

2011-CA-0067 T

**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:  \_\_\_\_\_

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**STATEMENT OF THE ISSUE**

WHETHER THE LOWER COURT ERRED BY ADOPTING TWO  
DIFFERENT DATES FOR THE PURPOSE OF CLASSIFYING NON-  
MARITAL AND MARITAL PROPERTY.

### **SUMMARY OF THE ARGUMENT**

This is a matter wherein the lower court, in its classification of marital and non-marital assets, adopted two different ending dates of the marriage. The date of valuation of the Appellant's pension was the date of the separation of the parties in 2004. However, the date of valuation the court used for the Appellant's 401(k) was the date of divorce, which was seven (7) years later.

Appellant contends that there can be only one (1) date of dissolution of a marriage and that the date the Chancellor used to value the worth of Appellant's pension is also the date that should be employed to value Appellant's 401(k).

### **STATEMENT OF THE CASE**

On March 24, 2011, the Chancery Court of Holmes County entered a Final Judgment of Divorce granting the Appellant, Henry Wayne Welch ("Henry"), a divorce from Appellee, Susan Renee' Vaughn Welch ("Susan"), on the grounds of adultery. (R. 105, Tr. 45:9-10). Incorporated into the Final Judgment of Divorce was the court's distribution of the parties' assets.

On September 9, 1983, Henry and Susan were married in West, Mississippi. (Tr. 8:7-8). They had two (2) children, Carly Suzette Welch, who is now over the age of twenty-one (21) and Cory Spencer Welch, who is now seventeen (17) years of age. (Tr. 8:13-17; 20:9-10).

Susan left the marriage two (2) days before Christmas in 2004. (Tr. 18:9-10). Thereafter, on January 11, 2005, Susan filed for divorce (R. 6) and requested temporary relief. (R. 16). Henry filed his answer and cross petition for custody on March 22, 2005. (R. 25). Approximately five (5) years later, Susan filed an amended complaint for divorce (R. 65) and Henry filed an answer to the amended complaint and a counterclaim for divorce on the grounds of adultery, cruel and inhuman treatment or in the alternative, irreconcilable differences. (R. 76).

Before Susan left the marriage she began having an affair with Dale Bailey ("Dale") as well as James Kennedy ("James"), and she continued those relationships after she filed for divorce. (Tr. 84-86). She also underwent tubal ligation surgery to prevent getting pregnant by another man since Henry previously had a vasectomy. (Tr. 31:14-16; Tr. 87:20-28).

Henry is employed as a technician with AT&T and has been employed by either AT&T or a company affiliated with AT&T since March 20, 1972. (Tr. 61). During his employment, he has been contributing to a pension plan (Tr. 62:8-10), which had a balance of approximately \$240,700 at the time of divorce. (R. 124). The Chancellor found that \$110,000 of the pension, which was almost one-half ( $\frac{1}{2}$ ), was non-marital property belonging to Henry. (R. 124). The remaining balance of \$130,700, was divided equally between Henry and Susan, with each receiving \$63,350. (R. 124).

In addition to his pension, Henry has a 401(k) set up through Bell South. (Tr. 129:7-24). When Susan left the marriage in 2004, the balance of Henry's 401(k) was \$114,128.79. (Def. Ex. 3; Tr. 130:18-22; R.E. 3). At the time of the trial, the 401(k) had increased to \$205,000 solely due to Henry's investments. (Tr. 62:18-20, 130:23-28; R. 124; R.E. 3). The Court split the balance equally, using the date of divorce, between Susan and Henry. (R. 124).

### **STANDARD OF REVIEW**

A Chancellor's findings of fact must be supported by substantial evidence. *Kilpatrick v. Kilpatrick*, 732 So. 2d 876 (Miss. 1999). The court will reverse if it finds the Chancellor abused her discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Id.* at 880. "[T]he Court will not hesitate to reverse if it finds the Chancellor's decision is manifestly wrong, or that the court applied an erroneous legal standard." *Owen v. Owen*, 928 So. 2d 156, 160 (Miss. 2005).

## ARGUMENT

It is well-settled law that the division of marital assets is governed by the court's decisions in *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994) and *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994). The first step is to classify the character of the assets as either marital or non-marital pursuant to *Hemsley*. Once that determination has been made, the Chancellor will employ the factors set forth in *Ferguson* to equitably divide the property that has been classified as marital.

Marital property is that which is "acquired or accumulated during the course of the marriage . . . unless it can be shown by proof that such assets are attributable to one of the parties' separate estates prior to the marriage or outside the marriage." *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss. 1994). If a party can provide proof that such assets are attributable to one of the parties' separate estates prior to the marriage or acquired outside of the marriage, then that property is classified as non-marital. *Fleishhacker v. Fleishhacker*, 39 So. 3d 904, 912 (Miss. Ct. App. 2009). Application of the guidelines set forth in *Hemsley* requires the Chancellor to "(1) identify the relevant beginning and ending dates of marriage; (2) determine the date each asset was acquired; and (3) determine whether a particular asset was the result of a spouse's efforts." *Bell on Miss. Family L.*, Debbie Bell, page 156, Section 6.02(2)).

Identifying the beginning date of marriage is straightforward; however, determining the ending date is complicated. The authority has been placed within the discretion of the Chancellor when determining the ending date of the marriage. *Fleishhacker v. Fleishhacker*, 39 So. 3d 904, 912 (Miss. Ct. App. 2009)(citing *Hensarling v. Hensarling*, 824 So. 2d 583, 591 (Miss. 2002)).



In *Hensarling v. Hensarling*, the lower court, in its previous orders, used the parties' date of separation as the date of valuation for marital property. *Id.* The Mississippi Supreme Court upheld the Chancellor's date of valuation, stating "the date of valuation is necessarily within the discretion of the Chancellor." *Id.* at 591 (quoting *MacDonald v. MacDonald*, 698 So. 2d 1078, 1086 (Miss. 1997)). More recently, in *Jenkins v. Jenkins*, 2010-CA-00129-COA (Miss. Ct. App. 2011), the Mississippi Court of Appeals upheld a Chancellor's date of valuation "because we have held that the valuation date falls within the discretion of the Chancellor when equitably dividing marital property upon divorce." *Id.* at ¶ 23.

Henry and Susan's marital relationship lasted from 1983 to 2004, approximately twenty-one (21) years. Henry set up a pension through AT&T when he began employment with the company in 1972. Therefore, for nine (9) years prior to his marriage to Susan, he continued to accumulate funds. The pension continued to grow during his marriage to Susan and after Susan left the marriage. Therefore, Henry accumulated stock for sixteen (16) years outside of the marriage; more specifically, the nine (9) years prior to his marriage to Susan and the six (6) years between the time Susan left in 2004 until the date of the divorce.

The Chancellor's opinion does not specifically identify the ending date of the marriage; however, from analyzing the court's division of the assets, it is evident that the court determined the ending date to be December 23, 2004, when Susan left the marriage and never returned. This can be directly inferred by the lower court's valuation of the pension at approximately \$230,000, and its classification of \$110,000 as non-marital property belonging to Henry and

division of the remaining \$130,700 equally between Henry and Susan. 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.

Furthermore, there is no discussion as to how the Chancellor arrived at the conclusion to deem the entire portion of Henry's 401(k) as marital property; however, it can be inferred conclusively that the date of dissolution for the purpose of determining the non-marital portion of Henry's pension differs from the date used to determine the non-marital portion of the 401(k). One-hundred percent of the 401(k) was divided equally between Henry and Susan in the court's chart, which classified the parties' assets and the amounts, but the record is devoid of the required *Helmsley* analysis discussing how the court came to its conclusion.

In its classification of other assets, the court found that the marital home, annuity, retirement and seven (7) acres were all marital property and divided it equally between Henry and Susan. The evidence shows that the marital home and the seven (7) acres were indisputably acquired prior to 2004. As to the annuity and retirement, Susan offered no proof that these assets accumulated any value after 2004; therefore the court held it to be marital property.

The checking account that the Chancellor found to be non-marital property is the only other asset, aside from the pension and the 401(k), which was not acquired prior to 2004. However, there is a discrepancy in the court's judgment

regarding said account. The court's judgment states, "Henry is allowed to maintain . . . funds in a checking account," however, in the court's chart itemizing the actual division amounts, the checking account was considered marital property and divided between the two (2) parties. (R. 124-126.) It stands to reason that the court's discussion in the judgment classifying the checking account as non-marital property supersedes the itemization in the chart.

Because the checking account was accumulated after 2004, the court, as with the classification of Henry's pension, determined the checking account to be non-marital property. This indicates, once again, that the Chancellor used the date in 2004 as the ending date of the marriage, not the date of divorce.

It is counter intuitive that the ending date of the marriage can be two (2) different dates. There can be but one ending date of a marriage. The ending date of the marriage was clearly 2004 when Susan abandoned the marriage, without any intention to return to her family. Susan's departure was "beyond mere separation of the parties." *Pittman v. Pittman*, 791 So.2d 857, 864 (Miss. Ct. App. 2001). When she left, she was having two (2) separate affairs, had ceased to have sexual relations with her husband, had undergone tubal ligation surgery, filed immediately for divorce, and never returned to the marriage. While a temporary support order was never entered, Susan's actions clearly reflect not only a physical separation but also an intention to sever what little spousal relationship existed. These facts clearly support the Chancellor's finding that the date of separation in 2004 was the ending date of the marriage.

Consequently, because the ending date of the marriage was 2004, the Chancellor erred in classifying the entire portion of Henry's 401(k) as marital

property and should have taken a pro rata approach in harmony with the 2004 cut-off date that was used for Henry's pension. When Susan left in 2004, the balance of the 401(k) was \$114,128.79. On the date of the judgment, the Chancellor valued it at \$205,000. Had the court used the 2004 date, the marital portion would be \$114,128.79, thus making the portion of the 401(k) acquired after 2004 \$90,871.21.

Moreover, Susan failed to contribute to the culmination of the pension and the 401(k) after she left the marriage. In order for property outside the marriage to transform into marital property there must be a substantial contribution to the accumulation of property, *Lowry v. Lowry*, 25 So. 3d 274, 292 (Miss. 2009), or the acquisition was through the use of marital property. *Hensarling v. Hensarling*, 824 So. 2d 583, 591 (Miss. 2002). Susan made no contributions to the accumulation of any assets after she left the marriage, and there were no marital assets expended to increase the value of the 401(k) after she left.

In *Hensarling*, after affirming the Chancellor's determination as to the ending date of the accumulation of marital property, the court stated that any funds added after the date of separation to an account that was deemed marital property should be considered separate property.

Moreover, a Chancellor may *only* divide property which is deemed marital. *Jenkins v. Jenkins*, 2010-CA-00129-COA (Miss. Ct. App. 2011). Therefore, the Chancellor abused her discretion by dividing the non-marital portion of Henry's 401(k). Because the portion of the 401(k) acquired after 2004 was not marital property, it could not be considered for equitable distribution

using the *Ferguson* factors. Only the balance of the 401(k) in 2004, which was \$114,128.79, should have been considered marital property.

### **CONCLUSION**

In light of the foregoing, the Chancellor erred in classifying non-marital and marital property by imposing two (2) different dates of marital dissolution. The Chancellor correctly applied Susan's abandonment of the marriage in 2004 as the ending date of the marriage to classify what portion of Henry's pension and the checking account were marital property, but failed to use the 2004 date when classifying the marital and non-marital portions of his 401(k).

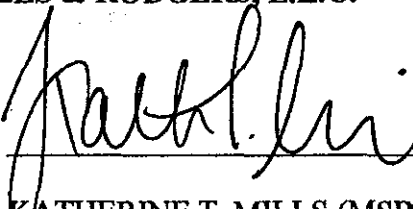


The non-marital portion of Henry's 401(k) should have been valued as of 2004, just like his pension. By classifying the entire portion of Henry's 401(k) as marital property, and finding that almost one-half ( $\frac{1}{2}$ ) of his pension and one-hundred (100) percent of the checking account as non-marital property, the Chancellor applied two (2) different dates for the discontinuance of accumulation of marital property.

The lower court erred in finding the portion of Henry's 401(k) accumulated between 2004 and 2010 as marital property. Accordingly, the Chancellor's decision should be reversed.

RESPECTFULLY SUBMITTED, this the 14<sup>th</sup> day of December,  
2011.

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

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

  
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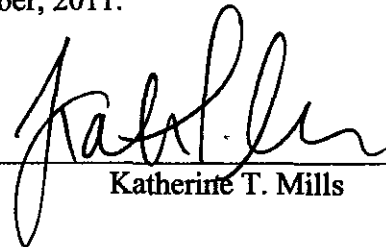
**CERTIFICATE OF SERVICE**

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 *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.  
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This the 14<sup>th</sup> day of December, 2011.



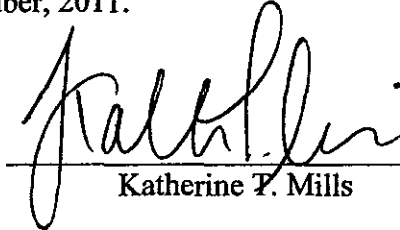
Katherine T. Mills

**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 *Brief of the Appellant* by hand-delivering the original of said document and three copies thereof to the following:

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

This the 14<sup>th</sup> day of December, 2011.

  
\_\_\_\_\_  
Katherine T. Mills