id.* The chancellor found the house to be the separate property of the wife. *Id.* at 881. On appeal, the husband argued 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. *Id.* at 888. In making this argument, he relied on *Henderson v. Henderson*, 703 So. 2d 262, 264 (Miss. 1997).

The Court of Appeals disagreed, affirming the chancellor's ruling and reasoning as follows:

> ***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.*** 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 (citations omitted)(emphasis added).

Mississippi has adopted the majority rule allowing assets to be traced to determine whether commingling occurred. In *Dorsey*, 972 So. 2d at 51 (Miss. Ct. App. 2008), the wife argued on appeal that the chancellor erred in classifying husband's business as his separate property. The stock in Engineered Systems, Inc. ("ESI") was transferred to the husband by his father, and the chancellor determined it qualified as an *inter vivos* gift and thus was separate property. *Dorsey* at 52. The wife argued that the ESI stock was transmuted into marital property based on several factors: she worked at ESI, contributing to the business through her clerical and bookkeeping skills; she received no compensation for her work at ESI; and, funds of the couple were used to pay ESI's expenses and debts. *Id.* at 51. The Court held that the ESI stock was separate property and belonged to the husband:

> 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.

Id. (emphasis added).

The focus of both *Brock* and *Dorsey* 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. And, unlike *Pittman* and *Brame*, 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. In *Dorsey*, the Court's focus correctly remained on whether the separate and marital assets could be traced, despite the wife's work at the company.

In this case, several facts stand out. First, the $500,000 in draw down funds were never commingled in any shape, form, or fashion. Instead, those funds remained completely separate. Even if the trial court determined that the funds had been commingled, the proof clearly allowed the court to easily trace these funds and separate them from any marital assets with which they were commingled. The following facts were apparently completely ignored by the trial court in making its decision to deem the $500,000 as a "marital" asset:

- Steve worked at State Termite for many years, and only acquired any ownership during the final years of his marriage to Terri (due to the death of his father and a gift from his mother).

- State Termite is Steve's separate property and is not subject to equitable distribution.

- Following Steve's acquisition of State Termite, his attorney and accountants suggested that he "draw down" some of the cash in the business for tax-related purposes and so as to reduce increased financial exposure in any potential lawsuit against State Termite.

- Steve withdrew approximately $900,000 from State Termite as part of the recommended "draw down."
- Of the $900,000 draw down, Steve placed $500,000 in certificates of deposit in the Bank of Vernon.
- Steve earned approximately $3,000 per month in interest income, a portion of which came from the Bank of Vernon CD.
- Some of the $3,000 per month Steve earned in interest income was used for "family-related" purposes.
- No principal from the Bank of Vernon CD was ever withdrawn and therefore was never used for any "family-related" purpose.
- No portion of the remaining $350,000 to $400,000 was ever placed into the Bank of Vernon CD and was thus never mingled with the CD funds.

These facts are clear and undisputed. Only interest income from the Bank of Vernon CD was ever used for family expenses. Because the interest income is clearly traceable, and the CD principal itself was never commingled with marital property, the Bank of Vernon CD was never converted from Steve's separate property to marital property and should not have been subject to equitable distribution. The trial court erred in finding that the Bank of Vernon CD had been converted to marital property.

A Mississippi Supreme Court case decided prior to Mississippi's shift to tracing indicates that Mississippi has always allowed tracing in the context of a family-owned business. In *Grantham*, 747 So. 2d 832, 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. The husband appealed, and the Mississippi Supreme Court addressed individually each piece of property the husband claimed to be separate. *Grantham*, 747 So. 2d at 838. The evidence demonstrated that, during the course of the marriage, the couple routinely paid personal living expenses out of various

corporate accounts, including alimony payments to the husband's first wife. *Grantham* at 837. Money withdrawn from the corporate accounts for personal use were shown as loans to the stockholders as the wife was actually a shareholder of the company. *Id.*

Affirming the chancellor, the Court reasoned 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***.

Id. at 839 (emphasis added).

Once again, the focus in *Grantham* 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.

1. Application Of Commingling And Tracing Doctrines To This Case

In this case, the chancellor stated that "testimony was elicited on two separate occasions from Husband that this money was used for family and household expenses." R. 251, RES016. While the court correctly noted the existence of the testimony, the court failed to consider several crucial issues. First, the court should have considered the identity of the funds. Were the funds *ever* commingled? If not, then the funds themselves are not subject to equitable distribution.[10] Second,

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10 Assuming that the funds were used for a family purpose, does the use of the non-commingled funds for a family purpose convert the entire corpus of the separate fund into marital property?

if the funds *were* commingled, could the use of these funds be traced sufficiently to identify the mutated property? Under the *Grantham*, *Brock* and *Dorsey* line of cases, this is the correct inquiry.

2. The Undisputed Proof Shows That Steve's Separate Property Could Be Traced

Steve's testimony clearly proved that Steve's separate funds could be traced. First, Steve testified that some of the interest income earned from the Bank of Vernon CD was used for family-related expenses. Tr. 80-81, 90-91; RES046-47, 048-49. Steve later testified on a second occasion that portions of the remaining funds from the draw down, other than those placed in the Bank of Vernon CD, were used for various family expenses, including the college expenses of the McKissack's daughters; expenses related to the family's lake house; and vehicles for the couple's daughters. Tr. 452, RES058. However, the trial court failed to make two important distinctions. First, the interest from the funds was not "commingled" into a joint marital account. Second, the issue of *how* the funds were used are not at issue. Steve did not ask the trial court to give him a greater share of ownership in the lake house, and did not ask that the court award him a greater share of other "family use" property purchased with these separate funds. Finally, in contrast to the husband and wife in *Grantham*, Steve and Terri were not "living out of the business," regularly paying household expenses with corporate funds, resulting in the funds becoming so commingled as to become untraceable. Steve never placed any of the funds from his separate business into a joint checking account. The testimony related to the Bank of Vernon CD was that Steve only used *interest* income from the CD for family-related expenses. Tr. 80-81, 90-91, 450-52; RES046-47,

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Should the Court determine that merely using separate property (funds) to purchase things for family use, or to support the family, then such a rule would *punish* the family member with a separate estate for supporting their family. In other words, such a ruling would discourage the use of separate funds to help the family. Such a result should be rejected out of hand by this Court.

048-49, 056-57. Thus, the $500,000 was *never* commingled with any marital asset.

Based on these undisputed facts, Steve's use of *interest* generated by the Bank of Vernon CD for some family expenses did not rise to the level required to transmute the entire corpus of the cd into marital property. Because Steve maintained draw down money in a separate non-marital account, because Steve only used interest from this account to pay family expenses, and because the interest proceeds were deposited into a separate account prior to paying family expenses, there is a "precise line of demarcation" between non-marital and marital funds in this case that did not exist in *Grantham*. Therefore, the $500,000 principal in the Bank of Vernon CD, the source of which was the draw down from State Termite, never transmuted to marital property.

Based upon the foregoing, the lower court erred in classifying the Bank of Vernon CD as marital property subject to equitable distribution and further erred in granting Terri exclusive use, title and possession of the Bank of Vernon CD.

II. ALTERNATIVELY, THE LOWER COURT ERRED IN DETERMINING THAT THE PRINCIPAL OF THE BANK OF VERNON CERTIFICATES OF DEPOSIT IS MARITAL PROPERTY.

Even if this Court determines that the family use doctrine applies or applies a strict commingling analysis to the instant case, the principal of the Bank of Vernon CD was never used for family purposes, never commingled with marital property and was therefore never converted from separate to marital property. According to the undisputed evidence presented at trial, only interest income from the Bank of Vernon CD was ever used for family purposes. Tr. 91-92, 450-52; RES049-50; 056-58.

In *Pittman*, 791 So. 2d at 867, this Court considered facts analogous to those in the instant case with regard to interest income. In *Pittman*, one of the many issues the Court addressed related

to family use and commingling of funds was whether the use of interest income generated by a spouse's trust fund, but used to pay family expenses, should be classified as marital or non-marital property. The husband, contended that the trial court erred in classifying the wife's trusts, set up by her grandparents, as her separate property. *Id.* At the time of the divorce, the combined value of the trusts was about $366,000.00; and the wife, an income beneficiary of the trust, received income from the trust in the amount of $2,560.00 every three months. *Id.* At trial, evidence was introduced showing that the wife used this periodic income as additional support for the family, and the couple even bought an interest in a vacation home, which they funded through a loan from the trust. *Id.* The *Pittman* Court found no error in the chancellor's classification of the trust as the wife's separate property, stating that "***[t]he actual trust corpus was not commingled with any marital assets.***" *Id.* (emphasis added).

Pittman's discussion of the trust fund is clearly analogous to the issues presented in this case related to the Bank of Vernon CD. Though some interest income was used for family expenses by Steve, such as expenses related to the children's college education, the principal of the Bank of Vernon funds was always kept separate, and was not used for a family purpose or otherwise commingled. Thus, there is no evidentiary basis for the trial court's conclusion that the $500,000.00 principal of the Bank of Vernon CD had been transmuted to marital property. To the contrary, the only portion of the Bank of Vernon CD which could have possibly transmuted into marital property was the interest income – not the principal.[11]

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[11] Steve's tax return indicated that his interest income for 2006 was $37,508.00 or $3,125.66 per month. Tr. 80, RES046. Though Steve had not completed his tax return for 2007 at the time of the trial, he estimated that his interest income was approximately $3,000 per month. Tr. 80-81, RES046-47. Assuming Steve earned approximately the same amount of interest income in 2007 and for the first three months of 2008, the total amount of interest income which Steve could

Based upon the foregoing, the lower court erred in determining that the principal of the Bank of Vernon CD was converted to marital property. Only the interest income of $84,392.98, the maximum Steve had potentially earned at the time of the 2008 trial, is potentially subject to equitable distribution.

III. THE LOWER COURT ERRED IN AWARDING PERMANENT, RATHER THAN REHABILITATIVE, ALIMONY.

The evidence at trial revealed that Terri is a college graduate, capable of supporting herself. The proof showed that Terri earned $1,500 per month, working only part time, and that there are no minor children in the home preventing her from obtaining full-time employment, which would presumably increase her income significantly. Notwithstanding this proof, the Court awarded Terri permanent alimony in the amount of $6,000.00 per month. This award was clearly erroneous and contrary to the proof.

In *Hubbard v. Hubbard*, 656 So. 2d 124, 129-30 (Miss. 1995), the Mississippi Supreme Court recognized rehabilitative alimony as a separate type of alimony. "Rehabilitative alimony is awarded to parties who have put their career on hold while taking care of the marital home. Rehabilitative alimony allows the party to get back into the working world in order to become self-sufficient." *McIntosh v. McIntosh*, 977 So. 2d 1257, 1272 (Miss. Ct. App. 2008) (citing *Lauro v. Lauro*, 847 So. 2d 843, 849 (Miss. 2003)). "[R]ehabilitative periodic alimony [is] synonymous with 'periodic transitional alimony'. . . ." *Goellner v. Goellner*, 2008-CA-00595-COA, ¶41 (Miss. Ct.

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have conceivably earned from the Bank of Vernon CD at the time of the trial in April 2008 was $84,392.98. Therefore, even if this Court determined that the interest income from the Bank of Vernon CD, the origin of which was Steve's separate asset, became so commingled with marital property as to be untraceable, the maximum amount which could have been commingled with marital funds and thus subject to equitable distribution should be the total amount of interest earned from the Bank of Vernon CD at the time of the trial - $84,392.98.

App. 2009) (citing *Hubbard*, 656 So. 2d at 130). Contrary to the goal of periodic alimony, which seeks to lessen a deficit suffered by one spouse after equitable distribution, rehabilitative alimony is designed as a temporary mechanism to provide support for the spouse "with lesser financial ability" to re-enter the workforce after a period of training or job search. *Hubbard*, at 129-30; *Hults v. Hults*, 2007-CA-02186-COA (Miss. Ct. App. 2009). *Cf. Holley v. Holley*, 892 So. 2d 183, 186 (Miss. 2004) (rehabilitative alimony not appropriate where spouse has not put career on hold at any time during marriage).

This Court recently considered whether an award of rehabilitative, rather than periodic, alimony was appropriate. In *Hults*, the wife was awarded approximately fifty percent of the marital assets and was entirely debt free except for a $10,000 credit card bill and a $100 department store account. *Hults* at ¶31. At the time of the trial, the wife was not working but listed monthly disability and unemployment insurance payments of $744 per month. *Id.* Moreover, the facts indicated that she was certainly capable of working, having earned an associate's degree and having prior work experience. *Id.* Based on these facts, the Court affirmed the chancellor's award of $900 per month for five years in the form of rehabilitative alimony. *Id.* at ¶¶33-34. In awarding rehabilitative rather than periodic alimony, the Court was not deterred by the fact that the couple had two children, ages eleven and seventeen at the time of the trial, of whom the wife had primary physical custody. *Id.* at ¶3.

Similar to *Hults*, the evidence in the instant case is that Terri is a college graduate, having a degree in home economics with an emphasis in interior design. Tr. 198, RES051. Unlike the wife in *Hults*, Terri does not have minor children in the home which would present *any* obstacle to obtaining full-time employment. The couple's children are now grown and no longer living at home.

Terri simply chooses to work on a part-time basis Tr. 200, RES052. She is currently working at Bella Interiors, and her income has increased from $800.00 per month when she began working there to about $1,500.00 per month based upon her having begun to develop a client base. *Id.* In addition to her capabilities of earning an income, Terri was amply provided for through equitable distribution, receiving almost one million dollars in liquid assets. Thus, there are no factors preventing Terri from working on a full–time basis; and her own testimony indicates she is attempting to build her client base, from which her income may continue to increase.

This Court's recent decision in *Hults* stands for the proposition that, where a spouse with less financial ability is capable of working and receives ample assets through property distribution, rehabilitative alimony, rather than permanent periodic alimony, is proper. Therefore, Steve should not be punished for Terri's desire to work only on a part-time basis when her education level certainly allows her to seek full-time employment and where there are no longer minor children in the home.

Based upon the foregoing, the lower court erred in awarding Terri permanent rather than rehabilitative alimony.

IV. THE LOWER COURT ERRED IN AWARDING $6,000 PER MONTH IN PERMANENT ALIMONY.

Alternatively, if the Court determines that Terri is entitled to permanent rather than rehabilitative alimony, the $6,000.00 per month award of permanent alimony is excessive for the reasons discussed below.

A. For the purposes of an alimony determination, the Court should have considered Steve's post-distribution income.

Steve's monthly income *post-property distribution* is the appropriate income to be considered

in determining the amount of an alimony award. The steps which a chancellor must follow in applying the *Ferguson* equitable distribution factors are as follows: (1) classify the property as separate or marital; (2) value the property; (3) equitably divide the property; and (4) determine whether alimony is necessary and appropriate. *Goodson v. Goodson*, 816 So. 2d 420, 424 (Miss. Ct. App. 2002) (citing *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994) and *Hemsley*, 639 So. 2d at 914). Alimony is only to be considered after equitable distribution and only if such distribution results in a deficit for one party. *Goodson*, 816 So. 2d at 424 (citations omitted); *see also Kilpatrick v. Kilpatrick*, 732 So. 2d 876, 880 (Miss. 1999) (permanent alimony need not be considered unless "one spouse is left with a deficit after the division of marital assets").

Based on the steps to be followed by a chancellor in equitable distribution and the fact that alimony is only to be considered after equitable distribution, the lower court should have considered Steve's post-property division income *as reduced by the interest income the court ruled he would no longer receive.* By virtue of the Court's awarding Terri the Bank of Vernon CD, as well as the other certificates of deposit, Steve's income has been reduced by at least $3,000.00 per month as he no longer receives the interest income from the CD's. Tr. 80-81, RES046-47. Therefore, the Court erroneously based its alimony award on Steve's prior income of $22,000.00, which included the interest income.

B. The alimony award is excessive in light of the amount of liquid assets awarded to Terri.

In addition to the fact that the Court erroneously considered Steve's pre-equitable division income of $22,000.00, the $6,000.00 per month of alimony awarded to Terri is excessive in light of the assets which Terri received through property division. In a recent case, this Court discussed the

purpose of periodic permanent alimony and its relationship to equitable distribution:

> ***One of the goals of equitable distribution is to alleviate the need for alimony.*** *Ferguson*, 639 So. 2d at 929. ***Accordingly, alimony should be considered only after the equitable division of marital property.*** *See Marsh v. Marsh*, 868 So. 2d 394, 398 (¶16) (Miss. Ct. App. 2004). ***"[T]he purpose of alimony is not punitive, but instead is designed to assit the spouse in meeting his or her reasonable needs while transitioning into a new life."*** *Holley v. Holley*, 892 So. 2d 183, 185 (¶ 7) (Miss. 2004) (citations omitted). ***Generally, permanent alimony should be considered if one spouse is left with a deficit after the division of marital assets.*** *See Kilpatrick v. Kilpatrick*, 732 So. 2d 876, 880 (¶16) (Miss. 1999) (citing *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994)).

Elliott v. Elliott, 2008-CA-00575-COA (Miss. Ct. App. 2009) (emphasis added).

Two recent cases decided by this Court consider the lower court's award of alimony in light of assets awarded during equitable distribution and the "deficit" to the spouse seeking alimony. In *Sellers v. Sellers*, 2007-CA-01459-COA, ¶ 1 (Miss. Ct. App. 2009), the husband appealed, asserting various issues including whether the chancellor erred in ordering him to pay periodic alimony. In *Sellers*, the chancellor valued the marital estate at $304,230, awarded $142,990 of the marital estate to the wife and the remaining $161,240 to the husband. *Sellers* at ¶8. The marital estate included $100,000 worth of equity in the marital home, which the chancellor awarded equally to husband and wife and which accounted for $50,000 of each spouse's property award. *Id.* The lower court then considered alimony, conducting an *Armstrong* analysis, and awarded $62,600.00 in lump-sum alimony. *Id.* The chancellor ordered the husband to pay $50,000 of the alimony out of his portion of the equity in the marital home and ordered that he pay the remaining $12,600 in monthly installments of $700. *Id.*

This Court affirmed the chancellor's award of $50,000 lump sum alimony to the wife, but it determined that amounted to distribution of property in the marital estate to the wife. *Id.* at ¶33.

The result was that the husband received $111,240 of the marital estate while the wife received $192,990 of the marital estate. *Id.* Thus, the Court addressed whether the chancellor erred in awarding the wife $12,600 of periodic alimony. The Court held that the chancellor erred in his award of $12,600 of alimony to the wife, and stated the following in reaching its decision:

> ***. . . Nancy's share of the marital estate exceeded Eddie's by $81,750. On these facts, we are unable to discern a deficit that was suffered by Nancy after the equitable division of the marital estate. Therefore, we find that the chancellor manifestly erred in ordering Eddie to pay Nancy $12,600 in periodic alimony, even though he had determined that Nancy's separate estate is considerably less than Eddie's. The chancellor was not charged with equitably dividing the parties' separate estate.***

Id. (emphasis added).

In another case decided within the last month by this Court, the wife argued that the chancellor erred in failing to award her alimony. *Kay v. Kay*, 2007-CA-02258-COA, ¶23 (Miss. Ct. App. 2009). The Court referred to the chancellor's findings related to the wife's request for alimony:

> With Greg's support obligation deducted from his net income, he will have about $2,500.00 monthly to live on, plus the bulk of the marital debt to pay as set forth herein. Plaintiff shows a net monthly income of $1,975.00, which with the addition of support due from Greg, gives her $2,625.00 each month to live on, giving the Court pause to deny requests for alimony based on the criteria for awarding alimony.

Kay at ¶23. Because the wife suffered no deficit following equitable distribution, this Court upheld the chancellor's denial of alimony "based on his assessment of her post-divorce monthly income." *Id.*

A case decided by the Supreme Court also addressed the issue of whether alimony was appropriate in light of assets awarded in equitable distribution. In *Gambrel v. Gambrel*, 650 So. 2d 517, 519 (Miss. 1995), the parties stipulated to a division of property, with the wife receiving assets through property division including the marital home; a rental property with an income of $210.00

per month after payment of the mortgage; one-half interest in a family business;[12] her checking account containing $400.00; an IRA with an approximate balance of $6,500.00; and approximately $3,5000 in cash proceeds from a CD the wife cashed at the time of the parties' separation.

The husband received comparable assets through property division and also retained $5,957.75 in a Southwest Airlines profit sharing account; a savings account of $2,668.00; a $20,000.00 401k plan; a $12,000.00 IRA; and control over $5,756.00 deposited with the Keesler Federal Credit Union which he indicated was for the children's college expenses. *Gambrel*, 650 So. 2d at 519. The chancellor awarded the wife permanent alimony in the amount of $1,750.00 per month to increase by $100.00 after one year when she was no longer eligible as a dependent under husband's insurance plan. *Gambrel* at 521.

The Court reversed the chancellor's award of alimony in the amount of $1750.00 per month, stating "***[i]t appears from these figures that the chancellor did not take into consideration the extent of the assets awarded to [the wife] and income therefrom when determining [the husband's] supplemental responsibilities***." *Gambrel*, 650 So. 2d at 521 (emphasis added). The Court remanded to the trial court for "reconsideration of the alimony award ***in light of the division of assets between the parties***." *Gambrel* at 521 (emphasis added).

This case is analogous to *Sellers* and *Kay* in that Terri suffered no deficit following equitable distribution. To the contrary, Terri received a total of $1,234,035.35 of marital assets as compared to Steve's $1,080,812.05. R. 261, RES026. Thus, Terri actually received $153,223.30 more in marital assets than Steve. Further, Steve only received $152,000.00 in liquid assets while Terri

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Though there is no specific mention of the value of the family business, the chancellor gave both husband and wife the opportunity to buy the other party's half interest for $3,000.00.

received close to one million dollars worth of liquid assets. Though Steve was awarded rental properties which generate some income, those properties are encumbered by debt, leaving little if any cash flow from those assets. Terri, on the other hand, is living virtually debt-free, having a house and car free of debt and no other major debt.

Gambrel, Sanders and *Kay* stand for the same proposition: an alimony award should be considered *in light of the payee spouse's assets awarded through equitable distribution.* However, the lower court clearly failed to consider the amount of assets awarded to Terri and her lack of debt following equitable distribution versus Steve's limited liquid assets and lack of cash flow. Therefore, the lower court erred in awarding $6,000.00 of permanent alimony to Terri.

CONCLUSION

The chancellor clearly found State Termite was Steve's separate property and not subject to equitable distribution. However, the court found that the Bank of Vernon certificates of deposit, the source of which was State Termite funds generated during a draw down, to be marital property. The chancellor erroneously relied on the family use doctrine in reaching that decision. This Court has previously distinguished the concept of the family use of intangibles, such as bank accounts or corporate stock, and family use of tangible personal property, such as furnishings in the marital home. Based on the evidence in the record, it is clear that the interest income from the Bank of Vernon CD, small portions of which were used for family purposes, are easily traceable. Thus, the Bank of Vernon CD was never converted from separate to marital property.

Even if this Court determines that the family use doctrine is applicable to less tangible property such as bank accounts, the record clearly supports a finding that the *principal* of the Bank of Vernon certificates of deposit was never used for family purposes. Instead, only portions of the

interest income generated by these certificates were ever used for family expenses. Thus, only the interest income from the Bank of Vernon CD could conceivably have been converted to marital property subject to equitable distribution.

The lower court erred in awarding Terri permanent, rather than rehabilitative, alimony. The evidence in the record demonstrates that Terri is a college graduate capable of earning more than she earns now in a part-time job. All the children have now moved from the marital home, and she has no responsibilities in the home preventing her from seeking outside employment. She simply chooses not to do so. Alternatively, the chancellor erred in awarding Terri alimony in the amount of $6,000 per month, which is excessive given the fact that Steve's pre rather than post-distribution income was considered. The lower court's award of the Bank of Vernon CD and other certificates of deposit to Terri resulted in Steve's loss of interest income, which thus reduced his monthly income by approximately $3,000 per month. The alimony award is also excessive based upon the large amount of liquid assets awarded to Terri through equitable distribution and Steve's now having very limited liquid resources.

Based upon the foregoing, 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 **Brief of Appellant** to the following:

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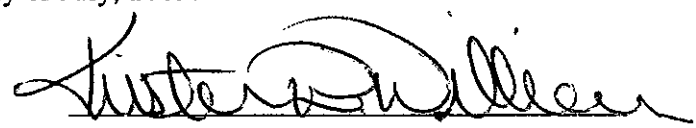
Trial Court Judge

SO CERTIFIED, this the 15th day of July, 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, Vicki Ray, Legal Assistant for Marc D. Amos, certifies that, pursuant to Rule 25(a) of the MISSISSIPPI RULES OF APPELLATE PROCEDURE, on the 15th day of July, 2009, I mailed by United States first class mail, postage prepaid, the original and four (4) copies of the Brief of Appellant to:

Betty W. Sephton
Mississippi Supreme Court Clerk
Post Office Box 249
Jackson, MS 39205-0249

and further certifies that a true and correct copy of the Brief of Appellant was mailed by United States first class mail, postage prepaid, to the following:

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The Honorable H.J. Davidson, Jr.
Chancellor, District Fourteen
Post Office Box 684
Columbus, MS 39703
Trial Court Judge

SO CERTIFIED, this the 15th day of July, 2009.

Vicki Ray
VICKI RAY