

IN THE SUPREME COURT OF MISSISSIPPI  
CASE NO. 2009-TS-00555

STACEY ANNE RHODES

APPELLANT

V.

GEORGE WILLIAM RHODES, JR.

APPELLEE

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BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case:

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Respectfully submitted,



CLIFFORD C. WHITNEY III

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## STATEMENT OF ISSUES

1. Whether the trial court erred in denying Stacey Rhodes any share of her husband, Rocky's wholly-owned businesses or the appreciation in value of those businesses.
2. Whether the trial court erred in failing to apply the family use doctrine to rule that the Florida vacation home was a marital asset, or at least that the appreciation in value was a marital asset.
3. Whether the chancellor erred in determining the Ocean Club Condominium to be a corporate asset of RCD and not the individual property of Rocky subject to equitable distribution.
4. Whether the chancellor incorrectly analyzed and applied key *Ferguson* factors in determining equitable distribution.
5. Whether the trial court erred in failing to grant Stacey possession of the marital residence, which was Stacey's family home.
6. Whether Stacey was entitled to a greater award of rehabilitative alimony.
7. Whether the trial court should have awarded Stacey her attorney's fees.
8. Whether the trial court erred in excluding Stacey's property valuation expert.
9. Whether the trial court erred in denying Stacey's motion for new trial.

## STATEMENT OF THE CASE

### A. Nature of Case, Course of Proceedings and Disposition Below.

This appeal concerns the denial of any rights to a housewife, Stacey Anne Rhodes ("Stacey"), to the millions of dollars in assets (including over \$3,000,000 in 2006 alone!) amassed during the marriage by her husband, George William Rhodes, Jr. ("Rocky"). The trial court instead determined that all of Rocky's businesses and business earnings were non-marital or that the businesses did not appreciate in value despite massive earnings during the time period. Chancellor Jim Persons only allowed Stacey - who at most

earned \$17,500 per year during the marriage and was a homemaker for the last two years - a cash payment of \$17,000 for her share of the marital assets, rehabilitative alimony of a mere \$2,000 per month for six months, an automobile, and a few of the possessions that she had when she entered the marriage.

On May 23, 2007, Rocky filed a Complaint for Divorce (Record Excerpts ("E.")E8) in the Chancery Court of Harrison County alleging habitual cruel and inhuman treatment or, in the alternative, irreconcilable differences. In July 2007, Stacey filed her Answer and Counterclaim for Divorce and Other Relief (E.13) alleging habitual cruel and inhuman treatment, adultery, or, in the alternative, irreconcilable differences.

Chancellor Persons entered a Temporary Order (E. 39) on August 17, 2007, granting Stacey \$2,000 per month in alimony and the right to live in the Florida vacation home. By an agreed order dated August 2007 (E.38), the parties consented to a divorce on grounds of irreconcilable differences. A trial was held regarding property settlement on May 7- 8 and 12, and June 13 and 17, 2008. Chancellor Persons subsequently entered an Amended Final Judgment of Divorce on January 26, 2009 (hereinafter the "Judgment") (E. 42).<sup>1</sup> By an Order entered March 5, 2009 (E.92), the trial court denied Stacey's January 29, 2009, Motion for New Trial and for Relief from Judgment (E. 87), and Stacey filed a timely Notice of Appeal (E. 93) on April 2, 2009.

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<sup>1</sup> The Amended Final Judgment of Divorce corrected a "scrivener's error" in the original Final Judgment of Divorce. Trial Court's Order of January 26, 2009 (Record at 492). All references in the remainder of this Brief to "Judgment" shall be to the Amended Final Judgment found at pages 42- 86 of the Record Excerpts.



**B. Statement of Facts.**

**1. Overview.**

After dating for 7 ½ years, Rocky and Stacey were married October 18, 2003, in Santa Rosa Beach, Florida. There were no children of the marriage. Rocky is 60 years old and owns multiple businesses and properties in the Biloxi area. Rocky earns \$580,000 per year average, and had an income in 2006 of over \$3,000,000. Stacey is a 47 years old and quit her \$17,500 per year job during the marriage to become a full time housewife. The first years of the marriage were good, according to the testimony of Jami Johnson (Stacey's daughter) and Floyd and Opel Girourd (Stacey's parents), and the parties enjoyed a good relationship which they shared with family and friends. Only toward the end were the parties observed arguing. Trial Transcript at 195-196, 409-410, 423-424 ("T.R.").

**2. Employment and Earnings**

**a. Rocky**

Rocky is a multi-millionaire. One of his major assets, at the time of the marriage, was a 24% interest in a flooring business called Rhodes Carpet and Draperies, Inc. ("RCD"), a company founded and controlled by his parents. His parents left the business in 1992, and Rocky and his brother managed the operation. Soon after the marriage, Rocky acquired the remaining 76% of RCD, so that, by November 2003, he owned 100% of the company. Tr. 109-118. In 2006 alone, due to business spawned by Hurricane

Katrina, Rocky realized income of \$3,043,567 from RCD. Tr. 77; Rocky's 2006 Federal Income Tax Return (Trial Exhibit 3H, E. 516).

Rocky listed a gross monthly income on his UCCR 8.05 financial statement (Trial Exhibit 1, E. 95) of \$48,149, which amounts to \$578,000 per year. Rocky's taxable income for 2003-2006, as shown on his IRS Form 1040s (Trial Exhibit 3H, E.516), totaled \$3,670,380, for an average annual income during the term of the marriage of \$1,835,190. Trial Exhibits 3A-H (E.244).

Rocky received a gross "salary" from RCD of \$10,000 per month, which was paid weekly. Rocky deposited two or occasionally three of his weekly paychecks from RCD each month into the couple's joint account for use for family expenses. In other words, he contributed one-seventh or less of his regular salary each month to support the family, together with other random deposits. The remaining \$30-35,000+ of his monthly income Rocky kept for himself. Tr. 657.

**b. Stacey**

Stacey has a high school education with two years of college course work. She was employed as a homemaker during the last two years of the marriage. Stacey worked in sales for the Rhodes' carpet business for three years in the early 1990's. Otherwise, Stacey worked in clerical and secretarial positions until June 2005. In sharp contrast to Rocky, Stacey at most made an annual salary of approximately \$17,500 during the period from 2003-2005. She earned no salary from mid-2005 to August 2007. Tr. 740-741; Trial Exhibit 11, Stacey's Work History (E. 1266).

In June 2005, Stacey ceased working outside of the home to focus on her family and health. The uncontroverted testimony was that Stacey suffers from Epstein-Barr, chronic fatigue and fibromyalgia. These conditions involve extreme fatigue and impair Stacey's ability to work on a regular basis. There are simply days where she must stay in bed and cannot perform on the job. Rocky was aware of Stacey's condition when the marriage began. Stacey quit her job without any objection by Rocky. Tr., 735-738, 741.

Stacey was a homemaker from June 2005 to the time of the divorce, and she performed household chores, managed the family finances, assisted in the clean up after Katrina. Admittedly, Hurricane Katrina altered the way in which she was able to serve as a homemaker, as it did with tens of thousands of other women. When Katrina struck in August 2005, Stacey's daughter's school in Biloxi was destroyed. The family home survived the hurricane, but experienced some damage. Stacey was forced to take her daughter, Jami, to Florida to live in the family's Florida vacation home, so Jami could enter school in that state, where the schools were undamaged and open. Rocky refused to leave Biloxi to go with them. While in Florida, Stacey was responsible for the maintaining of the home there. Tr. 612-617, 721-725, 741.

While living in Florida, Stacey cleaned and maintained the Florida home and returned frequently to Biloxi to bring supplies and to help with the work needed on the marital residence as a result of the storm. Stacey split her time living in the marital home in Biloxi and in the Florida residence, until the Temporary Order required her to move to the Florida house full time. Tr. 721-725.

Testimony at trial revealed that the parties maintained separate checking accounts for approximately the first year of marriage. Both parties, including Stacey, used their separate accounts for family expenses. When the parties bought Stacey's parents' home for their residence, all of Stacey's income was placed in joint accounts with Rocky. As of the date of trial, Stacey's only income, other than temporary alimony, was the \$350 in child support.<sup>2</sup> In contrast, Rocky put at the most two of his weekly paychecks from RCD into the joint account. The remainder of his nearly \$50,000/month income went into separate accounts or was left in RCD as retained earnings. Tr. 308, 311-312, 626-629, 637-640, 643-649.

In January 2006, Rocky got mad at Stacey over sex and announced that he was no longer going to support her. He said words to the effect of "I hope there's enough money in the joint account, because that that's all the money you'll ever get from me." Tr. 661-662. Rocky did not deny saying this. At that point, Stacey had no choice but to use the funds in the joint account and a home equity line of credit to pay her bills (including marital bills), living expenses and eventually her attorney's fees in the divorce filed by Rocky. Tr. 665-687.

### **3. Business Assets**

#### **a. Rhodes Carpet and Draperies, Inc.**

##### **i. Rocky's Active Ownership of RCD**

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<sup>2</sup> Stacey's lease payments on her pre-marital property on Dacey Street had ceased by the time of trial. Tr. 748.

Rocky's most significant asset is his flooring business, RCD, which is a Subchapter S corporation wholly-owned by Rocky. This business was started by Rocky's father, G. W. Rhodes, Sr. Rocky and his brother, Keith Rhodes, grew up working in the business. Their parents retired in 1992, and Rocky and Keith managed the operation. Their parents promised them that their efforts would bring them ownership of the business in the future. Rocky also has a sister, Christine Rhodes Slay, who did not work in the business. Tr. 20-24, 109-112, 114-118, 227-230, 281, 324-325.

Rocky and Keith received interests in the company from their parents, such that, by 2003, each brother owned 24%. It is notable that the sister who did not work in the business was not "gifted" any portion of RCD. On October 30, 2003 - following Rocky's marriage to Stacey - Rocky's parents "gifted" their remaining interests in the business to Rocky and Keith, so that Rocky and Keith each held 50% of the stock. *Id.*

The Rhodes family accountant testified that no IRS "Gift Tax Return" was filed or even prepared with regard to Rocky's acquisition of any of the ownership interests. The time within which to file a gift tax return, even an extended return, has long since passed. Tr. 288.

Next, Rocky and Keith set about to separate their business interests, and, on November 7, 2003, Rocky bought Keith's 50% interest in RCD for \$658,000, through a corporate stock redemption. See Stock Redemption Agreement, Trial Exhibit 7 (E. 787). Keith testified that this transaction was in fact a buyout of his interests by Rocky and not a "gift". Tr. 229-230. Rocky is now the 100% owner of RCD and actively operates and

manages the business. Rocky is involved in all phases of RCD's business activities.  
Tr.305.

**ii. Value of RCD**

A 2004 Statement of Financial Condition , prepared by Rocky's CPA firm, Piltz, Williams, LaRosa and Company, listed the present "assets of George W., Jr. & Stacey Rhodes, at estimated current values and the liabilities at estimated current amounts." This Statement listed Rocky's 100% interest in RCD as \$655,000, with no applicable liability.

Chancellor Persons found that the value of the business at the beginning of the marriage was \$1,636,519.50, by extrapolating from the 2002 Valuation Report (Trial Exhibit 7B, E. 952) used to value Keith's 50% interest for the 2003 sale to Rocky. The trial court used the date of the August 17, 2007 Temporary Order as the date for determining the ending value of RCD for purposes of determining any appreciation during the marriage. The trial court held that RCD did not appreciate in value during the four years of the marriage and was still worth only \$1,636,519.50 in August 2007. Judgment at 15, ¶ 39.

Yet, the RCD Financial Statements from Rocky's accountant that were put in evidence at trial (Trial Ex. 38, E. 1761) paint an entirely different picture regarding the value of RCD. First, we will look at the asset-liability picture for each year during the marriage, which is shown by Rocky's accountant in the Financial Statements as

shareholder's equity, i.e., the value of the assets of the company minus its liabilities equals stockholder's equity. The net worth of RCD for broken down by year is as follows:

6/30/2004	\$828,928
6/30/2005	\$903,929
12/31/2005	\$1,073,918 <sup>3</sup>
12/31/2006	\$3,507,410
8/31/2007	\$3,164,492

According to Rocky's own accountant, the book value of RCD increased nearly fourfold from the beginning of the marriage until the end. Even using Judge Persons' figure of \$1,636,519.50 as the beginning value of the company, the value of RCD almost doubled from October 2003 to August 2007 (an increase of \$1,527,972.80).

Moreover, the April 2007 Balance Sheet and Trial Balance (part of Trial Ex. 38) show that RCD made a \$1,002,913 dividend distribution to Rocky during that month, thus depleting the value of the business by \$1 million immediately prior to Rocky's filing for divorce in May 2007. If this \$1 million is added back into the Balance Sheet, the business was worth \$4,164,492 at the end of the marriage, reflecting an appreciation in value of \$3,335,564 over what was shown in the June 30, 2004 Financial Statement. The figures produced by Rocky's own accountant totally preclude any finding that the business's value was stagnant and did not increase over the course of the marriage.

### **iii. Chancellor's Decision about RCD.**

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<sup>3</sup> The company converted to a Subchapter S corporation in 2005 and changed from a June-June fiscal year to a calendar fiscal year. Tr. 284.

At trial, the chancellor refused to accept Stacey's business valuation expert - James Angle, a CPA and a certified business valuator - or to consider his expert opinions regarding the value of RCD. Rocky did not present any expert testimony regarding value. Despite the above-described evidence, the court found that RCD was non-marital property of Rocky obtained solely by gift or "passive activity." Judgment at 13, ¶ 33. The chancellor expressly disregarded the millions of dollars in profits earned by RCD in 2005 and 2006 in the wake of Hurricane Katrina and which remained as an asset of the company in the form of retained earnings. Instead, the trial court held that "unusual income should not be considered in valuing a business, since it is not indicative of the business's historical or prospective earnings." *Id.* at 15, ¶ 39. The trial court went on to rule that RCD did not appreciate in value during the marriage and held that Stacey was not entitled to any part of the business. *Id.*

**b. Rhodes Capital, LLC.**

Rhodes Capital, LLC is an entity formed in 2006, during the marriage, by Rocky as a spin off of RCD. RCD sold its office property in Biloxi to Hancock Bank for \$1,850,000, and acquired property in the Woolmarket area near Ocean Springs to build new offices for RCD. The Woolmarket property, having a value of \$1,303,817, was placed in Rhodes Capital as part of an IRC 1031 like-kind exchange. Tr. 78-79, 273, 474. Trial Exhibit 38, 2006 Financial Statement, Note K (E. 1769).

The valuable Woolmarket property and its holding company, Rhodes Capital, were acquired by Rocky during the marriage, but the transactions was "off the books" at the



time of trial. The asset was not included in the value of RCD. No tax returns or financials had been prepared for Rhodes Capital, because it was deemed by Rocky's accountant to be a "disregarded entity" by the IRS. This was because the asset was being held by an IRC 1031 "qualified intermediary", pending the completion of construction. *Id.* The chancellor failed entirely to address this valuable asset in his Judgment.

**c. Rhodes Rentals of Ocean Springs, Inc.**

Rhodes Rentals of Ocean Springs, Inc. is closely related to RCD. The company is owned entirely by Rocky and was established on February 18, 2004 (during the marriage). RCD leases its Ocean Springs store location and equipment from Rhodes Rentals. Rocky actively manages the business and its business property. Tr. 47. The chancellor held that Rental had a value of \$319,946 and was a non-marital asset of Rocky's, in which Stacey had no rights. Judgment at 17, ¶¶ 42, 43.

**d. Other Rhodes Entities**

Rocky owns interests in several Rhodes family entities, including Rhodes Family, LLC (formed by Rocky and his siblings during the marriage to hold real estate inherited by them prior to the marriage); Rhodes Marine Flooring (formed and managed by Rocky during the marriage but which has only nominal value); and R&K Properties (real estate partnership between Rocky and Keith established prior to the marriage in 1994). The chancellor valued Rocky's interest in Rhodes Family, LLC at \$17,601 and in R&K at

\$347,076 and held that these were his separate, non-marital assets. Judgment at 16, 18, ¶¶ 41, 45.

#### **4. Real Estate**

##### **a. Marital Home - 4033 Brandon James Drive, Biloxi, MS**

The marital home, located at 4033 Brandon James Drive, Biloxi, was purchased by the parties in May of 2004 from Stacey's parents, Floyd and Opal Girouard. The Girouards built this home and moved into it in 1991, and this was the Girouard family home until the sale to Stacey and Rocky. Testimony of Floyd Girouard, Tr. 411-413.

Testimony at trial revealed Stacey's strong sentimental and emotional connection with this home. The home was originally her family's home. It was built by her parents and used for family gatherings and holidays by Stacey and her daughter for many years prior to the marriage with Rocky. Testimony also revealed special considerations made by the Girouards to Stacey and Rocky, so they could purchase this home and keep it in the family. The Girouards allowed Rocky additional time to secure financing before receiving payment for the home. Tr. 411-413, 608-609

Stacey's domestic efforts in the Biloxi home were considerable. She cleaned floors, vacuumed, washed windows, dusted, did the laundry, ironed, made the beds, grocery shopped and cooked. This home was also remodeled, with Stacey controlling and making the major decisions concerning the remodel. Tr. 413, 417, 425-427, 611-612.

Chancellor Persons found that the Brandon James house and furnishings were marital property, but he awarded Rocky ownership and possession of Stacey's family

home. Judgment at 35, ¶ 98. The court valued the personalty at \$16,000 and awarded Stacey one-half of this amount. The court also ordered that the equity in the house of be divided. *Id.* at 42, ¶ 119(8).

However, the chancellor debited Stacey's share of the assets by the entire amount of an outstanding \$60,000 home equity loan on the marital home. *Id.* at 42-43, ¶ 119(8). Stacey was forced to use the funds to employ her attorney, after Rocky cut her off from all funds from him and then laid down an ultimatum for Stacey to provide a divorce settlement proposal on the same day. Tr. 684-685.

**b. Florida Home - 119 Buddy Street, Santa Rosa Beach, Florida**

The Florida home, located at 119 Buddy Street, Santa Rosa Beach, Florida, was purchased by Rocky in December of 2000. The parties, although not married at the time of purchase, Stacey helped find the house, and she and Rocky began using this home as a vacation home in the Summer of 2001, and continuing thereafter throughout the marriage. Stacey lived in this home exclusively after the Temporary Order in this matter and also split her time living in the Florida house and the Biloxi residence from August 2005 through August 2007. Stacey and Rocky used this home frequently throughout their marriage. They were married on the beach in front of this home. The parties both testified that they frequently stayed in the Florida home, and Stacey's family used the Florida home. The parties used the home on holidays, including Easters, Thanksgivings, Christmas, birthdays and as a getaway. Tr. 327-329, 719-728.

Stacey made considerable efforts and contributions to the Florida home. Stacey designed, picked out and arranged the majority of the furnishings and decor of this home. Stacey helped in the maintenance and upkeep of this home by cleaning, cooking, vacuuming, mopping, doing dishes, laundry and the like. Stacey and her family performed maintenance on the home, including lawn maintenance and general repair. *Id.*

The equity in the home at the time of the divorce amounted to \$304,874. The trial court held that the Florida home was the non-marital property of Rocky and declined to allow Stacey any share of the equity in the home, let alone possession of the property. Judgment at 11, ¶¶ 28, 29.

**c. Dacey Street Property - S&J, LLC**

Stacey purchased her grandmother's home located at 448 Dacey Street in Biloxi in 2002, prior to the marriage of the parties. The parties lived in this home temporarily at the beginning of the marriage, until they purchased the marital home on Brandon James. The Dacey Street property was gutted by Hurricane Katrina which resulted in the house being donated to an organization that rebuilds salvageable homes for low income families. Stacey retained the underlying real property. Tr. 694-700.

Stacey continues to hold the Dacey Street property through an LLC formed by her known as S&J, LLC. This entity has a lease agreement with the Bayview Development Group, and the property is the potential site of a casino. The testimony at trial from John Ed Ainsworth, manager of the Bayview Development, revealed that, although the

parties to the lease are hopeful the lease's purchase option will come to fruition, it is not guaranteed. In fact, Bayview Development is in default in making lease payments, and the future income potential and value of this entity is speculative at best. Tr. 366-367, 728-729, 748.

The chancellor held that Dacey Street/S&J is the separate property of Stacey. However, the chancellor's rulings about the value of the asset were inconsistent and depended on the context. On the one hand, the court found that the value of the LLC through which Stacey owns the property to be worth \$295. The court held that the buy-out option price in the lease of the property of \$1.5 million "is not representative of the fair market value." Judgment at 5, ¶ 14. On the other hand, when comparing the assets of the parties for purposes of determining alimony, the court credited Stacey with \$1,500,000 as her separate asset, thus giving her an inflated asset value to compare with Rocky's. *Id.* at 32-33, ¶ 85. The chancellor's latter finding ignored Stacey's and Mr. Ainsworth's testimony that it was highly questionable whether Stacey will ever realize the proceeds of the casino deal. Without the casino lease, all Stacey has is a small residential lot with no house on it. Tr. 699, 748.

**d. Ocean Club Condominium**

During the marriage, Rocky purchased a one-third interest in the Ocean Club Condominium (1/3 interest), which is valued at \$160,072. August 2007 Balance Sheet, Trial Exhibit 38 (E. 1761). Despite the fact that this property interest was acquired during marriage through the active work of Rocky and was titled in his name, the

chancellor deemed the asset to be non-marital property of RCD, and Stacey received no interest in or compensation for this property. Judgment at 19, ¶ 48. Although the asset is shown on RCD's books, it was never put in the corporation's name, and Rocky's 8.01 Financial Statement lists a \$500 personal monthly expense for "Ocean Club Condo." Trial Exhibit 1 (E. 95).

## **5. Joint Accounts**

The parties established a joint checking account as the marital joint account at Southtrust/Wachovia Bank in 2005 with \$45,000 in funds deposited by Rocky. The account was managed by Stacey and used for household expenses and the remodeling project at the marital home on Brandon James Drive. Stacey was never extravagant with the money or use it for excessive personal spending. Tr. 656-657.

Stacey testified that she deposited her paychecks into the account while working, as well as her child support payments. In contrast, Rocky deposited two or occasionally three of his paychecks into the account. Rocky deposited or invested the remainder of his \$50,000 per month of income elsewhere. Tr. 308, 626-628, 643, 655.

In January 2006, Rocky got angry after an argument with Stacey about sex and told her he was cutting her off from any further support. The uncontroverted testimony was that Rocky told Stacey she would have to get by on what was in the joint accounts, because he was not going to give her another dime. Tr. 662. Understandably, Stacey was fearful about how she would support herself and her daughter, given her health problems and her being an unemployed housewife. Therefore, Stacey withdrew funds

\$20,000 from the joint account and placed the money in an account in her own name. She also deposited \$13,000 in Hurricane Katrina insurance proceeds belonging to her and Rocky, which Rocky had tried to hide from Stacey. Stacey used these funds to pay her and her daughter's living expenses, as well as marital expenses on the Brandon James and Florida homes. Trial Exhibit 58 (E.1960) shows exactly how Stacey used these joint account funds.

**a. Home Equity Line of Credit**

When Rocky and Stacey took out a mortgage loan to buy the Brandon James house, they also obtained a home equity line of credit with the mortgage lender, on which Stacey was an authorized signatory. When Rocky delivered Stacey an ultimatum to deliver a settlement offer to Rocky's divorce attorney by the end of the day, Stacey was forced to access the line of credit to hire a lawyer. Given that Rocky had millions of dollars at his command to hire lawyers and attempt to intimidate Stacey into an unfavorable (to her) divorce, Stacey had no choice to use \$60,000 of these funds, given that she had no other means to hire legal representation. Tr. 685-687.

**6. Individual Accounts**

The chancellor awarded each party the following individual accounts: Rocky received five bank/brokerage accounts in his name containing a total of \$383,098 (*Hancock Bank Checking* -\$26,540.77; *Hancock Bank Savings* - \$176,504.97; *Merrill Lynch* -\$109,401.49; *Safe Deposit Box* - \$10,000.00; *Jackson Nat'l Annuity* - \$61,651). Stacey

was awarded three accounts containing **\$2,086** (*Wachovia Checking* - \$1,696.00; *Keesler Federal Credit Union* - \$95.00; *Wachovia Bus. Check* - \$295.00). Judgment at 19-23, 26.

7. **401 K Account** - The chancellor deemed Rocky's Merrill Lynch 401K retirement account to be marital to the extent of the appreciation in value during the marriage and held that the appreciation of \$46,126.95 should be divided equally. Judgment at 22, ¶ 55.

8. **Summary of Chancellor's Division of Assets.**

a. **What Rocky Received.**

<u>Property</u>	<u>Chancellor's Valuation</u>
RCD	\$1,636,520
Rhodes Rentals	\$319,946
R&K Properties	\$347,076
Rhodes Family, LLC	\$17,601
Bank/Brokerage Accts	\$383,098
401K Account	\$193,141
IRA	\$9,402
Life Insurance Policies	\$8,693
Stock	\$7,599
Equity Marital Home (1/2)	\$44,527
 Furnishings (1/2)	 \$8,000
Florida Home	<u>\$304,874</u>
 TOTAL TO ROCKY	 \$3,280,477

b. **Award to Stacey.**

<u>Property</u>	<u>Chancellor's Valuation</u>
Bank Accounts	\$2,086
S&J, LLC	\$295
Life Insurance	\$1,000
Marital Assets	
Hancock	\$10,847



401K	\$23,063	
Home	\$44,526	
Furnish.	\$8,000	
Less Line Credit	(\$60,000)	
Net		\$26,436
2005 Audi A4		
not valued - current Blue Book=		\$20,000
<u>Rehabilitative Alimony</u>		
\$2,000/mo. x 6		<u>\$12,000</u>
<b>TOTAL TO STACEY</b>		<b>\$61,817</b>

#### SUMMARY OF ARGUMENT

1. The trial court clearly erred in determining that no portion of Rhodes Carpets and Draperies was a marital asset. The evidence is uncontroverted that RCD appreciated in value during the marriage by millions of dollars, and this appreciation is subject to equitable distribution. In addition, 76% of the company was acquired by Rocky during the marriage through his active efforts, thereby making this portion of the business marital property. Because of this and the other manifest errors discussed below, this Court should reverse and remand for a new trial.
2. Rhodes Rentals of Ocean Springs was a marital asset acquired during the marriage, and the appreciation in value of the company is a marital asset as well.
3. The Florida vacation home purchased by Rocky is marital under the family use doctrine, or, at a minimum, its appreciation in value is subject to equitable distribution.

4. The Ocean Club Condominium is titled in Rocky's name and was acquired during the marriage. The trial court erred in holding that the asset belongs to RCD and therefore is not marital.
5. The trial judge erroneously ruled against Stacey with regard to key *Ferguson* factors for equitable distribution.
6. Stacey is entitled to possession of the marital home, due to her substantial contributions to the property and its emotion value to her as her family home.
7. The chancellor overvalued Stacey's assets, earning capacity and ability to meet expenses in awarding her only minimal rehabilitative alimony.
8. Stacey's financial need entitles her to attorney's fees.
9. The chancellor should have permitted Stacey's expert, James Angle, CPA, to testify regarding the value of Rocky's assets, given Mr. Angle's clearly sufficient qualifications and the correctness of his methodology.
10. The trial court erred in denying Stacey's motion for new trial, because she amply demonstrated manifest error in the original findings by the chancellor.

## **ARGUMENT**

### **A. Standard of Review.**

In a divorce case involving issues of equitable distribution and alimony, the decision of the chancellor should be overturned if "manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Henderson v. Henderson*, 757 So.2d 285 (Miss. 2000), quoting *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990). Likewise, a

decision is subject to reversal if the findings of fact are not supported by substantial credible evidence in the record. *Id.*

**B. Error in Classification of Marital Property.**

The first step in distributing property in a divorce is to determine whether it is a marital or non-marital asset. *Hemsley v. Hemsley*, 639 So.2d 909, 914-915 (Miss. 1994). Any asset owned by a spouse is presumed to be marital. *Id.*; *Yancy v. Yancy*, 752 So.2d 1006, 1011-1012 (Miss. 1999). The property that is found to be marital is subject to the second step, which is equitable distribution. *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994).

In this case, the chancellor found that the vast majority of the valuable assets of the parties were the non-marital property of Rocky. We will demonstrate why this finding was clearly in error as to certain valuable assets, requiring this Court to reverse and remand for equitable distribution of these assets.

**1. Rhodes Carpet and Draperies, Inc.**

**a. Stacey is Entitled to Share in the Appreciation in Value.**

As the chancellor correctly recognized, the appreciation in value of an asset achieved by a spouse's efforts during the marriage is a marital asset subject to equitable distribution, even if the business itself is a non-marital asset. Judgment at 13, ¶ 34, citing *Flechas v. Flechas*, 791 So. 2d 295, 304 (Miss. App. 2001). The trial court had no question that Rocky is the active 100% owner and manager of RCD and that his efforts yielded any appreciation in value in the company, thereby making the appreciated value

subject to equitable distribution. *Id.*; *A & L, Inc. v. Grantham*, 747 So.2d 832, 839 (Miss. 1999).

Yet, in the face of clear evidence to the contrary, the chancellor held that RCD did not appreciate. The court stated:

There was no evidence presented to show an increase in the value of RCD. More recent balance sheets and tax returns were exhibited, which only serve to show a steady downward fluctuation in income with a drastic increase in income for 2006. . . **With no evidence of any appreciation in value, there is no portion of RCD attributable to the marital estate.**

Judgment at 15, ¶ 39 (emphasis added). The valuation of assets during divorce proceedings does not require expert testimony and, as the trial court recognized, may be accomplished by adopting the values cited in the parties' financial statements, in the testimony, or in other evidence. *Horn v. Horn*, 909 So.2d 1151, 1165 (Miss. App. 2005); *Christopher v. Christopher*, 766 So.2d 119, 123 (Miss. App. 2000).

The problem is that the chancellor misinterpreted the financial disclosures, which clearly show a major appreciation in value in RCD over the term of the marriage. The trial court based its conclusion of no appreciation in value on its finding that the income of RCD steadily declined, other than for one year in 2006, in which it “drastically” increased. First of all, the record does *not* support the court’s conclusion that RCD’s income “steadily declined.” In fact, it rose substantially over the entire term of the marriage. The financial statements of RCD (Trial Exhibit 38, E. 1761) and the RCD tax returns (Trial Exhibit 36, E.1280) reveal the following annual net income figures for RCD during the term of the marriage:

RCD NET INCOME

<u>YEAR END</u>	<u>FINANCIALS</u>	<u>TAX RETURN</u>
6/30/2004	(\$70,790)	(\$76,335)
6/30/2005	\$75,001	\$90,287 <sup>4</sup>
7/1 - 12/31/2005 <sup>5</sup> (annualized)	\$339,978	\$352,504
12/31/2006	\$2,538,480	\$2,335,150
1/1 - 8/1/2007 <sup>6</sup> (annualized)	\$409,071	n/a

Thus, while there was a spike in income in 2006, the company's income reverted in 2007, at the time of the parties' separation, to a level that was higher than it had been at any time during the marriage other than 2006. A line graph of these figures would show a significant increase in RCD's income over the term of the marriage.

Secondly, the trial court's employing its own income approach to valuing RCD is puzzling, given that the court specifically held at trial that any valuation approach that includes goodwill could not be used. The income approach is the one valuation method in which goodwill is very tightly intertwined and difficult to separate out. *Watson v. Watson*, 882 So.2d 95, 106 (Miss. 2004).

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<sup>4</sup> The 2004 losses were deducted to reach net taxable income for this year. We have stated the income before the prior years' losses were deducted.

<sup>5</sup> The company became a Sub-S corporation and changed accounting periods. Tr. 73.

<sup>6</sup> The Temporary Order was entered August 17, 2007.

In arriving at the beginning value of RCD, the trial court relied upon the valuation report of RCD, prepared by James A. Koerber for the limited purpose of the buy-out of Keith Rhode's fifty percent interest. The Koerber report was introduced in evidence as Trial Exhibit 7B (E. 952). Koerber ended up relying on an asset-based valuation approach rather than the income method, and his \$655,000 figure for the 50% interest was identical to one-half of the net value he placed on the company's assets. Report at 32, 54. In placing a value on the assets, Koerber employed the financial statement/balance sheet of RCD. *Id.* at 32.

RCD's balance sheets (Trial Exhibit 38, E. 1761) reveal an entirely different story than one involving stagnant growth by the company during the parties marriage. As discussed in detail in the fact section of this Brief, the shareholder's equity in RCD, as shown in its financial statements, escalated by \$1,527,972.80 from the beginning of the marriage to the end. Using the financial statements themselves, there was an increase from January 1, 2004 to August 1, 2007 of \$2,335,564. Under no circumstances can it be said that Rocky's 100% ownership of RCD failed to increase in value at all. Therefore, this Court should reverse and remand for a determination of the applicable amount of appreciation and for an equitable distribution of this sum.

**b. RCD Is a Marital Asset.**

We submit the stock in the corporation itself, and not just the appreciation in value, is subject to equitable distribution. Chancellor Persons held that RCD is totally non-marital and is the exclusive property of Rocky. In *Hemsley v. Hemsley*, 639 So.2d

915 (Miss. 1994), the Mississippi Supreme Court defined marital property as any and all property acquired or accumulated during the marriage. Again, any asset owned by a spouse is presumed to be marital. *Yancy*, 752 So.2d at 1011-1012.

While an *inter vivos* gift to a spouse during the marriage is considered to be the separate property of that spouse (*Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss. 1994)), it is the burden of the spouse claiming the gift as individual property to prove its status as such by clear proof. *Henderson v. Henderson*, 757 So.2d 285, 291 (Miss.2000). In the present case, we submit that the evidence failed to establish that the stock was a true gift, rather than compensation for Rocky's labors in RCD.

*Hankins v. Hankins*, 729 So.2d 1283, 1287 (Miss. 1999) provides guidance as to whether a transfer of stock in a closely-held family corporation should be considered a gift. In *Hankins*, the husband - like Rocky in the present case - worked in his father's business. He and his other brothers who worked in the business received stock in the company, but those who were not involved in the company did not receive stock. The Mississippi Supreme Court affirmed the trial court's finding that the stock obtained by the husband during the marriage was a marital asset and not a true gift. The stock transfer failed to meet the requirement of a gift that it be gratuitous, because of the fact that the husband worked in the company and his non-employed siblings received no stock. These facts supported a finding that the husband had earned the stock through his work and not as a gift. *Id.*

The facts of *Hankins* are indistinguishable from those in the present case. Just like the husband in *Hankins*, Rocky had a management position in the family company, and he and his brother ran the business after 1992, when their parents retired. Rocky and Keith received stock from their father and mother, while their sister who did not work in the company received no stock. No gift tax return was filed regarding the stock, nor was any gift tax paid. Therefore, it was error for the chancellor to hold that the 26% of stock in RCD received by Rocky after October 18, 2003, was a non-marital gift.

Clearly, the fifty percent interest in RCD “redeemed” for \$658,000 from Keith Rhodes was a gift to Rocky. Instead, the chancellor’s approach was to disregard Rocky’s accession to 100% ownership of RCD, holding that he did not acquire this interest in the company. According to the chancellor, “Keith’s shares of stock, which comprised a 50% interest in the corporation, were not bought by Mr. Rhodes. The stock was redeemed for cash value, leaving Mr. Rhodes as the sole owner and shareholder of the corporation. Mr. Rhodes was authorized to act in his capacity as President of RCD to execute a loan agreement with BancorpSouth Bank on behalf of RCD in order to provide the corporation with the funds needed to redeem his brother’s shares.” Judgment at 12-13.

We respectfully submit that this view exalts form over substance. The undisputed evidence in the record is that Rocky increased his ownership of RCD from a 50% share to a 100% share during the term of the marriage, by purchasing and retiring Keith Rhodes’ outstanding stock. A letter in evidence from Keith’s attorney to Rocky makes it clear that the two brothers got a “divorce” from one another in their various joint business



endeavors, with one buying out the other and vice versa. Trial Exhibit 7 (E. 635). Keith confirmed in his trial testimony that Rocky was buying him out. Tr. 229-230.

The final “divorce” was accomplished by Rocky buying out Keith’s 50% share of RCD through a stock redemption for the sum of \$658,000. RCD borrowed the money from Bancorp South, and he personally guaranteed the loan. Trial Exhibit 7A (E. 636). No corporate assets were directly used to pay Keith, and RCD and Rocky used future corporate earnings - which belonged solely to him - to repay the bank. The \$658,000 paid for the fifty percent stock interest was as much Rocky’s money - as sole owner of RCD - as if it had come out of his own pocket and doubled his ownership interest in the corporation. Rocky chose to make the purchase as a stock redemption by his wholly owned corporation rather than as a direct stock purchase, but the result either was the same - Rocky acquired an additional 50% ownership.

The bottom line is that Rocky acquired 76% of RCD during the marriage through his active efforts. Even under the trial court’s ruling that the corporation was only worth \$1,636,519.50 at the end of the marriage, seventy-six percent of that amount - \$1,243,754.80 - was marital property subject to equitable distribution. Because the corporation was worth at least \$3,164,492, based on RCD’s own financial statements, the amount subject to equitable distribution is considerably higher. In any event, the case should be reversed and remanded for equitable distribution of the 76% share of RCD.

## **2. Rhodes Capital, LLC**

Rhodes Capital, LLC was formed in 2006 by Rocky as a spin off of RCD. As part of an IRC 1031 like-kind exchange, Rocky sold RCD's property in Biloxi for \$1,850,000 by exchanging it for property in the Woolmarket area near Ocean Springs, where RCD built new corporate offices. Because of the like-kind exchange requirements, the asset was being held by an IRC 1031 "qualified intermediary", pending the completion of construction. At the time of trial, the asset was not included in the value of RCD. No tax returns or financials were prepared for Rhodes Capital, because it was a "disregarded entity" by the IRS.

The chancellor failed entirely to address this valuable marital asset in his Judgment. As a result, Stacey was denied any opportunity for an equitable distribution of a \$1,300,000 property acquired by Rocky during the marriage. The case should be remanded for a consideration of this asset in the property distribution in this divorce case.

### **3. Rhodes Rental of Ocean Springs, Inc.**

Rhodes Rental is inextricably intertwined with RCD. Rhodes Rental owns the building and equipment used by RCD for its Ocean Springs operation. Tr. 47. Rhodes Rental's property was a premarital asset of a company Rocky owned with his brother. As part of the "divorce" between Rocky and Keith, Rocky received the Ocean Springs property and put it into Rhodes Rental during the marriage in 2004. *Id.*

There can be no question that Rocky actively managed Rhodes Rental's property and that his efforts contributed to its increase in value. Rocky was the sole owner and

manager of RCD, so clearly he also actively directed the operations of Rhodes Rental, as the owner of RCD's store property, on a day-to-day basis. The two companies necessarily operated in tandem.

Therefore, the appreciation in value of Rhodes Rental is a marital asset. Page 4 of the 2004 tax return of Rhodes Rental (Trial Exhibit 36, E. 1280) values the company's assets at \$289,648, and the same balance sheet on the 2006 tax return shows a value of \$319,946. Stacey is entitled to equitable distribution of the \$30,298 in appreciation.

#### **4. Florida Home.**

##### **a. The Property Is Marital under the Family Use Doctrine.**

The chancellor found that there was \$304,874 in equity in the Florida vacation home at the end of the marriage. However, the court held that the house was the exclusive property of Rocky and rejected Stacey's contention that the property had become marital under the family use doctrine. Judgment at 8-11.

The family use doctrine mandates the conversion of separate property used extensively by a family into a marital asset. *Boutwell v. Boutwell*, 829 So.2d 1216, 1221 (Miss. 2002). The Supreme Court has described the doctrine as follows: "Nonmarital assets (e.g. inherited property) may be converted to marital assets if they are commingled with marital assets or used for familial purposes. Such converted assets are then subject to equitable distribution." *Heigle v. Heigle*, 654 So.2d 895, 897 (Miss. 1995) citing *Johnson v. Johnson*, 650 So.2d 1281, 1286 (1994). The burden is on the person

claiming an asset to be non-marital to demonstrate its non-marital character. *Striebeck v. Striebeck*, 911 So.2d 628, 633 (Miss. App. 2005).

While the family use doctrine is most often applied to the primary marital residence, the Mississippi appellate courts also applied it to other types of property. See, e.g., *Stewart v. Stewart*, 864 So.2d 934, 937-938 (Miss. 2003)(furniture); *Boutwell*, 829 So.2d at 1221 (promissory note income). Although the Mississippi Supreme Court and Court of Appeals have not reached the issue, the Ohio Court of Appeals has held that a vacation home can become transmuted into marital property through family use. *Oatey v. Oatey*, 1996 WL 200273, \*25 (Ohio App. 1996).

In the present case, there is no question that the Florida home was used extensively by the family. As set out with transcript citations in the fact section above, the record reflects that the vacation home was tantamount to a second marital residence. With the participation of Stacey, Rocky purchased the Florida house in 2000, while the couple was dating. Stacey was intimately involved in the selection and decision to buy the home. The couple used the house frequently during their relationship prior to the 2003 marriage. They continued the frequent use of the house during the term of the marriage, spending considerable time there, including holidays. Contrary to the chancellor's holding, the record shows that Stacey contributed not only her labor and energy in maintaining and remodeling the Florida house, but she also contributed monetarily, both in the form of payments made from the parties' joint bank

account for the home but also in her direct expenditures to maintain and decorate the house.

Stacey and her daughter, Jami, used the Florida home as their residence after Hurricane Katrina, from August through December 2005. Jami went to high school in the area during this period. Even after Stacey returned to Biloxi, she frequently stayed at the Florida residence for extended periods.

We submit that this is precisely the situation calling for the extension of the family use doctrine to a residence beyond the primary marital residence. The case relied upon by the trial court - *Gutierrez v. Bucci*, 827 So. 2d 27, 37 (Miss. App. 2002) - does not by any means dictate to the contrary. Judgment at 10, ¶ 27. The question in *Gutierrez* was whether certain motorcycles converted to marital property by virtue of family use. The Court of Appeals held that the family use doctrine did not apply where the wife “would use them on occasion.” The Court stated that “we do not find that occasional riding of one of the motorcycles by the nonpurchasing spouse necessarily causes the separate property to lose that classification.” In sharp contrast, the non-purchasing spouse in this case used the property far more than her husband and contributed at least as much as he did to the upkeep of the property. While the scant use in *Gutierrez* might not have been enough, what we have here puts the Florida residence far over the line into family use, marital property.

As a result, the trial court should have equitably distributed the \$304,874 in equity in the house. Its failure to do so warrants reversal.

**b. Stacey Is Entitled to Half of the Appreciation in Value of the Florida Home.**

The home was actively rented, managed and maintained by both Stacey and Rocky during marriage. As with the RCD stock, the appreciation in this property resulted from Rocky's active efforts, with the substantial contribution of Stacey. At a minimum, Stacey is entitled to the equitable distribution of the appreciation in value of the Florida house. *Grantham*, 747 So.2d at 839 (where increase in value at least in part attributable to husband's efforts, increase is marital property).

The record reflects that Rocky invested \$52,900 in the house, with the remainder of the initial \$275,000 value being borrowed funds. See Settlement Statement, Trial Exhibit 6 (E. 573). The chancellor found that the equity had grown to \$304,874 by August 2007 - an increase of \$251,974. Judgment at 11, ¶ 29. A substantial portion of this appreciation clearly occurred during the marriage and should have been equitably distributed by the trial court. The case should be remanded for that purpose.

**5. Ocean Club Condominium.**

There is no question that Rocky holds the one-third interest in the Ocean Club Condominium in his own name. There is no question that he purchased the asset during the marriage. Yet, the trial court held that the property belongs to RCD. Judgment at 19, ¶ 48. This conclusion is based solely on Rocky's testimony that the interest in the condominium was supposed to have been placed in the RCD. However, it is clear that this never occurred. See fact section above.

Rocky ought not to be able to hide a one-third interest in a vacation condominium in his wholly-owned flooring business, thereby protecting the asset from any rights of his spouse. *See Grantham*, 747 So.2d at 843-844 (corporate assets are available in divorce case for distribution where “principal shareholder or owner conducts his private and corporate business on an interchangeable or joint basis as if they were one.”) This is particularly true where the legal title in fact resides in the husband’s name. Therefore, the Ocean Club Condominium is a marital asset, and the trial court should have included its \$160,000 value in the assets to be equitably distributed.

**C. Errors in Equitable Distribution.**

**1. The Trial Court Clearly Erred in its Application of Key Ferguson Equitable Distribution Factors.**

The Mississippi Supreme Court cited the fundamental purpose for moving away from the old separate property system to the equitable distribution method as follows:

The flaw of the separate property system, however, is not merely that it will occasionally ignore the financial contributions of the non-titleholding spouse. The system ... is also unable to take account of a spouse's non-financial contribution. In the case of many traditional housewives such non-financial contributions are often considerable. Thus, to allow a system of property division to ignore non-financial contributions is to create a likelihood of unjust division of property.

*Ferguson v. Ferguson*, 639 So.2d 921, 926. Thus, the Supreme Court adopted the equitable distribution method and the well-known factors for determining equitable distribution. 639 So.2d at 928.

The trial court had scant opportunity to apply *Ferguson* factors, because the court found that almost all of the assets were non-marital and belonged to Rocky. This

allocation in itself, we submit, was a reversion to the strict separate property system, because the trial court for the most part allowed declared everything non-marital that was titled in Rocky's name. The separate property view also spilled over into the chancellor's application of equitable distribution to the few marital assets that it did find. Upon remand to equitably distribute the assets discussed above, as well as the marital residence, the trial court should correct its clear errors in the application of the *Ferguson* factors.

**a. Parties' respective economic contribution.**

In applying the first *Ferguson* criterion, the trial court largely discounted Stacey's contribution to the marriage, holding that "it is clear that Mr. Rhodes' direct contributions to the acquisition of property are significantly greater than Mrs. Rhodes' contributions. There is little evidence of record to distinguish the parties' domestic contributions." Judgment at 29, ¶ 76. The chancellor was clearly in error in this determination for two reasons. First, the court failed to take into account the parties' respective ability to contribute economically.

A homemaker's contributions are presumed to be equal to those of a wage earning spouse. *Hemsely*, 639 So.2d at 915. Reversal is warranted where the trial court "failed to give proper weight to [the wife's] extensive non-economic contributions to the marital union." *King v. King*, 760 So.2d 830, 837 (Miss. App. 2000). In *King*, the Court of Appeals reversed and remanded the chancellor's determination, like the one in this case, that the wife made "only negligible economic contributions to the marriage, and



few indirect economic contributions.’” *Id.* The Court held that the wife’s testimony that she placed monies in the joint account that were used for marital expenses and that she performed substantial housekeeping chores was enough to support the presumption of equal contribution. *Id.*

Contrary to the implication of the chancellor’s holding, the case law does not say that the domestic contributions of housewife have to be placed on a balance sheet with those of her husband, with the wife’s efforts being debited for every chore done around the house by her spouse. Instead, the task is to determine whether a full time housewife made significant indirect contributions to the marriage, in which event those indirect contributions are to be considered as counting as against the husband’s direct monetary contributions. As the Supreme Court said in *Hemsley*, “if the breadwinner happens to be the husband and has all property in his name, this serves to relegate the non-breadwinner wife to the equivalent of a maid-and upon division of the marital estate entitled to a minimum wage credit for her homemaking service. We abandon such an approach.” 639 So.2d at 915.

Stacey clearly contributed significant domestic labor to the marriage in this case.

The record is replete with evidence of Stacey’s contributions, which included:

1. Provided Dacey Street house as marital residence during early marriage and paid expenses while there. Tr. 637.
2. Obtained favorable terms for Brandon James home from her parents. Tr. 610.

3. Managed major remodel of marital home in 2004, including supervising contractors and interior design and decorating. Tr. 611-612.
4. Managed household expenses and physically wrote the checks from joint account to pay bills. Tr. 656.
5. Contributed all her available funds toward living expenses. In contrast, Rocky only deposited half of his monthly salary (and none of his \$30,000+ in other business income) into the joint account. Tr. 308, 626-628, 643, 655.
6. Obtained FEMA funds for paying household expenses following Katrina. Tr. 618-619.
7. Stacey's \$550 per month rental income from Darcey Street used by Rocky. Tr. 649.
8. Cleaned up marital home after Katrina and brought cleaning supplies from Florida. Tr. 615-616.
9. Performed extensive household chores both in marital home and Florida home, including sweeping, mopping, vacuuming, dusting, clothes washing, cooking, grocery shopping, ironing, cleaning porches, cleaning windows. Tr. 417, 428, 612.
10. Managed and maintained Florida home. Tr. 721, 724-725.
11. Reimbursed Rocky for \$10,000 cost of surgery on Stacey. Tr. 633.
12. Did not use joint account for personal shopping sprees or extravagant living. Tr. 657.

Stacey performed many of the domestic duties despite being seriously restricted by health problems. Tr. 735-737. The chancellor minimized Stacey's significant contributions, in the same way that caused a reversal in favor of the wife in *King*.

**b. Dissipation of Marital Assets.**

Another *Ferguson* factor is “the degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets . . .” 639 So.2d at 928. The trial court held that, by utilizing a home equity line of credit in the amount of \$60,000 to pay her attorneys’ fees and expenses in this divorce action filed by Rocky, Stacey dissipated marital assets. Judgment at 31-32, ¶ 82. The court failed entirely to take into account the fact that utilizing this sum from the marital line of credit was made necessary by the actions of Rocky in (1) Rocky’s cutting off Stacey from any funds in January 2006; (2) Rocky’s threatening to take Stacey’s only automobile from her; (3) Rocky’s filing a divorce against Stacey; (4) Stacey’s being without any other resources to pay for an attorney to represent her in a case brought on by Rocky; and (5) Rocky having millions of dollars in resources to pay his own attorney’s fees. Moreover, Stacey utilized the funds to hire a lawyer only after Rocky left her a note delivering an ultimatum to present a settlement offer to his divorce lawyer by the end of the day. These are compelling equities which the trial court did not consider and which dictate a finding that Stacey’s use of the home equity in this matter was not a dissipation of assets. See the discussion below of the denial of attorney’s fees.

**c. Value of Assets Brought to Marriage.**

*Ferguson* provides that a trial court should consider “the value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse.” *Id.* The chancellor found that there was

a sort of rough parity between the parties' respective outside assets by using an unrealistic figure for the value of Stacey's interest in S&J, LLC, the entity that owns the Darcey Street property. The court held that "the value of Mr. Rhodes' separate estate is \$2,879,319.22. The value of Mrs. Rhodes' separate estate is \$1,500,000.00."

Yet, at the time of the Temporary Order, the Dacey Street property consisted of a vacant lot in Biloxi. Although there was a lease agreement containing a purchase option of \$1.5 million, the representative of the lessor, Bayview Development, testified that there is no guarantee that the option to purchase will ever be exercised. The chancellor therefore held on page 8 of the Judgment as follows:

Though the casino lease agreement contains a default clause with a buyout value of \$1,500,000.00, that amount is not representative of the fair market value. Bank statements submitted show that the only cash remaining in the LLC is \$295.00. Any value assigned to the leasehold interest at this time would be purely speculative. With no other assets, **the Court finds that the value of S&J is \$295.00.**

The chancellor's holding later in the judgment that the interest in S&J is worth \$1.5 million is totally contrary to the court's own finding that it is worth \$295 and runs contrary to all of the testimony in the case. The undisputed fact is that that Stacey basically has no assets of any significant value, as compared to millions in assets belonging to Rocky.

**d. Need for Financial Security.**

One of the *Ferguson* factors is "the needs of the parties for financial security with due regard to the combination of assets, income and earning capacity." *Id.* A wife's financial needs being disproportionately lower than the husband's is an important factor

in equitable distribution. *Wells v. Wells*, 800 So.2d 1239, 1243-44 (Miss. App. 2001). In *Seymour v. Seymour*, 960 So.2d 513, 519 (Miss. App. 2006), the Court of Appeals held that a significant factor in equitable distribution in that case was that the husband “earns more than \$50,000 per year, while Karen, a homemaker with minimal work force experience, earns only \$18,000.” See *Bumpous v. Bumpous*, 770 So.2d 558, 560 (Miss. App. 2000) (wife awarded husband’s family restaurant on basis of need, where wife’s only employment was in restaurant, while husband made substantial income in other employment); *Lauro v. Lauro*, 924 So.2d 584, 590 (Miss. App. 2006)(significant factor in award to wife was that husband earned \$200,000 per year as doctor and wife was housewife); *Patterson v. Patterson*, 917 So.2d 111, 119 (Miss. App. 2005)(awarding greater share of marital assets to wife warranted by wife’s need; her income with alimony was \$45,000, while husband’s was \$75,000).

With regard to the need factor, the trial court held in the present case that

Mrs. Rhodes is unemployed, but has clerical skills and experience that would be useful should she choose to seek employment. Mrs. Rhodes gave varying reasons for quitting her previous employment in 2005, including health concerns. Based on the entirety of her testimony, this Court is not convinced that her earning capacity and ability to work is any less than it was at the beginning of the marriage.

Judgment at 33, ¶ 88. The court went on to discuss Stacey’s income under the S&J lease to Bayview Development but held that this “income is extremely speculative at this juncture and should not be considered.” Judgment at 34, ¶ 89. Indeed, this income had ceased by the time of trial in this case.

Thus, the chancellor ignored entirely the massive disparity between Rocky's \$578,000 per year income and Stacey's last earnings, nearly five years ago, of \$17,500. It is pure conjecture to say that Stacey's earning capacity and ability to work are the same as they were five years ago. The court further failed to consider that Stacey lived a lifestyle during marriage based on two homes and a half million dollars per year income. The court disregarded entirely the fact that Stacey was a housewife without employment income for the last two years of the marriage. The trial court brushed aside Stacey's testimony about her health problems that keep her from working, despite there being no evidence to rebut her suffers from Epstein-Barr, chronic fatigue and fibromyalgia. Moreover, Stacey's monthly expenses total \$4,989 for herself and her college-age daughter, as shown on her 8.01 Financial Statement (Trial Exhibit 28, E.1268). Even if Stacey could get a job, given her health problems, making the same \$17,500 she made in 2005, that amounts to \$1,458 per month - less than 1/3 of her monthly expenses.<sup>7</sup> In short, the trial court's treatment of the need factor was manifestly in error.

**2. The Chancellor Wrongly Awarded Possession of the Marital Home to Rocky.**

The trial court awarded possession of the marital home to Rocky, while allowing Stacey one-half of the equity. Judgment at 34-35, ¶¶ 93, 98. In so doing, the court held that Stacey did not make any direct contributions to the home, other than assisting in its remodeling. Judgment at 27-29, ¶¶ 71-76. The chancellor acknowledged that Stacey had

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<sup>7</sup> The trial court considered Stacey's monthly expenses for purposes of alimony to be \$3,700.

by far the greatest emotional interest in the property but was swayed totally by the issue of his finding that the direct monetary contributions toward the home were made by Rocky. Judgment at 34-35, ¶¶ 93, 98.

First of all, Stacey's direct and indirect contributions to the home were substantial, as we discussed in the previous section of this Brief. However, perhaps the most important issue with regard to the possession of the home is the *Ferguson* criterion of emotional value. We submit that the trial court greatly undervalued Stacey's emotional attachment to the property that was her parents' former home. In *Sandlin v. Sandlin*, 906 So.2d 39, 42 (Miss. App. 2004), the Court of Appeals affirmed the chancellor's award of the marital home to the wife, despite her committing adultery, because she was "emotionally attached to the marital home and property since it is near the homes of other family members and was once her grandparents' property and was given to the parties by her father." In *Scott v. Scott*, 835 So.2d 82, 86-88 (Miss. App. 2002), the Court reversed award of the marital home to the husband, while criticizing the trial court for failing to take into account the fact that the house was on property that had been in the wife's family and next to which her family members still resided.

The marital home was not only the former home of Stacey's parents, but she had considerable attachment to the home going well beyond the "family gatherings" mentioned in the trial court's decision. Judgment at 32, ¶ 83. Stacey testified as follows:

Q. Did you go to this home while your parents lived there?

- A. I did. When my parents were building it - my dad and brothers and my uncle built it, and I did spend a lot of time there while it was under construction. I was the one who painted the whole interior of that house. We had my daughter's birthday parties at that house, Christmas. Every holiday was at that house, family gatherings, crawfish boils. I was at that house quite a bit.
- Q. And so your daughter also -
- A. Yes.
- Q. - used this home?
- A. Yes. This is the only house that my daughter knows my parents ever living in. She was too young to remember the other house.

Tr. 608-609. The trial court erred in not placing sufficient weight on these emotional attachments by Stacey in order to award possession of the home to Rocky.

Another reason stated by the chancellor for denying the home to Stacey was that she could not afford to pay the mortgage. Judgment at 33, ¶ 87. The trial court in *Scott* awarded the marital home to the husband on the same basis. The chancellor "explained that he believed Catherine [the wife] would eventually lose the home due to her low income, and this appeared to be one of his primary reasons for awarding the house to Leroy [the husband]." 835 So.2d at 88. The Court of Appeals reversed, holding that "whether Catherine could maintain upkeep on the home does not appear to us a valid consideration for failing to award the home to her if equity otherwise dictated such result. Yet that appears to be the chancellor's overarching consideration in not awarding the home to Catherine." 835 So.2d at 88.

Not only should Stacey's means to pay not have been a factor in this case, but, if the trial court had not erred in denying Stacey a share of valuable marital assets, as discussed above, she would have had greater means to pay the mortgage on the home.



The chancellor also did not consider requiring Rocky to pay the mortgage as part of the equitable distribution of the assets. This Court should reverse the trial court and direct the trial court, upon remand, to award possession of the Brandon James house to Stacey.

**D. Error in Rehabilitative Alimony.**

A fundamental reason why this Court should reverse the trial court's findings as to alimony is because, when the Court reverses a trial court's division of marital property, it must also reverse the accompanying award or denial of alimony. *Faerber v. Faerber*, 13 So.3d 853, 863 (Miss. App. 2009). Moreover, the chancellor's *Armstrong* alimony analysis was fatally flawed. As the chancellor noted in his decision, alimony is a means of achieving financial equity after divorce. *Ferguson*, 639 So. 2d at 926-27. In the Judgment, the trial court went through an analysis of the alimony factors stated in *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993). Judgment at 36-44, ¶¶ 101-115. In the end, the trial judge declined to award Stacey any lump sum rehabilitative alimony and gave her monthly rehabilitative alimony of only \$2,000 per month for six months. This was intended to tide her over until she could return to work. *Id.*

We respectfully submit that the trial court was clearly in error in his *Armstrong* analysis as to several key factors. The most basic error is the court's failure to take into account the huge disparity in income between the parties and its erroneous conclusions about Stacey's ability to earn sufficient sums to meet her basic expenses. Professor Deborah Bell has stated that disparity of financial circumstances is the foremost reason for granting alimony. In her treatise, she discusses this issue as follows:

Disparity in the parties' financial circumstances is the most frequently cited reason for an award of alimony. Numerous decisions state that alimony should be considered if, after equitable distribution, one party is left "with a deficit." This discussion uses the term "financial disparity" synonymously with the notion of deficit, meaning a disparity in the parties' resources and reasonable expenses. Financial disparity is determined by examining a number of factors, including income, earning capacity, assets, obligations, reasonable expenses, standard of living, and custodial arrangements.

D. Bell, *Mississippi Family Law*, § 9.04[4] at 252 (1<sup>st</sup> ed. 2004), *citing Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994). We have already discussed the enormous gap between Rocky's and Stacey's income and earning capacity - Rocky grosses 33 times more per month than Stacey ever earned while she was employed.

Without citing any support for its conclusion, the trial court found that Stacey's earning capacity is \$20,000 a year. This amounts to \$1,666.66 per month gross, as compared with Rocky's \$48,000. Likewise, Rocky has millions of dollars in assets, while Stacey has nothing except a fast-depreciating 2005 automobile and \$17,000 in cash, which was all the chancellor awarded her in this case. Stacey also has the Dacey Street LLC, which has a speculative value, at best.

The trial court found that Rocky only has \$9,592 in monthly expenses, which leaves him with a net disposable income of nearly \$27,000 per month. Meanwhile, the court criticized Stacey's expense accounting and discounted her stated monthly expenses, "including the marital home", to \$3,700.<sup>8</sup> Even at \$3,700 per month, Stacey

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<sup>8</sup> Presumably the "including the marital home" notation is intended to mean "including housing expenses," since the chancellor awarded the marital home to Rocky.

would be more than \$1,000 per month short of meeting her expenses from a job paying \$1,666 per month, gross.<sup>9</sup>

The chancellor was also quick to dismiss Stacey's health problems, without any medical evidence to dispute Stacey's testimony that she was not able to work regularly because of her conditions. Tr. 737. Instead, the court found that Stacey was "better" than she was in 2002 and could return to work. This conclusion is not supported by the record, however. All Stacey said was that her endometriosis was better since 2002. She testified that she has continuing problems with Epstein-Barr, fibromyalgia and chronic fatigue, all of which can cause her to have to miss work without warning. Tr. 735-737. With this limitation on her ability to hold a regular job, it cannot be said with any reasonable certainty that Stacey can return to work, let alone earn \$20,000 per year.

#### **E. Error in Denial of Attorney's Fees.**

An award of attorney's fees in a divorce case is dependent on whether the party seeking the award is able to pay. *Crowe v. Crowe*, 641 So.2d 1100, 1105 (Miss. 1994). Thus, in *Crowe*, the Supreme Court affirmed the award of attorney's fees where the wife's monthly expenses exceeded her income, while the husband's income was double the wife's. *Id.*

For the reasons discussed above, Stacey clearly did not have excess assets from which to pay her attorney's fees, while Rocky had ample resources. The chancellor held

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<sup>9</sup> Since the trial court disallowed any expenses for Stacey's support of her child from another marriage, the \$350 per month in child support she receives should not be counted on the income side either.

that Stacey's use of the \$60,000 home equity line of credit resolved the ability to pay issue against her. However, the chancellor had already deducted the \$60,000 from the Stacey's share of the marital assets, thereby making Stacey pay her attorney's fees and expenses from her own pocket. In reality, Stacey had to personally fund her attorney's fees while having very few assets left over to help her in her tenuous financial situation. This is precisely the result that the Mississippi Supreme Court condemned in *Adams v. Adams*, 591 So.2d 431, 435 (Miss. 1991) and in *Hemsley*, 639 So.2d at 915.

The trial court also held that the attorney's fees of \$45,000 charged to Stacey were excessive, just because two lawyers and a paralegal represented Stacey at trial. Judgment at 41, ¶ 117. The chancellor was clearly in error in concluding that Stacey's legal fees were excessive, when Rocky himself paid \$40,000 for his representation. Tr. 176. Therefore, the Court should reverse the trial court's denial of attorney's fees to Stacey.

**F. Error in Excluding Stacey's Expert.**

Stacey proffered James Angle, CPA, CVA, as a business valuation expert. Tr. 522-530. The trial court sustained Rocky's objection to the expert testimony of Mr. Angle. Tr. 530. The chancellor held that Mr. Angle did not have sufficient experience in valuing businesses, and the court disagreed with Mr. Angle's including, as an alternative valuation method, the income approach because it necessarily includes "goodwill". Tr. 529-530.

The test as to whether a person is qualified to testify as an expert is whether he or she has sufficient education, experience *and/or* training to assist the trier of fact. *Investor Resource Services, Inc. v. Cato*, 15 So.3d 412, 420 (Miss. 2009). In this case, the trial court's exclusion of Mr. Angle was based solely on his having not performed a prior business valuation. However, the court ignored Mr. Angle's extensive training and education in this area, including his holding two certifications from business valuation certification organizations. He is also a CPA with vast experience in business accounting and auditing. Tr. 501-522. Mr. Angle fully explained his methodology, and Plaintiff had taken his deposition and had ample opportunity to cross examine him. If Mr. Angle did not have a portfolio of prior completed business valuations, he held ample credentials to be of assistance to the court, and it was clear error to disqualify him.

The trial court also had a problem with Mr. Angle's including of an income approach as an alternative method of valuation, because the chancellor held that this approach necessarily included "goodwill", which cannot be considered in valuing a business. Tr. 302-304, 529-530. However, Mr. Angle also employed the asset value approach in his valuation. Tr. 526. While the trial court may have taken issue with the income approach, this was no reason to exclude the witness's testimony about the other approach. This Court should therefore reverse and order a new trial so that Mr. Angle may testify about the business valuation.

**G. Error in Denial of Motion for New Trial.**

A party is entitled to a new trial in a divorce action where the chancellor's rulings at the first trial are manifestly in error. *Muhammad v. Muhammad*, 622 So.2d 1239, 1250-1251 (Miss. 1993). The moving party must show that there is "basis for believing that there was . . . error in the original finding . . ." *Mayoza v. Mayoza*, 526 So.2d 547, 550 (Miss. 1988). For the reasons discussed above, Stacey has made a more than sufficient showing of manifest error in the rulings of the trial court to warrant a new trial. Therefore, the chancellor's denial of a new trial should be reversed and the case remanded for a new trial.

### CONCLUSION

Despite the enormous disparity between the income and assets of the multi-millionaire businessman husband and the housewife spouse in this case, the trial court largely denied the wife any assets or alimony, while penalizing her for using joint assets to pay her attorney's fees by reducing her share of the meager assets that were awarded her. The errors including failing to properly recognize and equitably distribute the huge increases in value of the husband's corporations and properties during the marriage; failing to apply the family use doctrine to the vacation home; failing to apply the emotion value standard to award the wife possession of the marital home; undervaluing the wife's contributions to the marriage and overvaluing her resources for purposes of equitable distribution and alimony; and failing to recognize that the court's ruling on the home equity line required the financially-challenged wife to pay her own attorney's fees

in a divorce action brought on by the husband. Because the trial court's rulings were clearly in error, this Court should reverse and remand for a new trial.

RESPECTFULLY SUBMITTED,

STACEY ANNE RHODES

BY:

  
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#### CERTIFICATE OF SERVICE

I, CLIFFORD C. WHITNEY, III, Attorney for Defendant, Stacey Anne Rhodes , do hereby certify that I have this day mailed, postage prepaid, by United States Mail, hand-delivered, or via facsimile, a true and correct copy of the above and foregoing document to the following counsel of record:

Dean Holleman, Esquire  
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This the 30<sup>th</sup> day of November, 2009.

  
CLIFFORD C. WHITNEY III