

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

**HENRY W. WELCH**

**APPELLANT**

**V.**

**CAUSE NO.: 2011-CA-00667**

**SUSAN RENEE' VAUGHN WELCH**

**APPELLEE**

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**ON APPEAL FROM THE  
CHANCERY COURT OF HOLMES COUNTY**

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**APPELLANT'S REPLY BRIEF**

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**ORAL ARGUMENT NOT REQUESTED**

### **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 this Court may evaluate possible disqualifications or recusals:

1. Henry W. Welch, Appellant
2. Susan Renee' Vaughn Welch, Appellee
3. Honorable Janace Harvey Goree, Chancellor

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

For Appellant:

1. Katherine T. Mills, Esq.
2. Patricia A. Rodgers, Esq.

For Appellee

Luther P. Crull, Esq.

By: \_\_\_\_\_

A handwritten signature in dark ink, appearing to read 'Luther P. Crull', is written over a horizontal line.

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## **TABLE OF AUTHORITIES**

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## APPELLANT'S REPLY

Susan maintains that Chancellors must adhere to a strict standard that marital property continues to accumulate until the date of final divorce. However, the courts do not require Chancellors to apply such firm standards when making decisions as to the beginning and ending dates of marriage. As stated in the Henry's brief, the courts have continuously placed that decision within the discretion of the Chancellor. (Appellant's Br. 5-6)(See generally *Fleishhacker v. Fleishhacker*, 39 So. 3d 904 (Miss. Ct. App. 2009), *Jenkins v. Jenkins*, 2010-CA-00129-COA (Miss. Ct. App. 2011), *MacDonald v. MacDonald*, 698 So. 2d 1078 (Miss. 1997), *Hensarling v. Hensarling*, 824 So. 2d 583 (Miss. 2002)). Each case is different; therefore, the courts have consistently placed such important decisions within the Chancellor's discretion, as inflexible rules concerning family issues will sometimes yield inequitable results. In order to do equity, Chancellors must be allowed to use their discretion in making such difficult decisions.

Susan cites *McIlwain v. McIlwain*, 815 So. 2d 476 (Miss. Ct. App. 2002), to support her assertion; however, the facts in that case are distinguishable from the one presently before this court. (Appellee's Br. 7). In *McIlwin*, the time between the parties' separation and divorce was only a year and one-half (1½), whereas Susan and Henry were separated for six (6) years before they were divorced. Further, the home in question was purchased after the separation of the parties with joint funds, wife attended the closing and had a key, and husband had told her that they would live in the home together while they tried to work things out. This is clearly distinguishable from the facts in the present case. In the present case, Susan had no involvement from 2004 to 2010 of any kind in the accumulation of Henry's assets.

Moreover, property that was not acquired through the joint efforts of the parties is separate property, even if it was acquired after separation but prior to divorce. *Spahn v. Spahn*, 959 So. 2d 8 (Miss. Ct. App. 2006). This further illustrates, contrary to what Susan argues, that the accumulation of marital property may cease upon separation, not divorce. As in *Spahn*, Susan made no contribution to the increase in the 401(k) since she abandoned the marriage, and there were no marital funds used to increase its worth.

The fact that the Chancellor classified almost half of Henry's pension as non-marital property shows that she considered the ending date of the marriage 2004.

The Chancellor's classification of almost one-half ( $\frac{1}{2}$ ) of the pension as non-marital property is proportional to the twenty-one (21) years between 1983 to 2004 and the sixteen (16) years prior to the marriage and after separation. It is evident from the above division that the Chancellor determined the ending date of the marriage to be when Susan left the marriage in 2004. (Appellant's Br. 7).

In light of the above, coupled with the court's continued findings that it is within the Chancellor's discretion to determine the ending date of the marriage, the Chancellor was not in error in determining the cut-off date of the marriage to be 2004 when Susan left the marriage. Consequently, the court should have also classified the portion of Henry's 401(k) that was accumulated after 2004, approximately \$90,871.21, as non-marital property for the purposes of equitable distribution.

As to Susan's argument regarding the classification of Henry's checking account, the issue is not whether the Chancellor had to make adjustments in the marital assets to arrive at an equitable outcome. The checking account was not a marital asset and was not subject to equitable distribution as only marital property may be divided. *Jenkins v. Jenkins*, 2010-CA-00129-COA (Miss. Ct. App. 2011). The fact is that the discrepancy in

the Court's findings in the *Final Judgment of Divorce* indicates that these funds were considered non-marital.

**CONCLUSION**

For the foregoing reasons, it is clearly within the Chancellor's discretion to determine the ending dates of marriage for the purposes of equitable distribution. The Chancellor in this case was correct in her determination regarding the ending date of the marriage in classifying what portion of Henry's pension was non-marital property. However, her use of a different date to determine the ending date of the marriage for the classification of the Henry's 401(k) was error, and Henry should be awarded that portion of his 401(k) that accumulated between 2004 and 2010.

**RESPECTFULLY SUBMITTED**, this the 19<sup>th</sup> day of March, 2012.

**MILLS & RODGERS, L.L.C.**

By: \_\_\_\_\_

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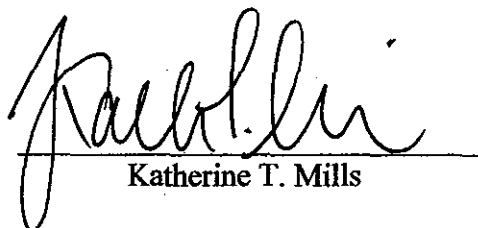
**CERTIFICATE OF SERVICE**

I, KATHERINE T. MILLS, of MILLS & RODGERS, LLC, attorneys for the Appellant, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing *Reply Brief of the Appellant* by placing a copy in the United States Mail, postage prepaid, addressed to the following:

Honorable Janace Harvey Goree  
Chancery Court Judge  
P.O. Box 39  
Lexington, MS 39095-0039

Luther P. Crull, Jr., Esq.  
Attorney at Law  
P.O. Box 2181  
Grenada, MS 38902-2181

This the 19<sup>th</sup> day of March, 2012.

  
Katherine T. Mills

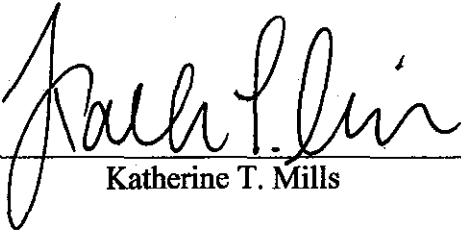


**CERTIFICATE OF FILING**

I, KATHERINE T. MILLS, of MILLS & RODGERS, LLC, attorneys for the Appellant, in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed *Reply Brief of the Appellant* by placing a copy in the United States Mail, postage prepaid, addressed to the following:

Ms. Kathy Gillis  
Mississippi Supreme Court Clerk  
450 High Street  
Jackson, Mississippi 39205

This the 19<sup>th</sup> day of March, 2012.

  
Katherine T. Mills