

IN THE COURT OF APPEALS OF MISSISSIPPI
NO. 2011-7S-00619

PENNY WILSON

CA CON

APPELLANT

V.

GREGORY WILSON

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies 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.

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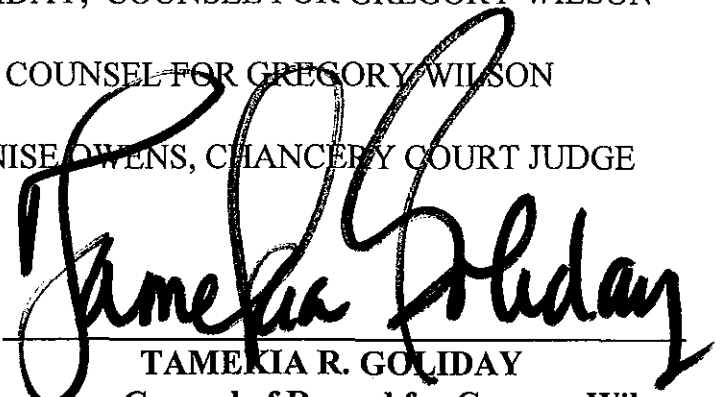

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STATEMENT OF THE ISSUES

WHETHER THIS APPEAL SHOULD BE DISMISSED AS UNTIMELY?

**WHETHER THERE EXISTS SUBSTANTIAL, CREDIBLE EVIDENCE
SUPPORTING THE DISTRIBUTION OF THE MARITAL ASSETS MADE BY THE
CHANCERY COURT?**

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This is a divorce action between Gregory Wilson, hereinafter "*Gregory*", and Penny Wilson, hereinafter "*Penny*". The parties were married on April 13, 2000, and have one child together, Tatyana Keturah Wilson, hereinafter "*Tatyana*", born on April 2, 1998. (CP, p. 1 - 5)(TT, p. 83).

On or about November 16, 2009, Penny filed a complaint for divorce in the Chancery Court of the First Judicial District of Hinds County, Mississippi against Gregory alleging habitual cruel and inhuman treatment as the grounds for divorce. (CP, p. 1 - 5). The chancery court, on January 15, 2010, entered an uncontested judgment of divorce in favor of Penny on the grounds of habitual cruel and inhuman treatment but held the issues of custody of the minor child and distribution of the martial assets in abeyance until a later hearing. (CP, p. 8).

On February 18, 2010, Gregory filed an answer to the complaint and a counterclaim seeking custody of the minor child and equitable distribution of the martial assets. (CP, p. 23 - 31). A hearing was held on August 3, 2010, before the Chancery Court of the First Judicial District of Hinds County, Mississippi regarding the custody of Tatyana and on January 26, 2011, a judgment of custody and visitation was entered which gave joint legal custody to the parties and sole physical custody to Gregory. (CP, p. 56 - 64).

Also, on January 26, 2011, a hearing was held to address equitable distribution of the marital assets and a final judgment of equitable distribution of martial property was entered

on March 25, 2011. (CP, p. 66 - 79). The chancellor valued the martial assets at \$454,696.51 and awarded Gregory \$92,069.67 of the assets and Penny \$362,626.84. Aggrieved by the distribution of the marital property, Penny filed an untimely notice of appeal on April 26, 2011.

B. STATEMENT OF THE FACTS

Gregory and Penny were married on April 13, 2000, and have one child together, Tatyana Keturah Wilson, born on April 2, 1998. (CP, p. 1 - 5)(TT, p. 83). The marriage could easily be classified as toilsome since Penny, with little provocation, often physically and verbally attacked Gregory and on several occasions, locked him out of the martial home. (TT, p. 47)(TT, p. 57 - 58)(TT, p. 160-162). One particular night, Tatyana, awoke to screaming and ran into the kitchen where she found Penny beating Gregory violently with a belt. (TT, p. 58)(TT, p. 177 - 178)(TT, p. 198).

During the marriage, Gregory was primarily responsible for cooking, helping Tatyana with her homework, ironing clothes, and putting Tatyana to bed. (TT, p. 27 - 28)(TT, p. 57)(TT, p. 149)(TT, p. 196 - 197). While Gregory was caring for the child in the evenings, Penny was working, relaxing in another part of the home or talking on the telephone. (TT, p. 29)(TT, p. 210). Gregory developed strong relationships with Tatyana's teachers and was active in the school PTA organization. (TT, p. 29). He enrolled Tatyana in ballet and afterschool care, and took her shopping and to the movies. (TT, p. 30)(TT, p. 48 - 49). Gregory also took Tatyana to the doctor and cared for her when she was sick. (TT, p. 33 - 34).

After the parties separated, Tatyana elected to live with her father because she thought *“I do better in school with him, and it will be more – he’ll pay more attention to me and stuff. He’ll try to make me happy and encourage me and do everything he can to make sure that I’m doing well in school and stuff.”* (TT, p. 61).

In 1998, Penny purchased a home located at 2846 Fallbrook Drive, Jackson, Mississippi but after getting married, Gregory moved into the home with Penny. (TT, p. 24 - 25)(TT, p. 90 - 91). The parties lived in the home together until they divorced on or about January 15, 2010. (CP, p. 8)(TT, p. 24 - 25)(TT, p. 83). During the marriage, Gregory made various repairs and improvements to the home, including but not limited to replacing the air conditioner unit, remodeling the guest bathroom, painting and rewiring the house. (TT, p. 95)(TT, p. 146-147). At the time of the divorce, the appraised value of the marital home was \$80,000.00, with an outstanding mortgage of \$40,614.65. (TT, Exhibit 6)(TT, Exhibit 7)(TT, p. 71 - 72)(TT, p. 93)(TT, p. 116)(TT, Exhibit 9).

During the marriage, Penny worked at Delphi -Packard and sold Avon products on a part-time basis while Gregory worked at Entergy. (TT, p. 27)(TT, p. 32). They equally contributed to and paid the household bills, taxes and expenses: each *“paid half mortgage, lights, gas and water.”* (TT, p. 4)(TT, p. 101)(TT, p. 125)(TT, p. 144)(TT, p. 175). Gregory was solely responsible for the cable bill and also, purchased groceries and supplies for the household. (TT, p. 145). The parties *“never paid taxes; we never filed income together; we never put money together period.”* (TT, p. 92)(TT, p. 99). Gregory would give Penny extra money if he worked side jobs and when she went on vacation. (TT, p. 192).

While married, the parties acquired the following real and personal property:

REAL PROPERTY			
PROPERTY DESCRIPTION	ACQUIRED BY WHOM	VALUE	EQUITY
2713 Halls Ferry Road Vicksburg, Mississippi	Gregory owns ½ interest in the property.	\$28,830.00	\$6,415.00 (TT, Exhibit 3) (TT, p. 72)
3821 Newman Avenue Jackson, Mississippi	Penny owns ½ interest in the property.	\$24,950.00	\$12,475.00 (TT, Exhibit 3) (TT, Exhibit 7) (TT, p. 111)
101 Sanford Street Jackson, Mississippi	Penny	\$39, 890.00	\$39,890.00 (TT, Exhibit 3) (TT, p. 110)
3829 Newman Avenue Jackson, Mississippi	Penny	\$34,120.00	\$34,120.00 (TT, Exhibit 3) (TT, p. 111)
2556 - 58 Williamson Avenue Jackson, Mississippi	Penny	\$21,450.00	\$21,450.00 (TT, Exhibit 3) (TT, p. 112)
PERSONAL PROPERTY			
2006 Trail Blazer	Gregory	\$15,000.00	\$0.00 Penny stipulated that she wants no interest in the 2006 Trail Blazer. (TT, Exhibit 3) (TT, p. 75)
1997 Nissan Pickup	Gregory	\$1,000.00	\$1,000.00 (TT, Exhibit 3) (TT, p. 75)

1999 Mazda Protégé	Gregory	\$1,500.00	\$1,500.00 Penny stipulated that she has no interest in the 1999 Mazda Protégé. (TT, Exhibit 3) (TT, p. 76)
2006 CTS Cadillac	Penny	\$15,000.00	\$15,000.00 (TT, Exhibit 3) (TT, p. 74)
2007 Pontiac Vibe	Penny	\$4,000.00	\$4,000.00 (TT, Exhibit 3) (TT, p. 75)
Members Exchange Account	Penny	\$217,278.86	\$217,278.86 (TT, p. 104 - 105)(TT, Exhibit 4)
Regions Bank Account	Penny	\$8,082.09	\$8,082.09 (TT, p. 106 - 107)(TT, Exhibit 5)
Trustmark Bank Account	Penny	\$50.00	\$50.00 (TT, p. 107)
Wells Fargo Retirement Account	Gregory	\$41,222.00	\$41,222.20 (TT, p. 181) (TT, Exhibit 2)
Riverland Credit Union Account	Gregory	\$500.00	\$500.00 (TT, Exhibit 2)
Trustmark Bank Account	Gregory	\$500.00	\$500.00 (TT, Exhibit 2)
Mutual Credit Union Account	Gregory	\$25.00	\$25.00 (TT, Exhibit 2)
Delphi Savings Plan	Penny	\$14,000.00	\$14,000.00 (TT, Exhibit 1)

Prior to the divorce, the parties amicably divided the household furnishings. (TT, p. 97). However, Penny withdrew the funds from the Members Exchange, Regions Bank and Trustmark Bank accounts before the final hearing on this matter and refused to advise the chancery court as to the location of the funds. (TT, p. 120 - 121). A reasonable inference can be drawn that Penny is dishonest and lacks credibility since she disposed of marital assets prior the final hearing on this matter and was unwilling to disclose the whereabouts of the assets.

In 2006, Penny's father died and left her \$6,000.00. (TT, p. 131). She also received \$1,500.00 as the result of an asbestos settlement. (TT, p. 131). Penny deposited a small portion of the funds in her savings account at Members Exchange and used the larger portion to repair and close in the garage on the marital home. (TT, p. 131). The cost of repairing and closing in the garage totaled approximately \$5,000.00. (TT, p. 94).

During the marriage, Penny received \$10,000.00 from her mother, Betty Hedrick, as payment for her interest in the property located at 3828 Newman Avenue, Jackson, Mississippi. (TT, p. 138 - 139). Betty Hedrick gave Penny the money because "*I wanted the house to be cleared in case something happens to me, Penny would have no say of that house,*" "*she would have no say in that house, period,*" and it "*would be Pamela Hedrick's house, you know, on her own.*" (TT, p. 138 - 139).

At the time of the divorce, Penny alleged that she was unemployed and was surviving on unemployment benefits of \$235.00 per week, however, there was evidence that Penny worked for Life Alert Company selling their product lines. (TT, p. 45)(TT, p. 83). Penny

worked for Delphi-Packard for twenty (20) years but the company went out of business and her last day of employment was February 19, 2010. (TT, p. 84 - 85).

After finding out that Delphi-Packard was closing, she agreed to stay with the company for approximately three years and assist them with closing down the facility. (TT, p. 132). As such, she was given a severance package which totaled \$155,000.00 (TT, p. 132). Penny deposited the monies in her savings account with Members Exchange. (TT, p. 133)(TT, p. 135).

Penny acknowledged during the trial that she purchased five rental properties after initially learning that Delphi-Packard was closing so that she "*would help the family, with us being married,*" could generate "*something to live on,*" and have "*some kind of income coming in*". (TT, p. 89). Although Penny purchased the properties, Gregory substantially contributed to and increased the value of the properties by performing electrical and wiring repairs on the majority of the rental properties. (TT, p. 149 - 150)(TT, p. 165 - 166). The parties together repaired and improved the condition of the rental properties. (TT, p. 151).

Penny testified at trial that she makes approximately \$6,000.00 annually from the rental properties, however, she indicates on her Form 8.05 that she makes approximately \$1,700.00 per month from her rental properties. (TT, p. 98)(TT, Exhibit 1). Her monthly bills and expenses total approximately \$2,000.00, which she is capable of paying based on the monthly earnings of \$2,640.00 reported on her Form 8.05. (TT, p. 119)(TT, Exhibit 1). Penny has no revolving credit card: she only has mortgage and utility bills. (TT, p. 123).

Penny's mother, Betty Hedrick, described Penny as "*frugal with her money*" and "*she could, as they say, hold a dollar till it hollers.*" (TT, p. 139).

Penny purchased a 2006 CTS Cadillac for \$29,000.00 in cash after learning that Delphi-Packard was closing. (TT, p. 95). Approximately three months after being laid off from Delphi-Packard, while allegedly unemployed, Penny purchased a 2007 Pontiac Vibe for \$7,600.00. (TT, p. 95 - 96)(TT, p. 117). When asked where she got the money to purchase the Vibe, she initially testified that "*I was working*" and "*I had gotten money for work*". (TT, p. 118). Later, Penny changed her testimony and indicated that "*I used some of my savings to buy the car.*" (TT, p. 118). A reasonable inference can be drawn that Penny was less than honest and gave questionable testimony during the trial since she gave inconsistent testimony regarding the means used to purchase the 2007 Pontiac Vibe.

II. SUMMARY OF ARGUMENT

This appeal should be dismissed since the notice of appeal was untimely filed: it notice was filed thirty-two (32) days after the March 25, 2011, final judgment was entered.

In the alternative, if this Honorable Court finds the notice of appeal to be timely, the March 25, 2011, final judgment should be affirmed because there exists substantial, credible evidence that the chancery court, after considering the evidence and testimony presented during trial, properly evaluated and applied the *Ferguson* factors when equitably dividing the marital assets of the parties.

III. ARGUMENT

A. STANDARD OF REVIEW

On appeal, the findings of a chancellor generally will not be reversed unless she “*was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.*” *Madison County v. Hopkins*, 857 So.2d 43, 47 (Miss. 2003). Put another way, “*chancellors are afforded wide latitude in fashioning equitable remedies in domestic relations matters, and their decisions will not be reversed if the findings of fact are supported by substantial credible evidence in the record.*” *Henderson v. Henderson*, 757 So.2d 285, 289 (Miss. 2000).

This Court is prohibited from substituting its judgment for that of the chancellor, even if it disagrees with the findings of fact and would arrive at a different conclusion. *Coggin v. Coggin*, 837 So.2d 772, 773 (Miss. Ct. App. 2003). The chancellor heard the testimony of witnesses, observed their demeanor and is in the best position to evaluate the credibility of the witnesses. *Ivy v. Ivy*, 863 So.2d 1010, 1013 (Miss. Ct. App. 2004); *Culbreath v. Johnson*, 427 So.2d 705, 708 (Miss.1983). As such, this Court is duty bound to give due deference to the chancellor's credibility determinations. *Id.*

In domestic relations matters, the sole job of this Court is to determine whether there was substantial, credible evidence supporting the chancellor's findings such that the decision was not manifestly wrong or clearly erroneous. *In re Estate of Carter v. Shackelford*, 912 So.2d 138, 143 (Miss. 2005). “*When reviewing a chancellor's judgment in property division we are not to conduct a Ferguson analysis anew, but are to review the judgment to ensure*

that the chancellor followed the appropriate standards and did not abuse his discretion.”
Shoffner v. Shoffner, 909 So.2d 1245, 1250 (Miss.Ct.App.2005).

Generally, this Court ought and will affirm a trial court sitting without a jury on a question of fact *unless* based upon substantial evidence, the court was manifestly wrong. *Jackson Public Sch. Dist. v. Smith*, 875 So.2d 1100 (Miss. Ct. App. 2004); *Havens v. Broocks*, 728 So.2d 580 (Miss. 1998). As such, this Honorable Court should affirm the ruling of the Hinds County Chancery Court so long as the decision is supported by substantial, credible evidence.

B. THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS UNTIMELY.

Mississippi appellate courts are without jurisdiction where a notice of appeal is not timely filed. *Rice v. Perma Corp.*, 908 So.2d 875, 878-79 (Miss. Ct. App. 2005). Mississippi Rule of Appellate Procedure 4(a) requires that a party file a notice of appeal within thirty days following entry of the judgment from which the appeal is taken. Mississippi Rule of Appellate Procedure 2(a) states that “*an appeal shall be dismissed if the notice of appeal was not timely filed pursuant to Rule 4.*” The time limits for perfecting an appeal are strictly enforced, and filing the notice even one day late requires dismissal of the appeal. *Redmond v. Miss. Dep’t of Corr.*, 910 So.2d 1211, 1212 (Miss. Ct. App. 2005).

In the case *sub judice*, Penny filed her notice of appeal thirty- two (32) days after entry of the May 25, 2011, judgment from which the appeal is taken: the notice of appeal was filed on April 26, 2011, two days after the thirty day period elapsed. Therefore, the notice of appeal was untimely and this appeal should be dismissed.

C. THE JUDGMENT OF THE CHANCERY COURT SHOULD BE AFFIRMED SINCE THERE EXISTS SUBSTANTIAL, CREDIBLE EVIDENCE SUPPORTING THE DISTRIBUTION OF THE MARITAL ASSETS.

When distributing marital assets, chancellors are directed to (1) classify the parties' assets as marital or separate, (2) determine the value of those assets, and (3) divide the marital estate equitably based upon the factors set forth in *Ferguson v. Ferguson*, 639 So.2d 921. (Miss.1994). *Larue v. Larue*, 969 So.2d 99, 104 (Miss.Ct.App.2007). If the marital assets, after equitable division, will adequately provide for both parties, then “no more need be done.” *Johnson v. Johnson*, 877 So.2d 485, 501 (Miss. 2003)(citing *Kilpatrick v. Kilpatrick*, 732 So.2d 876 (Miss. 1999)).

Under the first step, marital property is defined as property acquired during the course of the marriage. *Waring v. Waring*, 747 So.2d 252, 255 (Miss. 1999). Separate property brought into the marriage by one partner and used by the family also becomes a marital asset, losing its identity as separate property. *Johnson v. Johnson*, 650 So.2d 1281, 1286 (Miss. 1994).

There is a rebuttable presumption that all property is marital. *Yancey v. Yancey*, 752 So.2d 1006, 1011 (Miss.1999). The burden of proof is on the spouse claiming property as a separate asset to rebut this presumption. *Horn v. Horn*, 909 So.2d 1151, 1165 (Miss. Ct. App.2005). “This burden goes beyond a mere demonstration that the asset was acquired prior to marriage.” *A & L, Inc. v. Grantham*, 747 So.2d 932, 839 (Miss. 1999).

Once the marital assets have been identified, the chancellor should value and equitably divide the marital property, employing the *Ferguson* factors as guidelines, in light of each

party's non-marital property. *Drumright v. Drumright*, 812 So.2d 1021 (Miss. Ct. App.2001). However, “*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.

Ferguson v. Ferguson, 639 So.2d 921, 928 (Miss.1994) sets forth the factors that should be considered by the chancellor when equitably dividing marital assets. These factors are as follows:

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; and
 - 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 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 distribution;
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.

The chancellor need not make findings regarding each *Ferguson* factor but may consider only those factors applicable to the property in question. *Sproles v. Sproles*, 782 So.2d 742, 748 (Miss.2001).

1. *The chancery court properly classified the property located at 2846 Fall Brook Avenue, Jackson, Mississippi as marital property and exercised appropriate discretion in awarding Gregory Wilson an interest in the marital home.*

Under the family use doctrine, property that was once separate may convert to marital property. *Brame v. Brame*, 796 So.2d 970 (Miss. 2001). The Mississippi Appellate Courts have historically applied this doctrine to marital estates. *Stewart v. Stewart*, 864 So.2d 934, 938 (Miss. 2003)(family use doctrine converted family home to marital property); *Boutwell v. Boutwell*, 829 So.2d 1216, 1221 (Miss. 2002)(family use doctrine converted family home to marital property); *Lockert v. Lockert*, 815 So.2d 1267, 1269 (Miss. Ct. App. 2002)(family use doctrine converted family home to marital property).

In *Lockert*, wife alleged that the home she purchased four years prior to her marriage was separate property. The Mississippi Court of Appeals disagreed with wife and reasoned that since the parties resided together in the home during the marriage and husband paid the utilities and contributed to the upkeep and maintenance of the home, the home changed its character from separate property to marital property under the family use doctrine. *Lockert v. Lockert*, 815 So.2d 1267, 1269 (Miss. Ct. App. 2002).

In *Gregg v. Gregg*, 31 So.3d 1277 (Miss. Ct. App. 2010), the Mississippi Court of Appeals determined that the house purchased by husband prior to the marriage was converted to martial property where the parties lived in the home for fourteen years and wife used her inheritance to make renovations to the home, which increased the value of the property.

Reading and interpreting *Lockert* and *Gregg* together, it is clear that separate property used and maintained by the parties as a martial home loses its characterization as separate property and is converted to marital property. Applying *Lockert* and *Gregg* to the case *sub judice*, it is clear that the property located at 2846 Fall Brook Avenue, Jackson, Mississippi, which was purchased by Penny Wilson prior to her marriage, was converted to marital property since it was used and maintained by the parties as a marital home.

Although Gregory Wilson contributed nothing to the purchase of the residence, the dwelling was used as the sole marital residence during eleven year marriage and he paid a portion of the monthly mortgage and the utilities and contributed to the upkeep and maintenance of the home. This long term family use of the property converted the residential house to martial property. As such, it is clear that the chancery court properly classified the property located at 2846 Fall Brook Avenue, Jackson, Mississippi as martial property and exercised appropriate discretion in awarding Gregory Wilson an interest in the marital home.

2. *The chancery court properly classified the funds held in the Members Exchange account as marital property and exercised appropriate discretion in awarding Gregory Wilson an interest in the funds.*

Marital property is “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.” Hemsley v. Hemsley, 639 So.2d 909, 915 (Miss. 1994).

- (a) Penny is wrong in her assertion that the \$7,500.00 she inherited from her father constitutes separate property.

Separate property brought into the marriage by one partner and used by the family also becomes a marital asset, losing its identity as separate property. *Johnson v. Johnson*, 650 So.2d 1281, 1286 (Miss. 1994). The money inherited from the death of Penny’s father was converted to a martial asset when she used the majority of the funds to renovate the martial home. The record evidence is clear on this point: Penny testified at trial that she used the money inherited from her father to repair and close in the garage on the marital home. Therefore, the inheritance was commingled and as such, is martial property.

- (b) Penny commingled her premarital savings of \$68,449.34¹ such that it constitutes marital property.

Although Penny had premarital savings of \$68,449.34 in the Members Exchange account, she commingled the savings when she, during the course of the marriage, used the funds to purchase two vehicles for approximately \$37,900.00 and five rental properties for approximately \$40,000.00 and these items were for family use. The vehicles were used to transport the family and handle the affairs of the household. Furthermore, Penny testified that she purchased the properties because Delphi-Packard was closing and it “*would help the*

¹The total of the premarital savings was calculated by adding the July 20, 2009, balance of the Members Exchange Account in the amount of \$41,347.32 with the \$17,102.02 balance of another savings account plus the \$10,000.00 Penny received from her mother. (TT, Exhibit 10) (TT, Exhibit 11).

family, with us being married. I would have something to have some kind of income coming in.” (TT, p. 89). Penny’s testimony indicates that the rental properties were purchased in an effort to provide income for the family and as such, they became marital property. By using her separate funds to provide for the family, Penny converted the separate funds to marital property. Therefore, the chancellor exercised appropriate discretion in not classifying the premarital savings of \$68,323.53 as separate property since Penny commingled the funds.

- (c) The funds in the Members Exchange Account that was accumulated during the marriage constitute marital property.

Applying *Hemsley*, a case that held all property accumulated during the marriage is martial property, it is clear any funds placed in the Members Exchange account during the marriage constitute martial property. Therefore, the chancery court properly classified the funds accumulated during the marriage as martial property and exercised appropriate discretion in awarding Gregory Wilson an interest in the funds.

- 3. *The chancery court properly classified the rental properties as martial property and exercised appropriate discretion in awarding Gregory Wilson an interest in the properties.*

Marital property is “*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.*” *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss. 1994). In *Striebeck v. Striebeck*, 911 So.2d 628 (Miss. Ct. App. 2005), husband worked as an attorney and wife was a school teacher. The chancellor found that husband’s contingency fee from a pending case did not constitute martial property. The

Mississippi Court of Appeals reversed the ruling of the chancellor and held there was no justification for concluding that the fee is non-marital property since the fee was generated during the marriage. *Id.* at 633.

Applying *Striebeck*, a case which held that all assets acquired during the course of the marriage are marital assets, it is clear that all of the rental property purchased by Penny constitutes marital property since it was purchased during the course of the marriage. As such, it is clear that the chancery court properly classified the rental properties as marital assets and exercised appropriate discretion in awarding Gregory Wilson an interest in the properties.

4. *The chancery court properly considered Penny's employment status when allocating the marital assets.*

The chancery court, after reviewing the evidence, found that Penny has earning capacity that would ensure her ability to provide for her future. This finding is supported by substantial, credible evidence since both parties are in good health and have the ability to work and earn income. Their good health and ability to work coupled with the division of the marital assets leaves each party with reasonable financial security.

The record is filled with substantial, credible evidence indicating the chancery court properly considered the employment status of Penny: Penny testified that she makes approximately \$500.00 per month from the rental properties, however, she indicated on her Form 8.05 that she makes approximately \$1,700.00 per month from her rental properties. Her Form 8.05 also indicates that her monthly bills total \$3,779.00 but she testified at trial that her monthly bills and expenses total approximately \$2,000.00, which she is capable of

paying based on the total monthly earnings of \$2,640.00 reported on her Form 8.05.

Where testimony is sharply contradictory, the chancellor is afforded broad discretion when deciding which testimony to believe. *Heidkamper v. Odom*, 880 So.2d 362, 365 (Miss. Ct. App. 2004). In *Carter v. Carter*, 735 So.2d 1109, 1114 (Miss. Ct. App. 1999), this Court held:

The resolution of disputed questions of fact is a matter entrusted to the sound discretion of the chancellor. On appeal, we are limited to searching for an abuse of that discretion; otherwise, our duty is to affirm the chancellor. Our job is not to reweigh the evidence to see if, confronted with the same conflicting evidence, we might decide the case differently. Rather, if we determine that there is substantial evidence in the record to support the findings of the chancellor, we ought properly to affirm. The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. It is necessarily the case that, when conflicting testimony on the same issue is presented, the chancellor sitting as trier of fact must determine which version he finds more credible.

The chancellor found Penny's monthly bills and expenses totaled approximately \$2,000.00 and she was capable of paying her bills and expenses with the total monthly earnings of \$2,640.00 reported on her Form 8.05, and her undisclosed savings. Furthermore, the chancellor found that Penny was skilled and able to obtain future employment. These findings clearly indicated that the chancellor properly considered Penny's employment status prior to equitably distribution the martial assets.

When there is substantial evidence to support the chancellor's decision, as in the case *sub judice*, this Court is powerless to overturn it, and that decision must stand. *Heidkamper v. Odom*, 880 So.2d 362, 365 (Miss. Ct. App. 2004). Since there is substantial, credible evidence to suggest that the chancellor considered Penny's employment status, the decision

of the chancellor must stand. *Wright v. Wright*, 737 So.2d 408, 411 (Miss. Ct. App.1999) (the law is well settled that this Court is bound by the chancellor's finding of credibility).

5. *The letters from Gregory disavowing an interest in the rental properties does not invalidate his interest in the rental properties.*

In *Flechas v. Flechas*, 791 So.2d 295 (Miss. Ct. App. 2001), husband alleges that wife entered into an oral agreement in which the parties agreed that the property accumulated during the marriage would not become martial property. The trial court enforced the agreement and this Honorable Court reversed the trial court holding that the oral agreement does not comply with the requirements for enforcement of prenuptial agreements and is unenforceable. This Court further determined that the a written prenuptial agreement would be the kind of agreement which would bind the chancellor regarding the distribution of marital assets. Without a prenuptial agreement, the oral agreement of the parties is not binding as to the martial assets.

Apply *Flechas* to the case *sub judice*, it is clear that the letters from Gregory disavowing an interest in the rental properties does not invalidate his interest in the rental properties since the letters do not constitute a prenuptial agreement. They are not binding on the chancery court with regarding to property distribution. Therefore, the chancery court was correct when it disregarded the letters.

6. *Penny is wrong in her assertion that Gregory made no significant contribution to the rental properties.*

There was substantial, credible evidence to indicate that Gregory made significant contributions to the rental properties. Despite the fact that Gregory did not contribute

financially to the purchase of the rental properties, he helped make repairs and renovations on the rental properties, which resulted in increased property value. Penny alleged that Gregory made no repairs to the property. The chancellor sat as the trier of fact and where testimony is sharply contradictory, she is afforded broad discretion when deciding which testimony to believe. *Heidkamper v. Odom*, 880 So.2d 362, 365 (Miss. Ct. App. 2004). The chancellor found Gregory to be credible and determined that he made repairs and renovations to the rental properties. Since there is substantial, credible evidence to suggest that Gregory contributed to the rental properties, the decision of the chancellor must stand. *Wright v. Wright*, 737 So.2d 408, 411 (Miss. Ct. App. 1999) (the law is well settled that this Court is bound by the chancellor's finding of credibility).

7. *The chancery court properly denied Penny an interest in Gregory's retirement benefits.*

Our case law does not allow for an “automatic” division of pension property between divorcing spouses. *Pierce v. Pierce*, 42 So.3d 658, 662 (Miss. Ct. App. 2011). Furthermore, only a “spouse who has made a material contribution toward the acquisition of an asset titled in the name of the other may claim an equitable interest in such jointly accumulated property.” *Jones v. Jones*, 532 So.2d 574, 581 (Miss. 1988). In *Crowe v. Crowe*, 641 So.2d 1100 (Miss. 1994), the Mississippi Supreme Court reversed the chancellor’s award of military survivor’s benefits where there was no evidence that the wife contributed to the acquisition of the benefits.

Like *Crowe*, there is no record evidence that Penny contributed in any way to the retirement savings Gregory has with his current employer, Entergy. As such, the chancellor

was correct in not awarding Penny any portion of the retirement savings since she produced no evidence to indicate that she contributed to the retirement savings.

Penny, in error, argues that she is entitled to a portion of the retirement saving because she does not have retirement savings available to her. Contrarily, the Form 8.05 completed by Penny indicates that she has \$14,000.00 in a retirement savings account with Delphi-Packard. As such, it is disingenuous for Penny to argue that she does not have retirement savings.

As a court of equity, the chancellor allowed Penny to maintain her retirement savings account since there was no evidence that Gregory contributed to the savings. As such, the chancellor was correct in not awarding the parties interest in the other's retirement savings.

8. *The chancery court conducted a proper Ferguson analysis as to justify its equitable distribution of the martial assets.*

"In reviewing a chancellor's judgment, [the appellate court] does not conduct a Ferguson analysis anew, but reviews the judgment to ensure that the chancellor followed the appropriate standards and did not abuse his discretion." Phillips v. Phillips, 904 So.2d 999, 1001 (Miss.2004). In so reviewing, this Court must keep in mind that equitable distribution does not always mean an equal division of property. *Chamblee v. Chamblee*, 637 So.2d 850, 863-64 (Miss.1994).

In the case *sub judice*, the final judgment made it abundantly clear that the chancellor fully considered the *Ferguson* factors in distributing the marital property. Following the guidelines, the chancellor addressed each factor considering the substantial, credible

evidence presented during the hearing. Penny, in her brief, takes issues with chancellor's evaluation of the following Ferguson factors:

- A. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
 - 1. Direct or indirect economic contribution to the acquisition of the property; and
 - 2. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
- B. 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.
- C. The market value and the emotional value of the assets subject to distribution.

Gregory substantially contributed to the accumulation of the marital assets. In determining the contributions of each spouse, it is imperative to remember that contributions are not limited to considering only the earning and cash contributions of a party, but it can be a sufficient contribution if one party renders services which are generally domestic in nature. *Arthur v. Arthur*, 691 So.2d 997, 1001 (Miss.1997) (citing *Draper v. Draper*, 627 So.2d 302, 306 (Miss.1993)). In *Pittman v. Pittman*, 791 So.2d 857, 862 (Miss.Ct.App.2001), this Honorable Court held that spouse who has made a material contribution toward the acquisition of an asset titled in the name of the other may claim an equitable interest in such property.

Gregory made direct and indirect economic contributions to the accumulation of the marital assets. The chancellor properly weighed this factor in favor of both parties because the evidence clearly indicated that both parties provided for the family. Both parties

repeatedly testified that they provided financially for the family: each “*paid half mortgage, lights, gas and water.*” (TT, p. 4)(TT, p. 101)(TT, p. 125)(TT, p. 144)(TT, p. 175). Based on the testimony of the parties, there exists substantial, credible evidence to support the chancellor’s evaluation of this factor.

The chancellor was correct in holding that the contribution to education and training factor was neutral. This factor generally deals with one spouse’s support for the other’s education and training. *Russell v. Russell*, 733 So.2d 858, 861 (Miss. Ct. App. 1999). There exists no record evidence that either party underwent any specialized education or training during the marriage. As such, this factor is clearly neutral.

Penny alleges that this factor should be weighed in her favor since she cared for the household for approximately five years while Gregory worked for International Brotherhood of Electrical Workers, a job which required that he work in St. Louis, Missouri. This allegation is false since the record evidence indicates that Gregory worked for International Brotherhood of Electrical Workers from the date of marriage until 2001, when he returned the Jackson Metro area and began working locally. (TT, p. 24 - 26).

Furthermore, after returning to the Jackson Metro area, Gregory was primarily responsible for cooking, helping Tatyana with her homework, ironing clothes, and putting Tatyana to bed. (TT, p. 27 - 28)(TT, p. 57)(TT, p. 149)(TT, p. 196 - 197). He provided care of the minor child while Penny worked the nightshift at Delphi-Packard and sold Avon products. (TT, p. 26 - 27). To the extent that Penny’s argument regarding the contribution to education and training factor contains any merit, it is clear that the factor weighs in favor

of both parties since each spouse has made sacrifices to facilitate the work demands of the other.

Penny has withdrawn or otherwise disposed of marital assets. The chancellor was correct in weighing this factor in favor of Gregory since Penny testified that she removed monies from from the Members Exchange, Regions Bank and Trustmark Bank accounts before the final hearing on this matter and refused to advise the chancery court as to the location of the funds. (TT, p. 120 - 121).

The chancellor was correct in holding that the emotional value factor was neutral. The record evidence is void of any evidence which suggests that either party has strong emotional ties to any portion of the martial assets. Penny, in her brief, alleges that she has strong emotional ties to the rental properties but she testified that she purchased the properties because Delphi-Packard was closing and it “*would help the family, with us being married.*” (TT, p. 89). Penny’s testimony indicates that the rental properties were purchased in an effort to provide income for the family and as such, there is no clear indication that she has any overriding emotional ties to the properties.

The chancellor was correct in holding that the value of separate assets factor was neutral. Penny, in error, alleges that the chancellor erred in not evaluating the rental properties under this factor. It is improper to evaluate the rental properties under this factor since the rental properties were properly classified as martial assets. As such, it would be wrong to consider the properties under the value of separate assets factor.

Considering the record evidence, it is clear that the chancellor properly applied the *Ferguson* factors in its equitable distribution of the marital assets. It is apparent that the chancellor neither committed manifest error nor abused her discretion in the manner or method in which she divided the marital estate. Therefore, the March 25, 2011, final judgment should be affirmed.

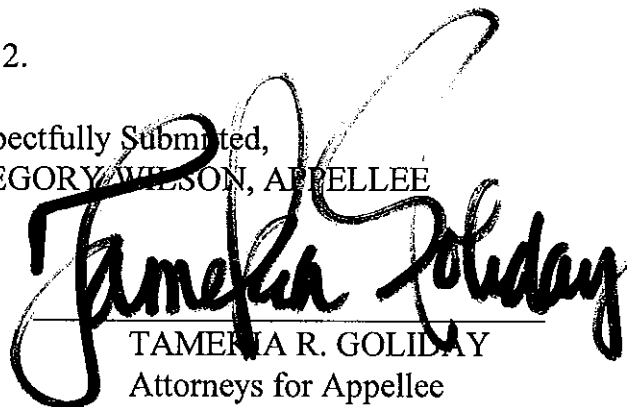
CONCLUSION

There exists substantial, credible evidence that the chancery court, after considering the evidence and testimony presented during trial, properly evaluated and applied the *Ferguson* factors when equitably dividing the marital assets of the parties. Therefore, the judgment entered by the chancery court should be affirmed.

SO BRIEFED, the 8th day of May, 2012.

Respectfully Submitted,
GREGORY WILSON, APPELLEE

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CERTIFICATE OF SERVICE


I, TAMEKIA R. GOLIDAY, attorney for appellee, GREGORY WILSON, certify that

I have this day mailed, *postage prepaid*, a true and correct copy of APPELLEE'S BRIEF to:

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Honorable Judge Denise Owens
HINDS COUNTY CHANCELLOR
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THIS, the 8th day of May, 2012.


TAMEKIA R. GOLIDAY