2009 CA 00679 COAT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify 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.

Melissa Weeks Wood	Appellant
Kelly Drew Wood	Appellee
Marc D. Amos	Attorney of Record for Appellant
Kristen Wood Williams	Attorney of Record for Appellant
Timothy C. Hudson	Attorney of Record for Appellee

Respectfully submitted this the 21st day of August, 2009.

MARC D. AMOS, MSB#[redacted]
KRISTEN WOOD WILLIAMS, MSB#[redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES

I. WHETHER, AS A MATTER OF LAW, THE LOWER COURT ERRED IN REWRITING THE PARTIES' PROPERTY SETTLEMENT AGREEMENT, WHICH WAS A VALID, UNAMBIGUOUS CONTRACT?

II. WHETHER THE LOWER COURT ERRED IN DETERMINING THAT THE INTENT OF THE PARTIES WAS TO TRANSFER A CERTAIN PERCENTAGE OF THE GGC SAVINGS ACCOUNT TO APPELLANT, RATHER THAN THE DOLLAR AMOUNT SPECIFIED IN THE PROPERTY SETTLEMENT AGREEMENT?

III. WHETHER THE LOWER COURT ERRED IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO FIFTY-FOUR PERCENT OF THE GGC SAVINGS ACCOUNT AS OF THE DATE OF THE ENTRY OF THE JUDGMENT OF DIVORCE?

STATEMENT OF THE CASE

A Background and Procedural History

Melissa Weeks Wood ("Melissa") and Kelly Drew Wood ("Kelly") were married in Oregon County, Missouri, on September 22, 1990, and resided in Columbus, Mississippi, at the time of their separation on April 24, 2008. Record ("R.") 7, Appellant's Record Excerpts ("REM") 00005.[1] Following their separation, Melissa and Kelly filed a Joint Bill for Irreconcilable Differences Divorce in the Chancery Court of Lowndes County, Mississippi. *Id.* Pursuant to the parties' Agreement Concerning the Custody, Support of and Visitation with Minor Children and Settlement of Property Rights Made in Contemplation of Obtaining a Divorce on the Ground of Irreconcilable Differences (the "Agreement"), Melissa and Kelly made provisions for settlement of all property rights between them. R. 11-25, REM00009-REM00024. The lower court entered its Judgment of Divorce on August 12, 2008, R. 7-10, REM00005-REM00008. The chancellor approved and ratified the Agreement, attached to the Judgment of Divorce as Exhibit "A," incorporating it therein. R.9, R 11-26; REM00007, REM00009-REM00024.

Following the entry of the Judgment of Divorce, Kelly refused to abide by certain terms of the Agreement. Therefore, Melissa filed a Motion for Contempt on January 12, 2009. R. 3-6, REM 00078-00081. Kelly responded, filing a Motion for Clarification of Section VIII. (b) of the Agreement. R. 27-29. The court held a hearing on the Motion for Contempt on March 9, 2009. R. 1. On March 25, 2009, the chancery court entered its Opinion and Final Judgment ("Order"). R. 31-33, REM00025-REM00027. On April 3, 2009, Melissa filed a Motion for New Trial, or

[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 REM00001, *et seq.*

Alternatively, to Amend Judgment. R. 34-37, REM00072-00075. The chancery court denied the requested relief by Order dated April 9, 2009. R. 38, REM00028. Aggrieved by the lower court's decision as to the distribution of the GCM savings account, Melissa filed a Notice of Appeal on April 23, 2009. R. 39.

B. The Property Settlement Agreement

Section VIII. of the Agreement provides for division of the parties' bank accounts, savings accounts and retirement plans, including the division of the GGC savings account in subsection (b), which is at the center of this appeal. The various subsections of Section VIII. provide for the division of such accounts as follows:

(a) Husband and Wife acknowledge, contract and agree that each shall have the exclusive ownership and use of any and all Bank accounts held in his or her name individually and further contract to relinquish any and all claims he or she may have in and to the other party's accounts.

(b) ***Husband and Wife acknowledge, contract and agree that Wife shall receive the sum of Two Hundred Three Thousand Two Hundred and no/100 Dollars ($203,200.00) from the GGC savings account which has an estimated balance of Three Hundred Seventy Six Thousand and no/100 ($376,000.00). Husband shall receive the sum of One Hundred Seventy Two Thousand Eight Hundred and no/100 Dollars ($172,800.00).***

(c) Husband and Wife acknowledge, contract and agree that Husband shall receive his 401k account with EKA in an estimated balance of Seventy Two Thousand Two Hundred Ten and no/100 Dollars ($72,210.00). Wife hereby relinquishes any and all claims or rights which she may have in any capacity or to any extent in said retirement plan.

(d) Husband and Wife acknowledge, contract and agree that Wife shall receive her 401k account with OCH in an estimated balance of Ten Thousand Two Hundred Sixty Seven and no/100 Dollars ($10,267.00). Husband hereby relinquishes any and all

claims or rights which he may have in any capacity or to any extent in said retirement plan.

(e) Husband and Wife acknowledge contract and agree that Wife shall receive the Gilmore Savings with an estimated balance of One Thousand Fifteen and no/100 Dollars ($1,015.00). Husband hereby relinquishes any and all claims or rights which he may have in any capacity or to any extent in said savings.

(f) Husband and Wife acknowledge, contract and agree that Husband shall receive Seven Thousand Six Hundred Seventy Five and no/100 Dollars ($7,675.00) from the stocks in the Janus Account.

(g) Husband and Wife acknowledge, contract and agree that Wife shall receive Sixty Eight Thousand Seventy One and no/100 Dollars (($68,071.00) from the stocks in the Janus Account.

(h) Husband and Wife acknowledge, contract and agree that Husband shall receive Two Thousand Three Hundred Twenty Four and no/100 Dollars ($2,324.00) from the cash in the Janus Account.

(i) Husband and Wife acknowledge contract and agree that Wife shall receive Twenty Thousand Six Hundred Thirteen and no/100 Dollars ($20,613.00) from the cash in the Janus Account.

(j) Any division of property accomplished or facilitated by any transfer or IRA or SET account funds from one spouse or ex-spouse to the other is deemed to be made pursuant to this divorce settlement and is intended to be tax-free under Section 408(d)(6) of the Internal Revenue Service.

R. 21-23, REM00019-REM00021 (emphasis added).

The Agreement also contemplated other issues related to support and property division and made clear that it was the full and final agreement between the Woods, not to be modified by extrinsic evidence:

> ***Husband and Wife agree and understand that this Agreement constitutes the full, final and absolute settlement of any and all property rights existing between the parties as a result of the marriage of the parties.***

R. 24, REM00022 (emphasis added). On May 2, 2008, both Melissa and Kelly signed the Agreement, and their signatures were acknowledged by a notary public. R. 25-26, REM00023-REM00024. Kelly confirmed during his testimony that the copy of the Agreement which appears in the record, was a copy of the Agreement he signed on May 2, 2008 in front of a notary. Trial Transcript ("Tr.") 6, REM00034.

Following the entry of the Judgment of Divorce, Melissa requested that Kelly transfer the $203,200.00 to her from the GGC account as contemplated in the Agreement and as ordered by the lower court by virtue of the Judgment of Divorce. Tr. 30-31, REM00058-REM00059. She made her first request in September and then again in November, thus giving Kelly ample time to affect the transfer of funds. *Id.* Kelly refused to transfer the GGC funds to Melissa as specified in the Agreement, and had not done so as of the date of the hearing. Tr. 31, REM00059.

C. Intent of the Parties

During the course of the hearing in chancery court and despite the clear and unambiguous terms of the Agreement, the chancellor heard testimony related to the parties' intent related to Section VIII. (b) of the Agreement. Kelly contended that the parties' intention related to the transfer pursuant to Section VIII. (b) was that Melissa receive fifty-four percent (54%) of the GGC savings account and that he receive the remaining forty-six percent (46%). Tr. 10, REM00038. However, when asked on three separate occasions to point to the terms of the Agreement which contemplated distributing particular percentages of the GGC savings account, he was unable to do so. Tr. 15, 20, 39-40; REM00043, REM00048, REM00067-REM00068. In fact, Kelly agreed that Section VIII. (b) of the Agreement states that Melissa was to receive the sum of $203,200.00 from the GGC savings account:

Q. ***All right. Paragraph B provides that the wife shall receive the sum of $203,200.00 from the [GGC] savings account which has an estimated balance of $376,000.00. Did I read that correctly?***
A. ***Uh huh.***
By the court: Yes or no.
A. ***Yes sir.***

Tr. 7, REM00035 (emphasis added).

As of the date of the entry of the Judgment of Divorce, fifty-four (54%) of the account would have been approximately $197,100.00, only $6,100.00 less than the amount specified in Section VIII. (b) of the Agreement. Tr. 37, REM00065. And, Kelly agreed that, as of August 12, 2008, Melissa's share of the account would have been ***at minimum*** $197,100.00. Tr. 39, REM00067.

Kelly only took the position that Section VIII. (b) contemplated distribution of particular percentages, rather than the dollar amounts particularly described therein, following the stock market's continued decline during the fall of 2008, as is indicated by his testimony:

> ***I told [Melissa] in October that the value had gone down and that if she wanted the total amount that was described in the Agreement language, then we're going to have to wait for it to go back up because it's not there anymore.***

Tr. 13-14, REM00041-REM00042 (emphasis added). Melissa's testimony also demonstrates that Kelly's intent only changed following the stock market decline and resulting decline in the balance of the GGC savings account:

Q. How many times did you ask Mr. Wood to go ahead and transfer that money?
A. I asked him twice.
Q. Okay. And when was the first time?
A. First part of September.
Q. ***Okay. And what was his response.***
A. ***His response was that the amount of money was no longer in there and that I would have to wait until it went back up. And I responded by saying I would like my money by the end of the year.***
Q. ***Okay. And then when was the second occasion in which you discussed the transfer of the money. Let me ask you this, I'm sorry. At that point, did he***

tell you that you could have the 54% but you couldn't have your full $203,200.00?

A. ***No, sir.***

Q. And then you contacted him in . . .

A. November.

Q. . . . November, is that correct?

A. Yes, sir.

Q. ***And what was your conversation at that point?***

A. ***I asked again when could I expect him to transfer the money. His reply was that amount is not in there and if you try to make me pay that amount, I will take you to court.***

Tr. 30-31, REM00059-REM00060 (emphasis added).

There was also testimony and documentary evidence presented regarding the amount in the GGC savings account at the time of the parties' execution of the Agreement on May 2, 2008. Prior to the execution of the Agreement in May of 2008, Kelly determined the amounts in the couple's various accounts. Tr. 27-28, REM00055-REM00056. *See also* R. 30 (P-4), REM00128. According to a spreadsheet created by Kelly, the value of the GGC savings account was $375,919.00 as of April 23, 2008. R. 30 (P-4), REM00128. And, a statement of the GGC savings account showed a balance of $376,319.64 as of May 1, 2008. R. 30 (P-2); REM00123. Thus, the parties' estimate of the total value of the account on May 2, 2008, as of the date of execution of the Agreement, was $376,000.00. R. 22, REM00020.

Following the execution of the Agreement, the GGC savings account appreciated by approximately $13,000, with an ending balance on May 31, 2008, of $389,150.89. Tr. 10, REM00038; R. 30 (P-2), REM00123. Before the court's entry of the Judgment of Divorce on August 12, 2008, the account lost money, resulting in an ending balance on July 31, 2008 of $365,106.65. R. 30 (P-3), REM00126. As of the date of the Judgment of Divorce, when Kelly was asked whether he informed the court or Melissa at any point that the account had appreciated,

earning approximately $12,000 following the parties' execution of the Agreement, he testified as follows:

> Q. Okay. Did you tell her that month, 'Melissa, by the way, the 54% that you're supposed to get just increased by seven grand'?
> A. No.
> Q. Why not?
> A. I mean, at the time, why would I?

Tr. 11, REM00039. Likewise, Kelly never informed Melissa or the chancery court of the decrease in the GGC savings account as of the time of the entry of the Judgment of Divorce. Tr. 13, REM00041. Regardless of the appreciation or depreciation in value, Kelly testified on two separate occasions that Melissa's $203,200.00 share of the GGC savings account was available in the account as of the date of the divorce, August 12, 2008. Tr. 7, 8; REM00035, REM00036. Kelly's failure to inform Melissa or the court of the appreciation or subsequent depreciation in value also indicates the parties' intention was always that Melissa receive the specific amount stated in the agreement as opposed to a particular percentage of the value of the account.

In response to Kelly's contention that the parties' intent was that Melissa receive 54% of the GGC savings account, Melissa entered into evidence the spreadsheet prepared by Kelly which estimated values of each of the couple's accounts and provided the amounts each was to receive from the respective accounts. R. 30 (P-4), REM00128. The spreadsheet details the particular ***dollar amount*** split of each of the couple's various accounts.[2] *Id.* As Melissa testified, Kelly's position

[2] The spreadsheet provides information as to the couple's various accounts and for each account, contains columns entitled "Split," Kelly," "Assets" and "Melissa." The "Split" column is to the immediate left of the "Kelly" column. The "Kelly" column contains a dollar amount Kelly was to receive from each asset, and the "Melissa" column contains a specific dollar amount that Melissa was to receive from each identified "Asset." In the "Split" column, there is a percentage documented by each dollar amount Kelly was to receive pursuant to the Agreement. For example, in the "Split" column for the GGC savings account, there is a notation of 46% by the particular dollar amount that Kelly was to receive. Likewise, in the "Split" column for the Janus account, there was a 10% notation by the particular dollar amount that Kelly was to

that the division was based on a percentage only arose when he realized that the amount in the account had drastically declined due to the declines in the stock market. Tr. 30-31, REM00058-REM00059.

Given the fact that Melissa's share of $203,200.00 of the GGC savings account was in the account on the date of the entry of the Judgment of Divorce, there was nothing preventing Kelly from transferring Melissa's share as of the date of divorce. Kelly's only argument to the contrary was based on Section VIII. (j) of the Agreement and his unsupported claim that he did not have information on Melissa's account to which he was to transfer the $203,200.00. Tr. 17, 33; REM00045, REM00061. Melissa's testimony indicated that Kelly had the information all along as all of the information on the couple's accounts remained in a filing cabinet in the marital home, where Kelly continued to live. Tr. 32, REM00060. When Melissa requested that Kelly transfer the $203,200.00 to her in September of 2008, she told Kelly that she wanted the amount transferred to her Prudential IRA account that was established in 2007 and that the account information was in the filing cabinet in the marital home. Tr. 33, REM00061. Moreover, Kelly confirmed this fact through his testimony, stating that he could have obtained the specific account number from Melissa if he had asked her and that the account information could have been in the marital home. Tr. 17, REM00045.

Over the course of the months following the divorce, all transfers, except the transfer from the GGC savings account took place, thus giving Kelly the benefit of all the property he was to

---

receive. However, in the "Melissa" column, there are no percentages attached to any asset division. All of this considered along with the fact that all accounts divided pursuant to Section VIII. of the Agreement specify a particular dollar amount each party was to receive, as opposed to a percentage, indicate that the "Split" column was simply for Kelly's individual purpose of remembering what percentage he was to receive from each account rather than the means by which assets were to be divided.

receive pursuant to the Agreement. Tr.16, REM00044. Despite Melissa's repeated requests that Kelly transfer $203, 200.00 from the GGC savings account to her, he refused. Tr. 31, REM00059. Therefore, since the date of the divorce, Kelly has maintained control over the GGC savings account and continues to have the benefit of the funds remaining in the account. Tr.24-25, REM00052-REM00053. Yet, he has done nothing to protect Melissa's $203,200.00 interest in the account. *Id.* The account has continued to lose money, but as of the date of the hearing, there was approximately $206,000.00 in the account, $203,200.00 of which is Melissa's pursuant to the valid and unambiguous terms of the Agreement between Kelly and Melissa. Tr. 8, REM00036.

D. Chancery Court Opinion and Final Judgment

Despite the clear, unambiguous language of the Agreement, the chancery court determined that the intent of the parties was that Melissa was to receive 54% of the GGC savings account and Kelly the remaining 46% of that particular account. R. 34, REM00027. Rather than relying simply on the four corners of the document, the Court seems to have relied heavily on the following extrinsic evidence: (1) the spreadsheet prepared by Kelly and entered as Exhibit P-4; (2) an award of the $203,200.00 from the GGC savings account to Melissa would produce an inequitable result as it would cause Kelly to be the sole bearer of the stock market losses; and (3) Kelly's testimony that Melissa failed to provide him with information as to an account number for transfer purposes. R.32-33, REM00025-REM00026. The court apparently failed, however, to consider the inequitable result its ruling provided to Melissa. By virtue of determining that Kelly was to receive 46% and Melissa 54% of the GGC savings account, the chancellor effectively modified the Agreement of the parties. Ultimately, the chancellor ordered Kelly to pay Melissa fifty-four (54%) of the GGC savings account as of April 1, 2009. R. 33, REM00027.

SUMMARY OF THE ARGUMENT

Valid, unambiguous contracts are not subject to modification or reformation, and property settlement agreements between divorcing parties are no different. Mississippi recognizes a three-tier analysis for contract interpretation, with the first step being that the trier of fact must consider the plain language used by the parties to the contract, with the general intent of the parties being based upon a reading of the entire agreement. Whether a contract is unambiguous is a question of law reviewed *de novo*.

In the instant case, the evidence in the record is that Kelly and Melissa Wood freely and knowingly executed the Agreement on May 2, 2008, and subsequently filed a Joint Bill for Divorce. The language of Section VIII. (b) of the Agreement clearly and unambiguously states that Melissa is to receive $203,200.00 of the total amount contained in the GGC savings account. There is no mention in that provision or in any other provision of the Agreement that the account was to be distributed based on percentages as opposed to the clearly specified dollar amounts. Moreover, the Agreement is not subject to modification simply because of the downturns in the stock market which resulted in depreciation of the account. The fact that Kelly made a "bad deal" under the Agreement by not providing for potential downturns in the market and did not specify that the parties were to receive a percentage rather than a dollar amount is no means for modification of the Agreement. Nor is there a basis for modification simply because the parties' disagree over the clear language in the Agreement. Therefore, the lower court erred as a matter of law by considering Kelly's alledged intent, rewriting the Agreement and finding that Melissa was only entitled to 54% of the GGC savings account.

Alternatively, even if Section VIII. (b) is ambiguous and therefore subject to interpretation by the lower court, both the documentary evidence and the testimony at a hearing on Melissa's Motion for Contempt indicate that the parties' intent at the time of the execution of the Agreement in May of 2008 was that she and Kelly receive specified dollar amounts from the GGC savings account as provided in the Agreement. Kelly only took the position that Melissa was to receive 54% of the GGC savings account as opposed to $203,200.00 specified in the Agreement several months following the execution of the Agreement and following entry of the Judgment of Divorce. Therefore, the lower court erred in determining that the intent of the parties at the time of the execution of the Agreement and as of the date of the Judgment of Divorce was that the GGC savings account be split based upon certain percentages.

Finally, even if this Court determines that the Agreement was ambiguous and that the lower court's determination that the intent was that Melissa receive fifty-four (54%) of the GGC savings account, Melissa was entitled to fifty-four (54%) as of the date of entry of the Judgment of Divorce. Though a chancellor has discretion in determining the date of valuation of marital property, marital property can only be accumulated during the course of the marriage and therefore only prior to the date of divorce. For this reason, Mississippi law is clear that the date of valuation of marital property cannot extend beyond the date of divorce. In addition to the date of valuation being no later than the date of divorce, any determination that the GGC savings account should not be valued as of the date of divorce provides an inequitable result to Melissa. Melissa and Kelly executed all other transfers contemplated under the Agreement. Thus, since August of 2008, Kelly has had the benefit of all property he was to receive pursuant to the Agreement in addition to retaining control over Melissa's property, in the form of $203,000.00 in the GGC savings account. Therefore, the chancellor erred

in valuing the GGC savings account as of April 1, 2009, as opposed to the date of the entry of the Judgment of Divorce.

ARGUMENT

I. THE LOWER COURT ERRED AS A MATTER OF LAW IN REWRITING THE PARTIES' PROPERTY SETTLEMENT AGREEMENT, WHICH WAS A VALID, UNAMBIGUOUS CONTRACT.

A. Interpretation of a Property Settlement Agreement.

"[A] divorce property settlement agreement is 'no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *Davis v. Davis*, 983 So. 2d 358, 362 (Miss. Ct. App. 2008) (citing *Ivison v. Ivison*, 762 So. 2d 329, 334 (Miss. 2000) (quoting *East v. East*, 493 So. 2d 927, 931-32 (Miss. 1986)). Thus, "property settlement agreements must be interpreted according to contract principles." *D'Avignon v. D'Avignon*, 945 So. 2d 401, 409 (Miss. Ct. App. 2006) (citing *In re Estate of Hodges*, 807 So. 2d 438, 445 (Miss. 2002)). As with any other contract, a determination as to whether any ambiguity exists in a property settlement agreement is a question of law and is reviewed *de novo*. *Harris v. Harris*, 988 So. 2d 376, 378 (Miss. 2008) (citing *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278, 283 (Miss. 2005)); *Crisler v. Crisler*, 963 So. 2d 1248, 1251 (Miss. Ct. App. 2007).

Mississippi has established a three-tiered analysis for interpreting contracts, and a court's first step in the analysis is to consider the "'four corners' of the agreement, i.e., examine the actual language used by the parties in the agreement." *D'Avignon*, 945 So. 2d at 409 (citing *West v. West*, 891 So. 2d 203, 210 (Miss. 2004) and *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 351 (Miss. 1990)). When looking to the "four corners" of the document, "***[t]he general rule is the intention***

of the parties must be drawn from the words of the whole contract. . . . *HeartSouth, PLLC v. Boyd*, 865 So. 2d 1095, 1105 (Miss. 2003) (citing *Jones v. Mississippi Farms Co.*, 76 So. 880, 884 (Miss. 1917)) (emphasis added). "A 'court is obligated to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous.'" *Ivison*, 762 So. 2d at 335 (citing *Merchants & Farmers Bank v. State ex rel. Moore*, 651 So. 2d 1060, 1061 (Miss. 1995)).

Furthermore, "***[t]he mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law.***" *Davis* at 362 (citing *Ivison* at 335) (emphasis added). The contract's meaning is determined based upon an objective standard "rather than taking into consideration a subjective intent or a party's belief that may conflict therewith." *Williams v. Williams*, 2007-CA-01736-COA, ¶10 (Miss. Ct. App. 2009); *see also D'Avignon* at 409 (citing *Beezley v. Beezley*, 917 So. 2d 803, 807 (Miss. Ct. App. 2006) (court need look no further than four corners where no ambiguity exists, and intent of parties should not be considered).

B. Reformation or Modification of a Valid, Unambiguous Property Settlement Agreement

When interpreting a property settlement agreement, a chancellor may not "modify the agreement based upon its own imputed intent of the parties," and doing so is error on the part of the lower court. *Ivison* at 335. There are, however, situations in which a chancery court may reform or modify a property settlement agreement incorporated into a final judgment of divorce. *Kelley v. Kelley*, 953 So. 2d 1139, 1143 (Miss. Ct. App. 2007). Modification is not justified, however, "simply because an agreement is not necessarily in one's best interest." *Williams*, 2007-CA-01736-COA, ¶9 (citing *In re Dissolution of the Marriage of De St. Germain*, 977 So. 2d 412, 420 (Miss.

Ct. App. 2008)). ***"The fact that a spouse 'might have made a bad deal does not relieve him of his duty to live up to his end of the bargain.'"*** *Williams* at ¶9 (citing *Steiner v. Steiner*, 788 So. 2d 771, 776 (Miss. 2001)) (emphasis added).

The *Ivison* Court discussed such circumstances which would justify either reformation or modification. In that case, the divorcing couple reached an agreement which awarded the wife exclusive use and possession of the marital home, with the husband agreeing to make the monthly mortgage payments as well as paying periodic alimony and child support to the wife. *Ivison* at 332. The agreement, which was made part of the final judgment of divorce, did not designate the house payments as alimony nor did it address whether the periodic alimony payments and mortgage payments were deductible by the husband or includable as income by the wife for federal and state income tax purposes. *Id.* Following the divorce, the husband deducted the monthly alimony payments on his income tax return as well as one-half of the mortgage payment. *Id.* The wife, however, did not include the payments to her as income when the husband began including the house payments as a deduction. *Id.*

This omission triggered an IRS audit of the wife, for which she eventually incurred tax liability. *Id.* The wife then sought an IRS ruling as to whether the payments were deductible to the husband and therefore should be included as income to her. *Id.* The IRS determined the payments constituted taxable alimony which should therefore be included as income on the wife's tax return. *Id.* Subsequent to learning of the tax consequences pursuant to the IRS ruling, the wife filed a motion for modification and clarification of the final divorce judgment and a motion for contempt seeking reimbursement for payments resulting from the IRS audit. *Id.* During a hearing on the matter, both parties testified that they were unaware of the tax consequences when they entered into

the property settlement agreement. *Id.* In a bench opinion, the chancellor determined that the husband and the IRS were correct that the husband had the right to deduct the mortgage payments and that they were taxable income. *Id.* at 333. Based on her findings, the chancellor modified the divorce agreement, ordering the husband to reimburse wife for any additional tax liability she incurred by failing to list the payments as income. *Id.*

The Court held that the chancellor committed error by modifying the agreement based on the lower court's "own imputed intent of the parties." *Id.* at 335. In reaching its decision, the Court considered both the legal basis for reforming a contract and modifying a contract separately, discussing the issues related to reformation initially:

> We recognize that a valid contract may be reformed in some instances where a mistake has been made. *Allison v. Allison*, 203 Miss. 15, 20, 33 So. 2d 289, 291 (1948). The general rule in this state is that reformation of a contract is justified only (1) if the mistake is a mutual one, or (2) where there is a mistake on the part of one party and fraud or inequitable conduct on the part of the other. However, "[t]he mistake that will justify a reformation must be in the drafting of the instrument, not in the making of the contract." *Johnson v. Consolidated American Life Ins. Co.*, 244 So. 2d 400, 402 (Miss. 1971).

Ivison at 335-36. *See also Kelley*, 953 So. 2d at 1143. The Court found compelling the fact that the property settlement agreement contained a clause which stated that "this is the whole Agreement between the parties" and that husband and wife had never discussed the tax consequences. *Id.* The Court discussed applicable law, as referenced *supra*, related to reformation based on fraud or mistake, and reasoned as follows:

> . . . neither side claims that the mistake is due to a scrivener's error. In fact the divorce agreement states exactly what the parties contracted to do, including how to divide the joint real property, living arrangement's Her's responsibility to pay the mortgage on the marital home, and periodic alimony. ***No language is present in the divorce agreement regarding the tax consequences of any of the provisions. Leigh and Herb each testified that they did not know the tax consequences of their divorce agreement when the contract was entered into***. From this, we can assume

> that no mistake was made in the drafting of the agreement. Therefore, the mistake is one in the making of the contract which is not a basis for reformation under Mississippi law. Accordingly, we find that the chancellor erred by reforming the parties divorce agreement.

Id. at 336 (emphasis added).

Next, the Court considered applicable law related to modification of a contract:

> ***[i]t is fundamental in contract law that courts cannot make a contract where none exists nor can they modify, add to, or subtract from the terms of a contract already in existence.*** *Wallace v. United Mississippi Bank*, 726 So. 2d 578, 584-85 (Miss. 1998). ***A court cannot "draft a contract between two parties where they have not manifested a mutual assent to be bound."*** *A. Copeland Enterprises v. Pickett & Meador, Inc.*, 422 So. 2d 752, 754 (Miss. 1982).

Id. (emphasis added). The Court determined that the chancellor erred in modifying the property settlement agreement and focused on two facts in reaching that conclusion: (1) neither party addressed the issue of tax consequences in the property settlement agreement; and (2) there was no testimony that husband and wife ever discussed the tax consequences. *Id.*

In *Kelly*, husband and wife entered into a property settlement agreement as part of their divorce based on irreconcilable differences. *Kelley*, 953 So. 2d at 1141. Pursuant to the agreement, the parties agreed to retain joint title to the marital home, the husband would be responsible for mortgage payments and wife would have exlusive use and possession of the home until the youngest of the parties' children became emancipated or until the wife remarried. *Kelley* at 1141. The agreement granted husband use, possession and title to a 1979 Corvette automobile. *Id.* The agreement also addressed matters related to child support, custody and maintenance. *Id.*

Three years following the divorce, the husband moved for modification of his child support obligations based on a reduction in his income. *Id.* In her answer, the wife asked that the court find husband in contempt and counterclaimed, seeking modification of the divorce decree. *Id.*

Specifically, she requested relief in the form of payments toward a new home based on her allegations that the marital home was no longer inhabitable. *Id.* Following the divorce, it was discovered that the foundation of the marital home was deteriorating, which led to subsequent problems rendering the home inhabitable. *Id.* She also requested that she be awarded the Corvette because it had been stored at the marital home since the divorce. *Id.* There was no evidence in the record that either party knew of the foundational problems in the marital home at the time of the drafting of the property settlement agreement. *Id.* at 1143. As to the issues related to modification of the property settlement agreement, the chancellor granted wife's request, ordering husband to repair the marital home in preparation for appraisal and sale, and awarding wife title to the Corvettte based on husband's having abandoned the vehicle. *Id.* at 1141.

This Court considered the applicable law related to reformation or modification of a property settlement agreement:

> ***when parties in a divorce proceeding have reached an agreement that a chancery court has approved, we will enforce it, absent fraud or overreaching, and we take a dim view of efforts to modify it just as we do when persons seek relief from improvident contracts.***

Id. at 1143 (emphasis added). Thus, the Court vacated the lower court's order with regard to all issues related to modification of the property settlement agreement because the trial court "was without authority to modify the parties' property settlement agreement made part of their judgment of divorce without basing the modification on an applicable ground." *Id.* at 1142. This Court also relied on the Supreme Court's reasoning in *Ivison*: because there was error in the making of the contract rather than the drafting, the chancellor was without authority to modify the terms of an unambiguous contract. *Id.* at 1143-44. Therefore, this Court reasoned, there could have been no

mistake in the actual drafting of the contract since neither party was aware of the foundational deterioration in the marital home at the time the agreement was made. *Id.* at 1143.

In a more recent case, this Court was once again faced with what amounted to a chancellor's modification of a valid, unambiguous property settlement agreement. *Williams v. Williams*, 2007-CA-01736-COA (Miss. Ct. App. 2009). In Williams, the parties entered into a property settlement agreement, which the chancery court incorporated into the final judgment of divorce. *Williams*, 2007-CA-01736-COA at ¶2. Subsequent to the entry of divorce, the wife filed a motion to clarify the judgment and/or for modification of the following provision of the property settlement agreement:

> It is the agreement and contract of the parties that the Wife is to have all survivors' benefits otherwise accorded to her by law, including, but not limited to, fifty-five percent (55%) of Husband's survivor annuity, upon his death, from Civil Service Retirement System. A QDRO will be entered allowing Wife 50% of Husband's Military Retirement based upon Husband's years of military service during this marriage. A QDRO will be entered allowing Wife 55% of Husband's Survivor Annuity upon his death from Civil Service Retirement System.

Williams at ¶3. At the time of the divorce, the husband was employed in a civil service position and was in the military reserves. *Id.* at ¶5. He retired the following year. Husband did not dispute that, pursuant to the agreement, wife was entitled to fifty percent of his military retirement and fifty-five percent of his survivor annuity from the Civil Service Retirement System. *Id.* The dispute which arose was whether wife was entitled to fifty percent of his military survivor benefit plan. *Id.*

The chancellor determined that the wife was entitled to fifty percent of husband's military survivor benefit plan. *Id.* at ¶4. On appeal, this Court considered whether the chancellor's decision was in error based upon the general principles of contract interpretation discussed *supra*. *Id.* at ¶10. In its analysis, the Court noted the following with regard to the disputed provision:

> [t]he specific provision of the agreement at issue is the clause titled "Survivor Benefit for Wife," which states that Barbara "is to have all survivors' benefits otherwise accorded to her by law including, but not limited to fifty-five percent (55%) of Husband's survivor annuity, upon his death from Civil Service Retirement. It further provides that Barbara is entitled to fifty percent of Julius military retirement based upon the number of years he served during the marriage. ***However, it does not specifically state that Barbara is entitled to receive any amount of Julius' military survivor benefits. As such, the issue becomes whether Julius military survivor benefits under the Plan were accorded to Barbara "by law."***

Id. at ¶11 (emphasis added). Based on its analysis of the agreement and applicable law related to the survivor benefits, the Court reversed the chancery court's judgment and rendered judgement in favor of Julius as follows:

> ***After reading the property settlement agreement, we find that the provision awarding survivor benefits was clear.*** We find that the chancellor was manifestly in error in interpreting the provision to award Julius's military survivor benefits to Barbara as they were not specifically mentioned in the property settlement agreement and were not accorded to her "by law." Therefore, we reverse the judgment of the chancery court and render judgment ***finding that under the clear terms of the property settlement agreement, Barbara is not entitled to receive survivor benefits from the [military survivor's benefit] Plan***.

Id. at ¶18 (emphasis added).

C. The Wood's Property Settlement Agreement Was an Unambiguous, Valid Contract and Therefore Not Subject to Reformation or Modification.

Mississippi law is clear that property settlement agreements between a divorcing couple are no different than any other contract, and as such, should be interpreted based on applicable contract law. Therefore, the three-tier approach to interpreting contracts applies to the Agreement executed by Kelly and Melissa in the instant case.

The first step of contract interpretation is to look to the four corners of the document, with the court examining the actual language of the contract and considering the intent of the parties based upon the document as a whole. Here, the language of the disputed section of the Agreement is clear

and unambiguous, stating the particular dollar amounts Melissa and Kelly were to receive from the GGC savings account:

> ***Husband and Wife acknowledge, contract and agree that Wife shall receive the sum of Two Hundred Three Thousand Two Hundred and no/100 Dollars ($203,200.00) from the GGC savings account which has an estimated balance of Three Hundred Seventy Six Thousand and no/100 ($376,000.00). Husband shall receive the sum of One Hundred Seventy Two Thousand Eight Hundred and no/100 Dollars ($172,800.00).***

R. 22, REM00020. VIII. (b) of the Agreement clearly stated the dollar amounts each party was to receive, making absolutely no reference to any percentage of the account. Moreover, considering the Agreement as a whole, there is nothing in the additional subsections of VIII. to indicate that Kelly and Melissa intended any of their accounts to be distributed based on a percentage. All of the subdivisions of Section VIII. of the Agreement specify particular dollar amounts both Kelly and Melissa were to receive subsequent to divorce. R. 21-23, REM00019-REM00021. Additionally, a disagreement between the parties to a contract as to the meaning of a contract provision is not a basis for a court's finding an ambiguity. Therefore, the disagreement between Kelly and Melissa (based on Kelly's assertions some ***five months following*** execution of the Agreement), does not provide a basis for the lower court's finding any ambiguity and going outside the four corners of the Agreement to determine the parties' intent. Like the property settlement agreement at issue and recently considered by this Court in *Williams*, the language of the agreement itself was plain, but the parties disagreed. This Court did not go beyond the four corners of the document to determine intent and found it error that the lower court modified the agreement. The result herein should be the same.

There is nothing in the record to indicate that either Kelly or Melissa were not competent to execute the Agreement on May 2, 2009, nor do either of the parties make such an argument. The Agreement was signed by both and notarized, and Kelly acknowledged that the copy admitted into

evidence at the hearing contained his notarized signature. R.25-26, Tr. 6; REM00023-REM00024, REM00034. Given that fact and given the unambiguous, clear language of subsection (b) of Section VIII., as well as all subsections of Section VIII. of the Agreement, there was no basis for the lower court's determination that the parties intended to divide the GGC savings account based upon percentages as opposed to the dollar amounts specifically stated in the agreement.

Cases in which this Court and the Mississippi Supreme Court have considered whether property settlement agreements can be rewritten by a chancery court provide further support for Melissa's position on appeal. In *Ivison*, the Court determined that the chancellor erred by modifying an unambiguous property settlement agreement. The Court relied on long-standing law that "courts cannot . . . modify, add to, or subtract from the terms of a contract. . . ." *Ivison* at 336. The facts of that case on which the Court relied in reaching its decision were that neither party addressed the tax consequences in the property settlement agreement, nor was there any testimony that the couple discussed the tax consequences related to the same. In the instant case, there is no provision in Section VIII. of the Agreement, or in any other part of the Agreement for that matter, which addresses consequences of stock market fluctuations on accounts such as the GGC savings account. Given that fact, it seems that neither Kelly nor Melissa considered the possiblity of such consequences.

Further, the testimony of Kelly and Melissa is clear that their intentions at the time the Agreement was executed was that each receive a specified dollar amount from the GGC savings account. Per the testimony of both, there was no discussion of the consequences of the stock market fluctuation or a split based on percentages until such time as Kelly realized the account had greatly depreciated. The testimony by each was that the discussion related to the decrease in value of the

GGC savings account took place at some time in early November of 2008, following both the execution of the Agreement and after the entry of the Judgment of Divorce into which the court incorporated the Agreement. Tr. 13-14, 30-31; REM00041-REM00042, REM00058-REM00059.

Additionally, Kelly seems to suggest that, because there was no consideration of the potential effects of stock market fluctuations, which thus resulted in his having made a "bad deal," the lower court should modify the agreement. However, the law does not allow for modification of valid unambiguous contracts simply because one party makes a bad deal. *Williams*, 2007-CA-01736-COA, ¶9 (citing *Steiner v. Steiner*, 788 So. 2d 771, 776 (Miss. 2001)) (emphasis added). For example, in *Ivison*, the wife made a bad deal so to speak based on the couple's failing to consider tax consequences at the time of the property settlement agreement, for which the wife ultimately had to pay tax penalties. However, the court was clear that, based on the non-ambiguity of the agreement as well as the testimony in the record, the "bad deal" did not justify modification.

Similarly in *Kelley*, the wife also bore the consequences of the property settlement agreement based on foundational problems discovered in the former marital home subsequent to divorce. This Court found error with the chancellor's decision in that case as well because the chancellor effectively modified the contract between the parties without any legal basis for doing so. Seemingly, the chancellor's reason for modification in that matter was to provide financial relief to the wife, then stuck with an uninhabitable property. Therefore, in the instant case, the fact that Kelly and Melissa failed to consider the potential effects of stock market fluctuation does not justify modification of the Agreement; nor was the chancellor justified in modifying the Agreement of Kelly and Melissa simply because one party must bear the burden of the stock market losses.

Finally, there was no legal basis pursuant to which the lower court should have reformed the Agreement between Kelly and Melissa. Kelly made no argument that Melissa committed fraud. As to a mutual mistake, this issue was discussed in both *Ivison* and *Kelley*, and both Courts stated that the mistake must be in the drafting of the contract, rather than in the making of the contract. Because the Agreement was executed at a time the GGC savings account contained the funds specified in the Agreement, there was no reason for the parties to consider market fluctuations since neither party could have foretold the considerable downturns in the stock market following the divorce.

For the reasons set forth herein, the chancellor erred by rewriting the terms of the Agreement and ordering that Melissa was entitled to fifty-four percent (54%) of the GGC savings account as opposed to the specified amount of $203,200.00 clearly stated in the agreement.

II. ALTERNATIVELY, THE LOWER COURT ERRED IN DETERMINING THAT THE PARTIES' INTENT WAS TO TRANSFER A CERTAIN PERCENTAGE OF THE GGC SAVINGS ACCOUNT TO MELISSA RATHER THAN A PARTICULAR DOLLAR AMOUNT.

Alternatively, if the lower court did not err as a matter of law in modifying a valid, unambiguous contract, the lower court's decision was clearly erroneous based upon the remaining steps of the applicable analysis for contract interpretation.

As discussed *supra*, principles of contract interpretation apply to property settlement agreements entered into by divorcing parties. Thus, the three-tiered analysis for contract interpretation must be applied:

> [w]e have delineated a three-tiered process for contract interpretation. First, we look to the "four corners" of the agreement and review the actual language the parties used in their agreement. When the language of the contract is clear or unambiguous, we must effectuate the parties' intent. However, if the language of the contract is not so clear, we will, if possible, "harmonize the provisions in accord with the parties' apparent intent." Next, if the parties' intent remains uncertain, we may discretionarily

> employ canons of contract construction. Finally, we may also consider parol or extrinsic evidence if necessary.

Williams, 2007-CA-01736-COA, ¶10 (internal citations omitted) (citing *West v. West*, 891 So. 2d 203, 210-11 (Miss. 2004); *see also Davis v. Davis*, 983 So. 2d 358, 362 (Miss. Ct. App. 2008), *Crisler v. Crisler*, 963 So. 2d 1248, 1252 (Miss. Ct. App. 2007) and *D'Avignon*, 945 So. 2d at 409 (Miss. Ct. App. 2006). As to parol evidence which may be considered, "prior negotiations, agreements and conversations might be considered in determining the parties' intentions. . . ." *Crisler*, 963 So. 2d at 1252 (citing *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278 (Miss. 2005)). Contract interpretation is "not a rigid step-by-step approach. . . . a reviewing court must keep in mind that 'the primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties.'" *Crisler* at 1252 (citations omitted).

Where a property settlement agreement is at issue and parol evidence must be considered, the prior actions of the divorcing parties' may also be demonstrative in determining intent. *Id.* at 1253. Before this Court in *Crisler* was a dispute over the following provision of the parties' property settlement agreement:

> Upon sale of the Airport Road Property, consisting of 42.89 acres, Al [Mr. Crisler] shall pay Dell [Mrs. Crisler] $300,000.00 of the net proceeds of the sale as a part of her equitable distribution of the marital estate. This distribution is based upon a sales price of $1.50 per square foot, which would result in Al receiving $400,608 and Dell receiving $300,000. If the property sells for more than $1.50 per square foot, then the net proceeds of the sale in excess of $1.50 per square foot shall be divided equally between the parties. Al and Dell shall pay their pro rata share of all income taxes generated by said sale.

Id. at 1250. In June of 2001, following the judgment of divorce into which the property settlement agreement was incorporated, 6.36 acres of the Airport Road Property sold for $170,208.17. *Id.* Mr. Crisler voluntarily paid Mrs. Crisler her share of the proceeds of that sell based upon the

aforementioned provision of the property settlement agreement; and Mrs. Crisler in turn executed a partial release with respect to the 6.36 acres. *Id.* In July of 2005, Mr. Crisler sold 17.29 acres of the Airport Road Property for which he received $560,000. He then filed a petition for preliminary injunction and specific enforcement of the agreement. *Id.* at 1251. At issue was whether the agreement was ambiguous as to whether Mr. Crisler was to pay Mrs. Crisler following each partial sale or only upon sale of the entire property. *Id.* The chancery court addressed various pending motions related to the dispute at which time it granted Mrs. Crisler's motion for declaratory judgment that the provision was ambiguous as to the time for payment of the proceeds and further held that Mrs. Crisler was entitled to the her portion of the proceeds following each individual sale of the property. *Id.*

Mr. Crisler appealed the lower court's ruling. *Id.* This Court agreed that the provision was ambiguous as to the time of payment of the sales proceeds and that a reading of the entire agreement provided no clear answer as to the Crislers' intent and thus considered extrinsic evidence. *Id.* at 1253. Considering Mr. Crisler's argument that the intent was to transfer the sales proceeds only after the sale of the entire Airport Road Property as opposed to following each individual sale, the Court stated:

> . . . Mr. Crisler could postpone paying Mrs. Crisler her portion of the proceeds indefinitely by simply selling all but a fraction of the property. Mr. Crisler argues that under that set of facts Mrs. Crisler could still recover her share by bringing an action against Mr. Crisler based upon breach of contract. While this is certainly true, and the Crislers are bound by the duties of good fath and fair dealing, it does not account for the possibility the sale fo the complete 42.89 acres could be hindered not by the unscrupulous actions of Mr. Crisler, but the market itself. Under Mr. Crisler's interpretation, if he sells all but five acres, one acre, or just half an acre and is unable, through not fault of his own, to sell the remaining pieces of the property, his duty to pay Mrs. Crisler would never arise, and there would be no breach.

Id. Like the trial court, this Court also found compelling Mr. Crisler's prior actions following the sell of the first portion of the Airport Road Property. *Id.* Particularly, "the $50,000 payment [following the first partial sale] . . . clearly evinces an intent on the part of the parties that Mrs. Crisler receive payment upon the sale of the property, be it a complete or partial sale." *Id.* Therefore, the Court affirmed the chancellor's findings as to the intent of the parties. *Id.* at 1255.

Like Mr. Crisler's actions following the sell of the first partial sell of the Airport Road Property, Kelly's actions indicate that the intent of the parties was always to transfer particular dollar amounts from the accounts the couple divided at divorce. First, the Agreement itself contemplates only specified dollar amounts throughout Section VIII., which addressed division of the Wood's bank accounts. R.21-23, REM00019-REM00021. Additionally, as Kelly testified, all other transfers, including other transfers contemplated under Section VIII. of the Agreement, had taken place following the divorce and as of the date of the hearing. Tr.16, REM00044. Those transfers were based upon the specified dollar amounts detailed in the Agreement, and Kelly did not allege that any of the other accounts should be divided based upon certain percentages of the accounts rather than the specified dollar amounts. Kelly's actions related to the appreciation and subsequent depreciation of the GGC savings account following execution of the Agreement and prior to the Judgment of Divorce are also telling. Kelly testified that he did not inform Melissa or the court of any changes in the account because "why would I?" Tr. 11, REM00039. There was no reason to inform Melissa or the lower court of the fluctuations in the account between the execution of the Agreement and the entry of the Judgment of Divorce because the intent was always that Melissa and Kelly receive specified dollar amounts, which did not change based upon market fluctuations.

Finally, under Kelly's interpretation of Section VIII. (b) of the Agreement, he could simply hold off on the transfer indefinitely, waiting until there is less than $203,200.00 in the GGC savings account, thus avoiding transferring any amount at all to Melissa. Thus, like Mr. Crisler and his interpretation, Kelly's interpretation would allow him to avoid his duties pursuant to the Agreement, whether through his own unscrupulous actions or based simply on continued downturns in the stock market. Such result would clearly be inequitable to Melissa.

III. ALTERNATIVELY, THE LOWER COURT ERRED IN DETERMINING THAT MELISSA WAS NOT ENTITLED TO FIFTY-FOUR PERCENT OF THE GGC SAVINGS ACCOUNT AS OF THE DATE OF THE ENTRY OF THE JUDGMENT OF DIVORCE.

A. The Lower Court Erred in Valuing the GGC Savings Account as of April 1, 2009.

As the testimony indicated, the value of the GGC savings account was substantially less at the time of the hearing than at the time of the divorce. As of August 12, 2008, the date of the entry of the Judgment of Divorce, Melissa's fifty-four (54%) share of the total amount in the GGC savings account would have been approximately $197,100.00. Tr. 37, REM00029. Kelly agreed that, as of the date of the divorce, Melissa would have at least been entitled to $197,100.00. Tr. 39, REM00067. The lower court, however, overlooked this testimony, and more importantly, applicable law regarding date of valuation of marital property. Ultimately, the chancellor valued the GGC savings account as of April 1, 2009. R. 33, REM00027.

"'[W]hen equitably dividing marital property upon divorce, the date of valuation is necessarily within the discretion of the chancellor.'" *Fleishhacker v. Fleishhacker*, 2007-CA-01942, ¶40 (Miss. 2009) (citing *Hensarling v. Hensarling*, 824 So. 2d 583, 591 (Miss. 2002) and *MacDonald v. MacDonald*, 698 So. 2d 1079, 1086 (Miss. 1997)). However, valuation of marital property as of a date subsequent to the entry of divorce constitutes manifest error. *Heigle v. Heigle*, 771 So. 2d 341,

350 (Miss. 2000). In *Heigle*, the Supreme Court held that the chancellor erred in valuing a business, previously determined to be marital property, as of the date the matter was initially remanded to the chancery court as opposed to the date of divorce. *Heigle*, 771 So. 2d at 350. *See also Henderson v. Henderson*, 757 So. 2d 285, 293 (Miss. 2000) (husband's one-half interest in marital home should be valued at time of divorce rather than after the case had been appealed and retired). In *Heigle*, the Court reached its decision related to valuation based on the definition of marital property:

> [m]arital property is defined as "any and all property acquired or accumulated during the marriage." *Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994). "Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor." Id. Further, "non-marital property is not subject to equitable distribution." *Devore v. Devore*, 725 So. 2d 193, 196 (Miss. 1998).

Heigle at 350. The "'course of marriage' runs until the date of the divorce judgment." *McLaurin v. McLaurin*, 853 So. 2d 1279, 1286 (Miss. Ct. App. 2003).

At the hearing on Melissa's Motion for Contempt, Kelly took the position that he had yet to transfer the $203,200.00 from the GGC savings account to Melissa because she had not provided him with an account number and account information to which the money was to be transferred. However, Melissa testified that she had informed Kelly of which account to transfer the money into and had also informed him that the account number and information related to the same was in the filing cabinet at the marital home where Kelly continued to reside. Tr. 32-33, REM00060-REM00061. Even Kelly admitted that he could have obtained the specific information on the account if he had simply asked Melissa and that the account information could very possibly have been in the filing cabinet in the marital home. Tr. 17, REM00045. Thus, Kelly's excuse for failing to transfer $203,200.00 from the GGC savings account to Melissa following the divorce is unsubstantiated by the evidence.

B. The Lower Court's Determination That the Parties Intended a Transfer of a Particular Percentage of the GGC Savings Account Produced an Inequitable Result.

The chancery courts' authority to equitably divide property at divorce is based upon their "broad inherent powers of equity. . . ." *Humphries v. Humphries*, 904 So. 2d 192, 198 (Miss. Ct. App. 2005) (citing *Ferguson v. Ferguson*, 639 So. 2d 921, 927 (Miss. 1994)). "General equity principles of fairness undergrid this authority." *Humphries*, 904 So. 2d at 198 (citing Ferguson, 639 So. 2d at 927). "Fairness is the prevailing guideline in marital division." *Humphries* at 198 (citing *Ferguson* at 929).

The lower court clearly failed to adhere to this fundamental principle of property division at divorce, thus producing an inequitable result to Melissa. Specifically, the chancellor did not consider Kelly's testimony that following the divorce, all other transfers contemplated under the Agreement had taken place. Tr. 16, REM0044. Thus, Kelly had the benefit of all property he was to receive under the Agreement while he denied Melissa the same, maintaining control over the GGC savings account and doing absolutely nothing to protect Melissa's interest in the same. Tr. 24-25, REM00052-REM00053.

Based upon the foregoing, the chancellor erred in valuing the GGC savings account as of April 1, 2009, rather than August 12, 2008, the date of divorce. Moreover, based upon general principles of fairness and equity, the result is simply inequitable to Melissa. For these reasons, Melissa is entitled to, ***at minimum***, $197,100.00, which constitutes fifty-four (54%) of the GGC savings account as of the date of the entry of the Judgment of Divorce on August 12, 2008.

CONCLUSION

Based upon the foregoing, the chancery court erred in considering the intent of Kelly and Melissa Wood based on extrinsic evidence rather than the clear, unambiguous language of the couple's property settlement agreement. A reading of all provisions of Section VIII. of the Agreement indicates that the intent of the parties was always to divide the couple's accounts based on specified dollar amounts set forth therein.

Alternatively, even if it was proper for the chancellor to consider the intent of the parties and allow parol evidence related to the same, the intent of the parties as of the date of the execution of the Agreement was clear - transfers of bank accounts, including the GGC savings account was based upon specified amounts set forth in the Agreement. Kelly only decided that the division of the GGC savings account should be based on percentages once he realized that he had done nothing to protect Melissa's interest in the account and that the account ultimately lost close to $170,000.00 during downturns in the stock market.

Alternatively, even if this Court determines that the parties intended to divide the GGC savings account based upon Melissa receiving fifty-four percent (54%) of the account, Melissa is entitled to fifty-four percent (54%) as of the date of divorce. Valuing the account some nine months following divorce is clearly erroneous given applicable law related to date of valuation of marital property and also fails to consider the principles of fairness, which are the basis for chancery courts' equitable division of marital property.

Based upon the foregoing, Melissa respectfully requests that this Court enter an order reversing the chancellor's findings with regard to all issues raised herein and render its opinion based upon the same.

CERTIFICATE OF SERVICE

Undersigned attorneys of record for appellant Melissa Weeks Wood 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:

Timothy C. Hudson, Esq.
SIMS & SIMS
Post Office Box 648
Columbus, MS 39701
Attorney for Kelly Drew Wood

The Honorable Dorothy W. Colom
Chancellor, District 14
Post Office Box 708
Columbus, MS 39703
Trial Court Judge

SO CERTIFIED, this the 21st day of August, 2009.

KRISTEN WOOD WILLIAMS

CERTIFICATE OF MAILING

The undersigned, Vicki Ray, Legal Assistant for Marc D. Amos and Kristen Wood Williams, certifies that, pursuant to Rule 25(a) of the MISSISSIPPI RULES OF APPELLATE PROCEDURE, on the 21st day of August, 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:

Timothy C. Hudson, Esq.
SIMS & SIMS
Post Office Box 648
Columbus, MS 39701
Attorney for Kelly Drew Wood

The Honorable Dorothy W. Colom
Chancellor, District 14
Post Office Box 708
Columbus, MS 39703
Trial Court Judge

SO CERTIFIED, this the 21st day of August, 2009.

Vicki Ray

Vicki Ray

W:\AllClients\29420-Wood\Appellant's brief - Final Version (082109).wpd