

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUSAN KRISTINE GREGORY JENKINS

APPELLANT

VERSUS

NO. 2010-CA-00129

ROBERT WAYNE JENKINS, JR.

APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE  
SECOND JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI  
CAUSE NO. 2007-0269

THE HONORABLE FRANKLIN C. MCKENZIE, JR., CHANCELLOR, PRESIDING

**BRIEF OF APPELLANT**

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**I. CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

Susan Kristine Gregory Jenkins - Appellant

Terry L. Caves - Attorney for Appellant

Robert Wayne Jenkins, Jr. - Appellee

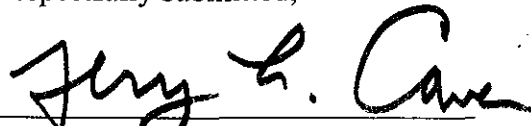
Honorable Thomas T. Buchanan - Attorney for Appellee


Honorable Leonard B. Cobb - Attorney for Appellee

Honorable Franklin C. McKenzie, Jr. - Chancellor

This the 28<sup>th</sup> day of July, 2010.

Respectfully submitted,

  
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#### **IV. STATEMENT OF ISSUES ON APPEAL**

1. Did the Chancellor commit reversible error in his division of marital assets and marital debts?
  - A. The Chancellor incorrectly held that only the appreciation of the homestead property was subject to equitable division.
  - B. The Chancellor incorrectly classified Industrial Steel Company as a non-marital asset.
  - C. The Chancellor erred in classifying the 3.8 acres located at 39 South Little River Road, Forest, Mississippi as non-marital property.
  - D. The Chancellor erred by excluding from his consideration Kris' total disability and health condition at the time of trial.
  - E. The Chancellor erred in failing to divide all of the marital assets and all of the marital debt.
2. Did the Chancellor commit reversible error in his determination of the fair market value of marital assets?
3. Did the Chancellor commit reversible error in his determination of the valuation date for the division of marital assets and marital debts?

## **V. STATEMENT OF THE CASE**

### **A. Nature of the Case.**

This case involves a divorce granted by the Court on the grounds of irreconcilable differences. The parties filed a consent to divorce on the grounds of irreconcilable differences and submitted to the Court certain issues for decision. The Chancellor granted the divorce, conducted a one day trial and divided the parties' assets.

### **B. Course of Proceedings and Disposition Below.**

Robert Wayne Jenkins, Jr. ("Bobby") filed a Complaint for Divorce and Related Relief on April 11, 2007 alleging irreconcilable differences as the sole ground for divorce. (CP 8)<sup>1</sup> An Agreed Temporary Order was entered by the Court on June 11, 2007. (CP 15) After some discovery was conducted, a trial of the case occurred on June 11, 2009. On September 24, 2009, the Chancellor entered his Opinion of the Court followed by a Judgment of Divorce and Related Relief entered on November 3, 2009. (CP 61 – 66)

On November 10, 2009, Susan Kristine Gregory Jenkins ("Kris") filed her Motion for Reconsideration, New Trial, to Alter and Amend Judgment, and to Amend Findings of Fact and Conclusions of Law and filed her Amended Motion on November 13, 2009<sup>2</sup>. (CP 76 – 85, 86 - 96)

The Chancellor conducted a hearing on Kris' post trial motion on December 10, 2009. (T 149 – 173) On January 14, 2010, the Chancellor entered his Opinion denying all relief requested in her post trial motions. (CP 112 – 116)

<sup>1</sup>Reference to "CP" are references to the Clerk's Papers; Reference to "T" are references to the pages within the transcribed testimony prepared by the Court Reporter; Reference to "Ex." Are references to Exhibits within the record; References to "R.E." are references to the Record Excerpts.

<sup>2</sup>The undersigned, Terry L. Caves, did not represent Kris during the trial.



Kris timely filed her Notice of Appeal to this Court on January 21, 2010. (CP 118 – 119)

### **C. Statement of Facts.**

Kris and Bobby Jenkins were married on November 18, 1999. The parties separated on April 5, 2007 with Bobby filing for divorce on the grounds of irreconcilable differences on April 11, 2007.

At the time of trial, Kris was 52 years of age and was unemployed due to a total shoulder replacement which resulted in her total disability. Kris was previously employed as a nurse at Wesley Medical Center and due to her fall and subsequent shoulder surgery, was unable to perform her duties as a nurse. (T 106) Her doctor recommended that she apply for social security disability. At the time of trial she was unemployed and was without any income whatsoever. (T 105 – 109) Kris had significant health problems beginning in 1994. She had low back surgery to repair a ruptured disc. (T 99) She suffered from chronic back pain prior to and subsequent to her marriage. (T 100) She also ruptured a cervical disc sometime in 2004. She has received no cervical intervention for repair of the cervical disc rupture. Kris has suffered from insomnia, severe depression, has been treated by a psychiatrist, and a number of doctors at Wesley Medical, Vicksburg Mental Hospital, and Pine Grove Recovery Center. (T 102 – 105) Due to her chronic and severe pain and depression, Kris became dependent on pain killers resulting in addiction for which she underwent treatment. (T 99 – 105, 139)

Bobby was awarded exclusive use and possession of the parties' home on a temporary basis beginning on June 11, 2007. (CP 15) Kris, at the time of the Temporary Order, was unemployed, had no home, and was not allowed any of the furniture in the parties' home. She was forced to sleep in her car for eight days. Kris received no income or support from Bobby for the two year period from June 11, 2007 through the trial of the case on June 11, 2009. The only source of support that she had was her withdrawals from her 401(K) retirement account that was

generated through her employment at Laurel Bone & Joint Clinic prior to the parties' separation. (T 113, 131 – 132) Bobby admitted that she received nothing out of the house and that he provided her no support and this was so found by the Court. (T 132) In other words, at the time of the separation on April 5, 2007, Kris only had her clothes, a 401(K) account and use of a vehicle.

During the marriage, Kris used her salary at Laurel Bone & Joint Clinic to pay all of the utilities, groceries and household expenses. The parties had a joint account and Kris deposited her paycheck in this joint account to pay these monthly expenses. (T 61 – 62) She was responsible for maintaining the house and the yard. (T 62 – 65) At the time of their marriage, Bobby's daughter lived with him. Kris helped take care of his daughter for three years. (T 63) Kris cooked, washed clothes, ironed, and provided a majority of all of the homemaker services. (T 27, 38, 60 – 65, 120 – 123, 127 – 128)

Kris' income while employed at Laurel Bone and Joint Clinic was \$1,400.00 every two weeks. Sometime in 2004, Bobby recommended that Kris contribute to her 401(K) account at the Laurel Bone & Joint Clinic. Kris began contributing \$1,000.00 per month to her 401(K) account and Bobby would reimburse that \$1,000.00 by depositing said sum in the joint checking account. Bobby and Kris received a tax benefit as a result of this contribution. (T 110 – 112, 121 – 122)

Bobby was 52 years of age at the time of the divorce trial. (T 1) He was self-employed and had a net worth of \$2,140,752.00 (total assets \$2,543,687.00 minus total liabilities of \$402,935.00). (Ex. 3) This net worth was testified to by Bobby himself based upon his values. Bobby was in good health and worked fulltime. His income pursuant to his federal U. S. Tax Return for 2007 was \$503,410.00. (Ex. 4) His 2006 U. S. Federal Tax Return revealed a total income of \$523,237.00. Bobby was the sole owner of Mid Mississippi, a millwright company

that works on grain elevators and feed mills. (T 2, 12) He started this company in 1986. Bobby is a 49% owner in Industrial Steel Company, a steel manufacturing plant that was started in 1993. He served on the Board of Directors for Industrial Steel from 1993 to 2002 without compensation. He worked actively in the business for seven months in 2002 and was compensated for his work. (T 15)

Kris and Bobby dated for 3 ½ years prior to their marriage. Bobby built a very nice home on 175 acres of real property located at 593 Lake Como Road in Laurel, Mississippi. The land was purchased in 1993 and the house was built in 1996. He owed no debt on the house and 175 acres of property. Upon the marriage of the parties, Kris moved in Bobby's home and lived there continuously until Bobby filed for divorce on April 11, 2007. (T 3 – 4) During the marriage, Kris and Bobby constructed a fence on the homestead and constructed outbuildings including a barn. (T 4) Bobby also owned 3.8 acres of real property that he purchased in 1988 that was paid for before the marriage. This land housed the office and shop building for Mid Mississippi in Forest, Mississippi. (T 4 -5) Bobby admitted that during the marriage he added improvements to this building in the sum of \$35,000.00. (T 5)

After the separation but before the Temporary Order was entered on June 11, 2007, Bobby also purchased 240 acres of land adjoining the homestead property. He paid \$665,000.00 for this property by paying cash in the sum of \$268,613.84 and borrowing the remainder. (T 5 – 10)

The Chancellor relied on Exhibit 3 in arriving at his value of marital and non-marital assets. Based on the Court's award, the parties received the following marital property:

**Marital Property Awarded to Bobby**

Home located at 593 Lake Como Road	\$1,050,000.00
3.8 acres of land	\$35,000.00
240 acres adjoining homestead	\$527,500.00
Lincoln Benefit Life	\$1,282.00
Checking Account	\$3,105.00
Savings Account	\$947.00
Cattle/Horses	\$2,500.00
Farm Equipment	\$34,620.00
Household Furnishings	<u>\$90,000.00</u>

**TOTAL MARITAL ASSETS AWARDED TO BOBBY \$1,744,954.00**

**LESS MARITAL DEBT \$398,278.99**

**NET MARITAL AWARD TO BOBBY \$1,346,675.10**

Bobby was also awarded his interest in Mid Mississippi, Industrial Steel, and Raymond Jones account totaling \$750,792.27. The Chancellor found these assets were non-marital.

**Marital Property Awarded to Kris**

Retirement account accrued during the marriage <sup>3</sup>	\$105,835.00
Lump sum award payable \$1,000.00 per month for five years <sup>4</sup>	\$50,000.00
Horses <sup>5</sup>	\$2,500.00
Household furnishings <sup>6</sup>	<u>\$14,942.00</u>

**TOTAL ASSETS AWARDED TO KRIS \$173,277.00**

**LESS MARITAL DEBT \$14,560.57**

**NET MARITAL AWARD TO KRIS \$158,716.43**

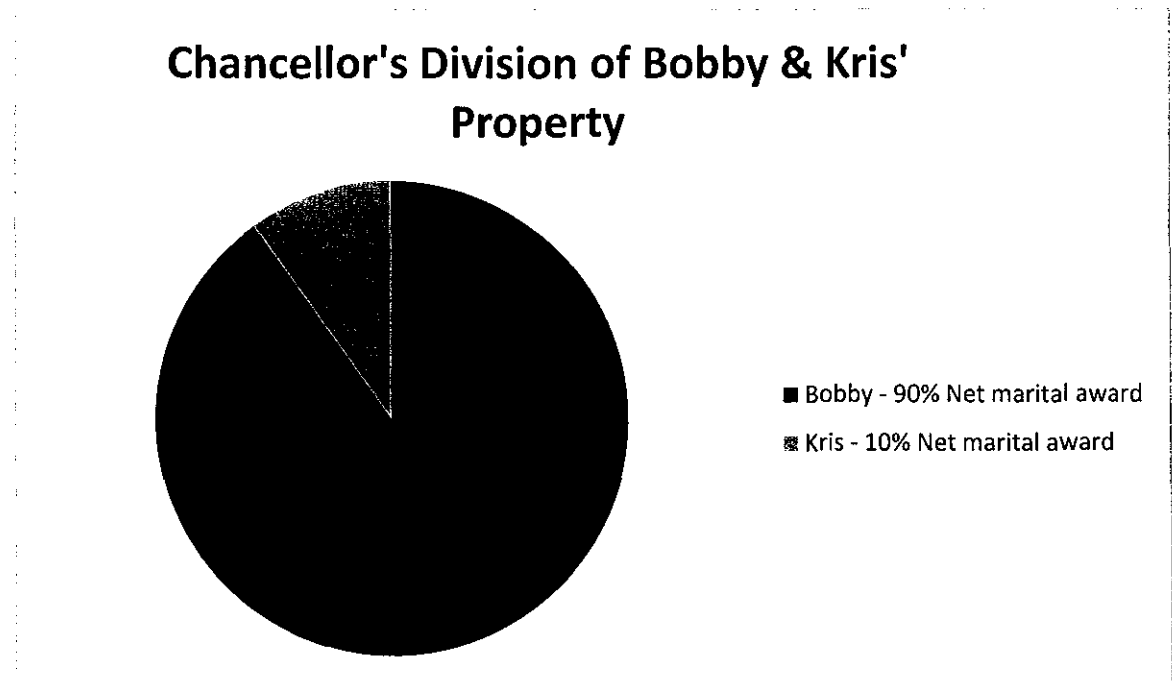
<sup>3</sup>This is a 401(K) and substantial taxes and/or penalties must be paid if withdrawn.

<sup>4</sup>Although the total was used in this calculation, the discounted present value would be less.

<sup>5</sup>This figure is estimated based on the trial testimony. This is an estimate because Bobby sold the cattle prior to trial.

<sup>6</sup>This figure is an estimate.

Bobby was awarded 89.5% of the marital assets. Kris was awarded 10.5 % of the marital assets.



In addition to Bobby being awarded 90% of all marital assets, Bobby was also awarded all of the marital appreciation of Industrial Steel Company during the marriage of \$176,103.00 with a total value of \$490,465.00 as of June 11, 2007<sup>7</sup>. Bobby was also awarded his 100% ownership in Mid Mississippi valued at \$12,280.68. Bobby was awarded his Raymond Jones account valued at \$248,046.59. The Chancellor also did not adjudicate ownership or award the 2002 Chevrolet Suburban incorrectly valued at \$17,000.00. The Chancellor also did not adjudicate or divide the marital debt listed on Exhibit 3. The values used

<sup>7</sup>Industrial Steel's value as of December 31, 2008 was \$3,454,045.00 pursuant to the financial statement produced by its Certified Public Accountant. (CP 97 – 102). Bobby's ownership interest of 49% is valued at \$1,692,482.40.

by Bobby to create Exhibit 3 were based solely on book values. (T 12 – 14) Although Kris was only awarded 10% of the marital assets, Bobby readily admitted that Kris brought in 25% of the income during the marriage and that he brought in 75% of the income during the marriage. (T 24 – 25) Bobby also admitted that the value of the home was a guestimate and was not supported by any competent appraisals or values. The value of the timber was not included in the value because he did not know how much the timber located on the homestead property was worth. (T 38 – 39, 56) He did admit that the timber had never been harvested for sale. He purchased the property in 1993 which resulted in 14 years of additional growth and value. (T 38 – 39) Bobby also testified that the value of the house did not appreciate at all from 1999 to 2007. (T 41) He only attributed the increase in the equity to the outbuildings and the fencing that were built during the marriage. The increase in the value of the timber alone belies his testimony. (T 41 – 42)

## **VI. Summary of the Argument**

The Chancellor erred in only awarding the wife 10% of the marital assets derived from an eight year marriage. The Chancellor incorrectly found that only the appreciated value of a marital asset was subject to equitable division. The appreciated value of the homestead was only taken into consideration by the Court in dividing this million dollar marital asset. Also, the timber value was not determined and erroneously excluded from the valuation. The Court mistakenly found that Bobby's appreciated ownership interest in Industrial Steel Company was not a marital asset although the appreciation of his 49% interest in this company occurred during the parties' marriage. The Chancellor should have considered the increase in the value of this asset where its increase was generated during the marriage. *Stewart v. Stewart*, 864 So. 2d 934 (Miss. 2003)

Although Bobby classified a parcel of land consisting of 3.8 acres as marital and admitted that this asset increased in value by \$35,000.00 during the marriage based on improvements made during the marriage, the Court classified this property as non-marital. The Court mistakenly characterized this property as non-marital. (Ex. 3)

In considering an equitable division of marital assets, the Court erred in excluding from his consideration Kris' total disability and health condition at the time of trial. The Court found that her "disability causing event" occurred after the Temporary Order was entered and therefore, should not be considered in his division of the marital assets.

The Chancellor erred in not dividing or awarding the 2002 Chevrolet Suburban vehicle and not addressing the Visa, Chase, and Central Sunbelt debts that were incurred during the marriage. The Chancellor should have divided all marital property and all marital debt.

The Chancellor erred by not ordering appraisals so that he would have a fair market value of the marital assets acquired during the marriage. The only values that were used were based solely upon the uncooperated testimony of Bobby Jenkins.

The Court erred in determining that the valuation date for his equitable division should be the date of the Temporary Order on June 11, 2007. The trial of the case was conducted two years later and therefore, the Court did not take into consideration the passive appreciation of marital assets or the true value of any of the marital assets. In addition, the substantial value of timber located on the marital property was not included in the valuation nor was the appreciation of the timber included in the Court's consideration. Therefore, the Court should have adopted a valuation date closer to the date of the trial.

## **VII. Legal Argument**

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

When issues presented on appeal are questions of law, this Court will review those issues on a *de novo* basis. *Grant v. Maness*, 786 So.2d 401, 403 (Miss. 2001) Further, this Court will not hesitate to reverse should it find that a Chancery Court was manifestly wrong, abused its discretion, or applied an erroneous legal standard. *Brown v. Brown*, 817 So.2d 588, ¶ 6 (Miss. Ct. App. 2002) The issues presented on this appeal are questions of law and should be considered *de novo* by the Court. A Chancellor's conclusions of law are reviewed *de novo*. *Lowrey v. Lowrey*, 25 So.3d 274 (Miss. 2009)

### **B. Did the Chancellor commit reversible error in his division of marital assets and marital debts?**

According to this Court's ruling in *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994), the first step before division of the assets is for the Chancellor to characterize the parties' assets as marital or non-marital. The Chancellor must also determine the ending date for the accumulation of marital property. Our Supreme Court has held that the entry of a temporary order ends marital property accumulation as a matter of law. *Godwin v. Godwin*, 758 So.2d 384, 386 (Miss. 1999) Next, the Chancellor must determine a valuation date for purposes of valuing all marital assets. Our Court has stated that "when equitably dividing marital property upon a divorce, the date of valuation is necessarily within the discretion of the Chancellor." *Holdeman v. Holdeman*, 34 So.3d 650 (Miss. Ct. App. 2010), *Heigle v. Heigle*, 771 So.2d 341 (Miss. 2000)

After determining a valuation date, the Chancellor is required to value all of the marital assets and determine the amount of marital debt. *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) The marital assets of the parties are measured by their fair market value. *Ferguson v.*



*Ferguson*, 639 So.2d 921 (Miss. 1994), *Drumright v. Drumright*, 812 So.2d 1021 (Miss. Ct. App. 2001)

In determining the classification of the assets as marital or non-marital, in *Hemsley v. Hemsley*, 639 So.2d 909, 914-915 (Miss. 1994) the Supreme Court held:

“We define marital property for the purpose of divorce being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the Chancellor. We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise, are of equal value.”

However, separate property can be converted to marital property by commingling or family use. *Stewart v. Stewart*, 864 So.2d 934, 938-939 (Miss. 2003) The law requires consideration of the following factors, or a finding of inapplicability by the Chancellor:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
  - a. Direct or indirect economic contribution to the acquisition of the property;
  - b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage;
  - c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
3. The market value and the emotional value of the assets subject to distribution.
4. The value of the assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or *inter vivos* gift by or to an individual spouse;

5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distributions;
6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
8. Any other factor which in equity should be considered. *Ferguson*, 639 So.2d at 928.

All can agree that a homemaker's contribution is presumed to be equal to that of a wage earner. *Lowrey v. Lowrey*, 25 So.3d 274 (Miss. 2009), see *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss. 1994) ("We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise are of equal value.")

An equitable division of property does not necessarily mean an equal division of property. *Chamblee v. Chamblee*, 637 So.2d 850, 863-64 (Miss. 1994) Fairness is a prevailing guideline in marital division. The polestar consideration in equitable division is fairness. *McDuffie v. McDuffie*, 21 So.3d 685 (Miss. Ct. App. 2009)

With these rules in mind, the Chancellor awarded Bobby 89.8% of the marital estate and awarded Kris 10.2% of the marital estate. The manifest unfairness in the division of the marital assets and marital debts can only be understood by looking at the Chancellor's conclusions of law as will be outlined below.

**1. The Chancellor incorrectly held that only the appreciation of the homestead property was subject to equitable division.**

Exhibit 3 was a list of assets and liabilities prepared by Bobby. Bobby purchased 175 acres of land in 1993 and built his house on their land in 1996. Upon the marriage of the parties,

Kris moved in Bobby's home located at 593 Lake Como Road and lived there continuously until Bobby filed for divorce on April 11, 2007. (T 3 – 4) The Court correctly classified this asset as marital based upon the family use doctrine. However, the Court believed and so found that only the appreciation of this separate asset converted to a marital asset was subject to equitable division. The Court accepted Bobby's testimony without any underlining basis that the home and 175 acres of land did not appreciate in value from November, 1999 through June 11, 2007. Bobby admitted that the value of the timber was not included in this valuation. The Chancellor found the following:

“Bobby estimates that during the marriage the value of the home and land he owned prior to the marriage increased in value by \$100,000.00 during the marriage due to his expenditure of funds he had earned prior to his marriage to Kris.” (CP 64)

In his Order overruling Kris' Motion to Amend Findings of Fact and Conclusion of Law, the Court again found that only the appreciation of the marital residence in the sum of \$100,000.00 was subject to division. (CP 112)

Once the Court determines that a non-marital asset has been converted to a marital asset by family use, the entire marital asset is subject to equitable division and not just the appreciated value of the asset during the marriage.

The marital residence valued at \$1,050,000.00 was a substantial marital asset. Although the Court, in some instances, can rely on the parties' opinion as to the value, Bobby's admitted guestimate of the value of this marital asset was not supported by any substantial evidence. Bobby's own testimony reveals that he did not know the value of the timber, therefore, the timber was not included in the valuation. (T 38 – 41) Bobby gave no indication that he had any experience appraising real estate. He claims the value of the house did not appreciate at all from 1999 through 2007. (T 41) Because Bobby did not know the value of the timber and gave no

specific reason how he arrived at the value of a million dollar asset, his testimony was too speculative to use in establishing the fair market value of the homestead property.

In regard to the homestead property, the Court used June 11, 2007 as the valuation date. The trial was conducted on June 11, 2009. Two years of appreciation of the marital home was not considered by the Court. The Court did not have the benefit of knowing the passive appreciated value of the marital asset after the Temporary Order was entered on June 11, 2007.

In *Fleishhacker v. Fleishhacker*, 2009 W L 1856732 (decided June 30, 2009), the Court of Appeals held that passive appreciation of a marital asset after the date of the Temporary Order is subject to equitable division. The Chancellor found that the house and 175 acres of land located at 593 Lake Como Road, Laurel, Mississippi was a marital asset because of the family use doctrine. Any appreciation of that asset from the date of the Temporary Order to the date of the trial would be marital property. The evidence presented to the Court by the parties only established the appreciation from November, 1999 to June 11, 2007. Passive appreciation caused by other forces will take the classification of the underlining asset. *Fleishhacker v. Fleishhacker*, 2009 W L 1856732 (decided June 30, 2009) Therefore, the Court should have considered in its equitable division the entire value of the marital home and the appreciation of the home from June 11, 2007 through June 11, 2009.

As further evidence that the Court did not believe he could divide a converted marital asset, the Court stated the following:

**“The Court:** Well, I think the view taken by the Supreme Court on property owned by a spouse prior to the marriage is that, if it was used for family purposes, it can be converted to marital property. However, typically I think the cases look at the enhanced value during the marriage by contribution by either spouse. I don’t think the cases contemplate that when someone owns a piece of property, marriage, he and/or she and her spouse live there, that the full value of that property becomes marital in character. I think under the *Ferguson* case, that certainly the Court could take into consideration

**improvements made during the marriage. But insofar as capturing the entirety, I don't think that's what the cases contemplate." (T 116 – 117)**

The Court took the position that he could not equitably divide the homestead property but only the appreciated value of the marital residence because it was a converted asset.

Unfortunately, if this is the law, this same logic could be applied to all types of converted marital property. According to *Brame v. Brame*, 796 So. 2d 970 (Miss. 2001) and *King v. King*, 760 So. 2d 830, 836 (Miss. Ct. App. 2000), the Court has authority to make an equitable division of the marital residence when the marital residence has been converted to marital property by family use.

Also see *Bowen v. Bowen*, 982 So. 2d 385, 395 (Miss. 2008) (family use converted pre-marital marina to marital asset because the couple lived at marina) and *Fogarty v. Fogarty*, 922 So. 2d 836, 840 (Miss. Ct. App. 2006) (husband's separate property home classified as marital based on family use and commingling; couple lived in home and added carport).

Respectfully, the Chancellor should have ordered an appraisal of the homestead property and considered the entire value in order to effectuate a fair division.

This Court should remand for a reconsideration and equitable division of all marital assets.

**2. The Chancellor incorrectly classified Industrial Steel Company as a non-marital asset.**

Industrial Steel Company was a close corporation in which Bobby owned a 49% interest. (T 14 – 15) Bobby served on the Board of Directors from 1993 to 2002 without compensation. He participated in the management of the company for three years during the marriage. He actively worked in the business for seven months in 2002. Because Bobby worked in the business as both Director on the Board and actively in the business for seven months, any appreciation of his interest in Industrial Steel Company would be a marital asset.

Although Bobby again placed his value on Industrial Steel without any reasonable basis to support the opinion, he valued his interest in the business as of June 11, 2007 at \$490,465.00. He attributed an increase in the value of this business during the marriage at \$176,103.00 which the Court did not take into consideration.

However, a report from the company's accounting firm reflects that Bobby's interest was valued at \$1,692,482.40 as of December 31, 2008. (CP 99 – 100) This substantial difference in the value of Industrial Steel creates suspicion surrounding Bobby's uncorroborated value. (CP 97 – 102) In *Faerber v. Faerber*, 13 So.3d 853 (Miss. Ct. App. 2009), this Court dealt with the issue of the classification and equitable division of a husband's business. In *Faerber*, this Court reversed the Chancellor because the Chancellor classified the husband's business as a separate property and failed to take into consideration the wife's homemaker services and failed to take into consideration the increase in value of the business during the marriage.

In *Hankins v. Hankins*, 866 So.2d 508 (Miss. 2004), this Court also dealt with the issue of classification and equitable division of a husband's business. Although this Court found that the husband's chicken farm was separate property, the Court found that the increase in value should have been included in the calculation of the marital estate including the wife's homemaker contribution during the marriage. In both of those cases, the Court found that the wife was entitled to an equitable distribution of any increase in the value of the business during the marriage. Kris performed homemaker services and earned 25% of the parties' income during the marriage. (T 24 – 25, 27, 38, 60 – 65, 120 – 123, 127 – 128)

The Court found that the value of Industrial Steel did not matter because he found it to be a non-marital asset. (T 157) This Court should remand for the Chancellor to include the appreciated value of Industrial Steel in his equitable division of marital assets.

In addition, the Chancellor valued Mid Mississippi at \$12,280.68 based solely on Bobby's estimate of the book value of this corporation. No explanation was given as to the decrease in the value of Mid Mississippi of approximately \$155,853.27.

Bobby testified that the value placed on Mid Mississippi was the book value. (T 12 – 14) No explanation was given as to the decrease in the value of Mid Mississippi for approximately \$155,853.27.

**3. The Chancellor erred in classifying the 3.8 acres located at 39 South Little River Road, Forest, Mississippi as non-marital property.**

The Chancellor found that the building and 3.8 acres of land purchased by Bobby before the marriage was non-marital property. However, Bobby's undisputed testimony revealed that the property was improved in the sum of \$35,000.00 during the marriage. (T 4 – 5) (Ex. 3) Bobby also listed this property as a marital asset as he did the homestead property. (Ex. 3) Although the value of this property was improved by \$35,000.00 during the marriage, the Court found that the appreciation of this property was non-marital. (CP 64 – 65) Interestingly, no fair market value was placed upon this asset as of the date of the marriage and Bobby was receiving \$1,500.00 a month rental income from this property.

The Chancellor should have considered the increase in the value of this non-marital asset where its increase was generated during the marriage. *Stewart v. Stewart*, 864 So.2d 934 (Miss. 2003) Kris' economic contributions and homemaker services should have been taken into consideration in the improvement of this asset.

Because the Court failed to properly classify those assets listed above as marital or failed to classify and include the appreciation of the assets as marital, the Court's division of the assets was inequitable and manifestly erroneous.

From the date of the marriage in 1999 through 2006, Kris worked fulltime as a nurse. In addition to her employment, Kris also performed a majority of the duties as a homemaker. (T 24 – 25, 27, 38, 60 – 65, 120 – 123, 127 – 128) Bobby admitted that Kris brought in 25% of the income during the marriage. (T 24 – 25) Kris worked in the yard, ironed clothes, cooked, washed dishes, and performed all the services of a homemaker to Bobby's benefit. (T 62 – 65) Kris even helped care for Bobby's minor daughter for three years during the marriage. (T 63)

Kris made both economic and noneconomic contributions to the marriage. Her contributions were substantial and certainly justify an award of more than 10% of the parties' marital assets. This is particularly so in light of the fact that no alimony was requested by Kris. When Bobby separated from Kris, she was left without a home, no money other than her 401(K) account, and a vehicle. She was unemployed, totally disabled, and was forced to live in her car for eight days. (T 131)

The Court should reverse and remand this case for the Court to order appraisals and to reconsider his division of marital assets.

**4. The Chancellor erred by excluding from his consideration Kris' total disability and health condition at the time of trial.**

The evidence is undisputed that Kris sustained a fall and shoulder injury after the parties' separation. (T 106) Kris was determined to be totally disabled.

The Chancellor found "However her injury occurred after the separation of the parties and the Court finds that it should not be considered as part of the Ferguson factors." (CP 66)

This Court specifically designated that the needs of the parties for financial security with due regard to the combination of assets, income, and earning capacity and any other factor which in equity should be taken into consideration by Chancellor's in making a fair division of marital assets. *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994)



Kris has been unable to find any authority that supports a Chancellor's finding that because Kris' injury occurred after the separation and before the divorce, that her injury is somehow "a non-marital event" which should not be taken into consideration in a fair division of these parties' assets. To the contrary, this Court has determined the needs of the parties for financial security should be taken into consideration. Because Kris did not request any alimony, the division of marital assets was critical to her financial security post divorce. Respectfully, the Chancellor made a mistake in failing to take Kris' health condition and total disability into account in arriving at an equitable division of the marital assets.

In *Larue v. Larue*, 969 So. 2d 99 (Miss. Ct. App. 2007) and *Selman v. Selman*, 722 So.2d 547, 552 (Miss. 1998), the Supreme Court approved of the Chancellor taking into consideration the poor health condition of the parties when making his equitable division of marital assets. Therefore, the Chancellor should have taken into consideration Kris' total disability and her need for security in light of the fact that she would not be awarded any alimony.

**5. The Chancellor erred in failing to divide all of the marital assets and all of the marital debt.**

The Court failed to divide or award the 2002 Chevrolet Suburban vehicle valued at \$17,000.00. (Ex. 3) The Chancellor also failed to address the Visa, Chase, and Central Sunbelt debts which were incorrectly designated as non-marital debts on the document prepared by Bobby. (Ex. 3)

The Central Sunbelt loan was used to purchase a four wheeler during the marriage.  
(113)

The Chancellor should have addressed the ownership of the Suburban and addressed the debts incurred during the marriage. (Ex. 3)

**C. Did the Chancellor commit reversible error in his determination of the fair market value of assets?**

As stated in *Ferguson*, “property division should be based upon a determination of fair market value of the assets and these valuations should be the initial step before determining division. *Ferguson*, 639 So.2d at 929. According to *Ferguson*, the marital estate must have the value placed upon it before the Chancellor can determine what is an equitable distribution.

In *Mace v. Mace*, 818 So.2d 1130 (Miss. 2002) the Supreme Court in a case of first impression, held that a spouse may be awarded an equitable interest in a professional practice. In *Mace*, the husband placed a value on his professional practice without any basis in the record for the valuation. The Court citing *Ferguson* stated “property division should be based upon a determination of fair market value of the assets, and these valuations should be the initial step before determining division. Therefore, expert testimony may be essential to establish valuation sufficient to equitably divide property, particularly when the assets are as diverse as those issued in the instant case.” *Ferguson*, 639 So.2d at 929. The Court reversed the Chancellor in *Mace* because the valuation was not based on credible evidence.

In this case, two of the marital assets consisted of close corporations. Bobby owned 100% interest in Mid Mississippi and the 49% interest in Industrial Steel Company. Bobby’s valuation of Mid Mississippi was based upon book value. Bobby had no basis for the valuation of Industrial Steel Company. The marital home was valued by Bobby without any explanation of how he arrived at the value on November, 1999, the date of the marriage or on June 11, 2007. What we do know is that Bobby did not take into consideration the value of the timber which appreciated from November, 1999 until June 11, 2007. (T 38 – 39) These three assets alone based on the values that Bobby gave total \$1,552,745.60. In fact, Bobby’s attorney recognized the need for an expert during the trial. (T 81)

Kris had no assets to hire a business valuation expert or to pay for appraisals. On the other hand, Bobby had substantial assets and income to pay for a court ordered business valuation expert and real estate appraisers. Bobby's income averaged \$500,000.00 per year. In *Mace*, the Court noted that the Chancery Court had authority to appoint an independent expert if absolutely necessary after the parties are unable to show good cause as to why such experts should not be appointed. Miss. R. Evid. 706, *Mace v. Mace*, 818 So.2d 1130 at 1134.

It is undisputed in this case that Exhibit 3 with regard to the house, 3.8 acres, Mid Mississippi, Industrial Steel, cattle, horses, farm equipment, and household furniture were not based upon fair market values. (Ex. 3)

Because the Chancellor had at his disposal the authority to order appraisals and because Bobby had the resources to pay for these appraisers, the Court should have appointed an expert to opine as to the fair market value of these assets. This Court should reverse and remand the case to the Chancellor to appoint an expert to appraise the assets so the Court can make a fair division of the marital estate.

**D. Did the Chancellor commit reversible error in his determination of the valuation date for the division of marital assets and marital debts?**

The parties separated on April 5, 2007 and this Court entered a Temporary Order on June 11, 2007. Two years later to the date, the trial was conducted on June 11, 2009. The Chancellor was under the mistaken belief that the Temporary Order date had to be the valuation date. The Chancellor said:

**"I thought the rule was that once a Temporary Order is entered that accumulation of marital assets ceases. That's the cut off date for valuation."**

In *Hensarling v. Hensarling*, 824 So. 2d 583, 591 (Miss. 2002) quoting *McDonald v. McDonald*, 698 So. 2d 1079, 1986 (Miss. 1997), the Court held that "when equitably dividing marital property, upon divorce, the date of valuation is necessarily within the discretion of the

Chancellor.” Although it is clear that the valuation date is within the Chancellor’s discretion, the Court should always keep his focus on achieving a fair division of marital assets and marital debts. Kris would show that it was patently unfair for the Court to use a valuation date that was two years old particularly in light of evidence that Bobby’s ownership interest in Industrial Steel as of December 31, 2008 was actually \$1,692,482.40. (CP 97 – 102) Bobby’s valuation of his interest in Industrial Steel as of June 11, 2007 was merely \$490,465.00.

To further support that the valuation date should have been the date of trial, the value of the timber was not included in the valuation presented to the Court. Based upon the substantial disparity between the values listed by Bobby as of June 11, 2007 and the values closer to the trial, the Court should have used appraisals closer to the trial date in order to achieve a fair division of these marital assets.

#### **VIII. CONCLUSION**

The Chancellor failed to effectuate a fair division of marital assets because he only considered the appreciated value of the homestead property of the parties. He further failed to take into consideration the fair market value of the marital property and further did not have a fair market value for the timber that was located on the marital property. The Court further failed to find that the appreciated value of Industrial Steel Company that was generated during the marriage was a marital asset subject to equitable division. The Court failed to take into consideration the value of an admitted marital asset of \$35,000.00 which consisted of 3.8 acres of land and failed to take into consideration Kris’ total disability and need for financial security in his division of marital assets.


Because all of the marital assets and marital debts were not addressed by the Chancellor, his division was not equitable. The Chancellor should have determined a valuation date closer to the trial date to allow him to achieve a fair division of the marital assets.

Therefore, this Court should reverse and remand this case for the Chancellor to order appraisals of the marital assets and to conduct a hearing on the equitable division of the assets and debts.

Respectfully Submitted,

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## **IX. CERTIFICATE OF SERVICE**

I, Terry L. Caves, Attorney for Susan Kristine Gregory Jenkins, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing Brief of Appellant to:

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This the 28<sup>th</sup> day of July, 2010.

  
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TERRY L. CAVES