

**SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

HENRY W. WELCH

APPELLANT

VERSUS

NO. 2011-CA-00667

SUSAN RENEE' VAUGHN WELCH

APPELLEE

**APPEAL FROM THE CHANCERY COURT
OF HOLMES COUNTY, MISSISSIPPI
CAUSE NO. 05-0009**

BRIEF OF THE APPELLEE

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ORAL ARGUMENT NOT REQUESTED

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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.

1. Honorable Janace Harvey-Goree
Chancellor
2. Henry W. Welch
Appellant
3. Katherine T. Mills, Esq.
Patricia A. Rodgers, Esq.
Attorneys for Appellant
4. Susan Renee' Vaughn Welch
Appellee
5. Luther P. Crull, Jr., Esq.
Attorney for Appellee

THIS THE 3rd day of March, 2012.



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REFERENCES IN BRIEF TO PARTIES

Appellant Henry W. Welch shall be hereinafter referred to as "Henry". Appellee Susan Renee' Vaughn Welch shall be hereinafter referred to as "Susan".

**REFERENCES IN BRIEF TO TRIAL TRANSCRIPT,
CLERK'S PAPERS and RECORD EXCERPTS**

References herein to the trial transcript shall be designated by page as [T-__]; reference herein to Appellee's record excerpts shall be designated by page as [R-__]; reference herein to the clerk's papers shall be designated as [CP-__]; and reference to trial exhibits shall be designated by page as [Exhibit-__].

STATEMENT OF FACTS

Susan and Henry were married on September 9, 1983. The parties separated on December 23, 2004.

Susan initiated this divorce proceeding by filing her Complaint for Divorce and Other Relief against Henry on January 11, 2005.

No temporary order nor separate maintenance support order was entered in this cause.

The trial of this matter was held on December 13, 2010.

The Chancellor on March 25, 2011, filed her Final Judgment of Divorce in this cause dated March 24, 2011, incorporating therein the Court's opinion setting forth the Court's findings of facts, legal authority and adjudications.

Susan's 8.05 Financial Statement dated December 13, 2010 was introduced into evidence, marked plaintiff's Exhibit "1" at trial on December 13, 2010. **[Exhibit-P1] [R:1-8]**

Henry's 8.05 Financial Statement dated December 9, 2010 was introduced into evidence, marked plaintiff's Exhibit "2" at trial on December 13, 2010. **[Exhibit-P2] [R:9-16]**

Henry was and is employed by AT&T. At the time of trial, Henry had a vested pension plan with AT&T valued at \$240,700.00. Henry started contributing to the plan on March 20, 1972, eleven years prior to his marriage to Susan.

At the time of trial, Henry had a 401(k) plan valued at \$205,000.00 which he started contributing to during the marriage in

1999.

The Chancellor took the value of the pension (\$240,700) and the value of the 401(k) plan (\$205,000) from Henry's 8.05 Financial Statement introduced into evidence on December 13, 2010. The Court's footnote 1 at page 5 of Judgment stated as follows: "The values used in this opinion are from the 8.05 Financial Declarations provided by the parties to the Court". **[CP-109] [R-21]**

The Court valued Henry's checking account at \$1,080 as setforth on his 8.05 Financial Statement.

The Chancellor found that the 401(k) plan and pension account were marital assets pursuant to 8.05 values. The Court further rightfully found that eleven (11) years pre-marriage contributions by Henry to his pension plan (\$110,000) was Henry's non-marital separate property. The Chancellor found that \$130,700 of the contributions to the pension account after the marriage were marital and divided those contributions equally between Susan and Henry (\$65,350 each). **[CP-124] [R-36]**

The Chancellor classified, valued and distributed the assets as of the trial date pursuant to the parties 8.05 Financial Statements.

The Court allowed the parties to keep certain assets in the division process (i.e. Henry keep checking account) but then equalized the distribution by ordering Henry to pay Susan the \$3,959.39 difference. **[CP-126] [R-38]**

SUMMARY OF THE ARGUMENT

The standard of review of a domestic relations appeal is limited by the substantial evidence/manifest error rule. The findings of the Chancellor should not be disturbed unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Further, the Appellant Court views the facts in a light most favorable to the appellee and will take appellee's testimony and evidence at its best.

The Chancellor was not manifestly wrong; her opinion was not clearly erroneous; the Chancellor did not abuse her discretion; and the Chancellor did not apply an erroneous legal standard. To the contrary, the Chancellor's opinion was supported by substantial evidence at the trial, particularly when viewed in a light most favorable to appellee.

For the reasons stated in appellee's argument, appellant's issue on appeal is without merit. Therefore, the Chancellor's decision should be affirmed in its entirety.

ARGUMENT

STANDARD OF REVIEW

The standard of review for this Court on this domestic relations appeal is set forth as follows, to-wit:

The scope of review by this Court in domestic relations appeals is limited by the substantial evidence/manifest error rule. *Magee v. Magee*, 661 So.2d 1117, 1122 (Miss.1995). "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.* (quoting *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990)). Additionally, this Court views the facts in a light most favorable to the appellee, Ms. Labella. See *Rawson v. Buta*, 609 So.2d 426, 429 (Miss.1992). This Court will take her testimony and evidence at its best. *Jones v. Jones*, 532 So.2d 574, 578 (Miss.1988).

Labella v. Labella, 722 So.2d 472, 474 (Miss.1998)

As trier of fact, the chancellor "evaluate(s) the sufficiency of the proof based upon his assessment of the credibility of the witnesses and the weight he thinks properly ascribed to their testimony." *Rakestraw v. Rakestraw*, 717 So.2d 1284, 1287 (¶9) (Miss.Ct.App. 1998). Our scope of review is "limited." *Rakestraw*, 717 So.2d at 1287 (¶9). The Mississippi Supreme Court has reiterated that in reviewing a divorce decree: "we view the facts of [the] decree in a light most favorable to the appellee and may not disturb the chancellor's decision unless we find that decision to be manifestly wrong or unsupported by substantial evidence." *Boutwell v. Boutwell*, 829 So.2d 1216, 1220 (¶13) (Miss.2002).

M.W.F. v. D.D.F., 926 So.2d 923 (¶13) (Miss.2005) (2003-CA-02642-COA) (July 26, 2005)

This Court employs a limited standard of review when reviewing a chancellor's decision.

Miss. Dept Human Servs. v. Shelby, 802 So.2d 89, 92 (Miss. 2001). We will not disturb a chancellor's award of alimony and division of marital assets unless the court was manifestly wrong, abused its discretion or applied an erroneous legal standard. *Sandlin v. Sandlin*, 699 So.2d 1198, 1203 (Miss. 1997).

Watson v. Watson, 882 So.2d 95, 98 (T14) (Miss.2004)

SUSAN'S RESPONSE TO HENRY'S ISSUE

The Chancellor applied one correct date for purpose of classification and valuation of non-marital and marital property.

The chancellor's valuation and classification of the pension fund and 401(k) plan are setforth at page 20 of the Final Judgment [CP-124] [R-36] as follows:

AT&T Pension:	non-marital	\$110,000
	marital	<u>\$130,700</u>
	Total Value	\$240,700
401(k):	non-marital	\$ 0
	marital	<u>\$205,000</u>
	Total Value	\$205,000

Susan asserted no value for the pension fund or the 401(k) plan on her 8.05. Henry placed the values of \$240,700 (pension) and \$205,000 401(k) plan on his 8.05 Financial Statement. The Chancellor used the values setforth on Henry's 8.05 which was introduced into evidence as Plaintiff's Exhibit "2". [Exhibit-P2] [R: 9-16] Therefore, the Court in her discretion classified and valued the assets as of the divorce trial date December 13, 2010.

Henry states that the Chancellor "does not specifically identify the ending date of the marriage". Henry then goes on to speculate the ending date used by the Chancellor by phrases such as "it is evident" and "it can be inferred conclusively". Henry then blatantly and erroneously states that the Chancellor made a finding that the date of separation was the ending date of marriage, when

the Chancellor made no such finding.

As aforesaid, the Chancellor classified and valued the property as of the date of the divorce hearing using Henry's 8.05 Financial Statement values. The Chancellor divided equally the \$205,000 401(k) account. The Chancellor in her discretion adjudicated the non-marital portion of the pension fund accumulated prior to the marriage to be \$110,000 and awarded this amount to Henry as his non-marital property. The \$130,700 balance of the pension fund was then awarded equally to the parties.

In defining marital property for the purpose of divorce the Court in McIlwain v. McIlwain, 815 So.2d 476 (¶7) (Miss. App. 2002), No. 2000-CA-02062-COA (April 30, 2002) stated in part as follows:

"We define marital property for the purpose of divorce as 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." Flechas v. Flechas, 791 So.2d 295 (¶8) (Miss.Ct.App. 2001), No. 2000-CA-00223-COA (July 24, 2001). The "course of the marriage" runs until the date of the divorce judgment, for purposes of calculating whether or not assets are marital or non-marital, and an otherwise marital asset may be classified as separate if an order for separate maintenance is entered. See Godwin v. Godwin, 758 So.2d 384(¶6) (Miss. 1999), No. 97-CA-00380-SCT (June 10, 1999)..... We find that the key factor is that funds were acquired during the marriage, thus rendering them marital assets. Emphasis added

See also Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994), No. 92-CA-00423 (July 7, 1994)

If a separate maintenance support order had been entered in this case, marital property accumulation would have terminated as

of the date of the separate maintenance order. No separate maintenance support order was entered in this case. Godwin v. Godwin, 758 So.2d 384, 386 (Miss. 1999).

If a temporary support order had been entered in this case, marital property accumulation would have terminated as of the date of the temporary order. No temporary order was entered in this case. Pittman v. Pittman, 791 So.2d 857, 866 (Miss. App. 2001).

As setforth in McIlwain, funds accumulated in the pension and 401(k) accounts during the course of the marriage are marital funds as found by the Chancellor. The course of the marriage runs until the date of divorce judgment.

Henry attempts to argue that because the Court awarded to Henry his checking account this award somehow made the checking account a non-marital asset. This exact procedure has been employed by Chancellors since 1994 when equitable division became law. Certain parties are awarded certain assets and if one has a deficit, the other pays to equalize the distribution.

The Chancellor's opinion was imminently correct and properly applied the law and detailed facts in the Court's classification, valuation and division of assets.

CONCLUSION

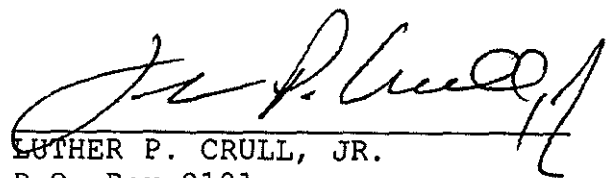
The Chancellor's opinion was supported by substantial evidence, particularly when viewed in a light most favorable and at its best to appellee. The Chancellor did not abuse her discretion, was not manifestly wrong and did not apply an erroneous legal standard.

Therefore, it is respectfully submitted that this Court should grant to Susan the following relief:

1. Affirm in its entirety the decision and opinion entered by the lower Court;
2. Tax all cost of appeal to appellant; and
3. Award to Susan attorney fees.

This the 3rd day of March, A.D., 2012.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I, LUTHER P. CRULL, JR., attorney for the appellee herein, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF THE APPELLEE to the following persons:

1. Chancellor Janace Harvey-Goree
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2. Katherine T. Mills, Esq.
Patricia A. Rodgers, Esq.
Attorneys for Appellant
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This the 3rd day of March, A.D., 2012.


LUTHER P. CRULL, JR.