SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2013-TS-01631

DRAKE L. LEWIS — APPELLANT

VS.

TONIA D. LEWIS PAGEL — APPELLEE

APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI, SECOND JUDICIAL DISTRICT, CAUSE NO. C2402-06-747(4) HONORABLE CARTER BISE, PRESIDING TRIAL JUDGE

AMENDED BRIEF OF APPELLEE

ORAL ARGUMENT IS 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:

Drake L. Lewis, Appellant

Tonia D. Lewis Pagel, Appellee

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Honorable Carter Bise, Trial Judge

Respectfully submitted, this the 5th day of December, 2014.

/s/Dean Holleman
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I. STATEMENT OF THE ISSUES

The parties were married in 1991 and the divorce was filed in 2006. A divorce was entered on January 11, 2008. (CP.122). Drake appealed that ruling and the case was affirmed in part, reversed and remanded in part in February 2011. A remand trial was conducted in June and July 2012. The chancellor issued his Judgment After Remand on February 13, 2013 (CP. 245), an Order on Modification and Contempt on March 7, 2013 (CP. 410) and an Order (on MRCP 59 Motion) on September 17, 2013. Some eight years since the complaint for divorce was filed, Drake now pursues his second appeal from the chancellor's Judgment After Remand of February 13, 2013, the Order on Modification and Contempt of March 7, 2013 (CP. 410) and the Order (On MRCP 59 Motion) of September 17, 2013 CP. 408.

II. STATEMENT OF THE CASE

A. Appellate History

In *Lewis v. Lewis,* 54 So.3d 233 (Miss. Ct. App.2009), Drake appealed from the chancellor's January 2008 Judgment of Divorce. He claimed the following as error: The chancellor erred in his valuation of Legacy Holding, Inc.; erred in his designation of marital/non marital assets; erred in its designation of the St. Martin property as marital; erred in valuing the loan from Legacy Holding, Inc. to the parties as an asset; and erred in his equitable distribution. Id. Drake assigned no other errors and more specifically he did not assign as error any of the chancellor's adjudications in January 2008 as pertained to the child support ordered to be paid by Drake to Tonia for the three children, i.e. $1,606.00 per month. (CP. 122)

The Court of Appeals affirmed the chancellor's January 2008 Judgment in part and reversed and remanded the chancellor in part. In its ruling the Court upheld the chancellor's 2008 findings of certain specific assets as marital: Tigerbend Apartments Interest; Richland Road sale proceeds; and Shenandoah/Kennesaw Interest. The Court reversed and remanded the portion of the chancellor's equitable distribution of the marital estate as pertained to specific assets: the chancellor's value of Legacy Holding, Inc., was reversed and remanded for further determination of value; the chancellor's finding that the St. Martin property was marital was reversed and remanded for further determination of its marital/non marital status; the chancellor's finding that the Swamp Road property was marital was reversed and remanded for further determination of its marital/non marital status. This Court specifically instructed the chancellor that once "these things" were addressed then the chancellor was to again make an equitable distribution of the marital estate "taking into account the new value of Legacy Holding, Inc. and any other property which has undergone a change in marital status". *Id.*

On *Writ of Certiorari* this Court agreed with the Court of Appeals findings, however, found that the Court of Appeals erred in its remand instruction regarding valuing Legacy Holding, Inc. to include goodwill. This Court instructed the chancellor to "cause the marital assets to be revaluated consistent with the instructions of this opinion and those of the Court of Appeals, with the exception of considering goodwill equity." *Lewis v. Lewis,* 54 So.2d 216 (Miss. 2011).

B. Judgment After Remand-Incorporation of 2008 Findings and Discussions

On remand, trial was conducted in June and July 2012. The chancellor followed this Court's instructions by once again reviewing the evidence to determine a value, if any, of Legacy

Holding, Inc., and reviewing the evidence regarding the marital/non-marital status of two real properties: Swamp Road and St. Martin. CP. 245. The chancellor also heard evidence on two motions for modification and contempt filed by Drake and by Tonia after January 2008 and prior to the 2012 remand trial. CP. 8, 36.

By Judgment dated February 15, 2013, the chancellor made specific reference to his January 2008 Judgment and the chancellor specifically reincorporated and readopted "all of his findings and discussions of relevant factors as contained therein, with the exception of the issues remanded and the applicable factors discussed *infra*." CP. 247. In other words, the chancellor restated by referenced his prior *Ferguson* analysis and findings and then set forth his additional findings before making his final equitable distribution of the marital assets on the remand. CP.245.

As to the chancellor's reincorporated and readopted "findings and discussions of relevant factors" in his 2008 Judgment, a brief summary of those findings and discussions would be of benefit: Drake was not credible; Drake made efforts to hide assets and income; (CP.122); the parties were married for 15 years with 3 children before separation; each party's education and employments were reviewed; the parties had no assets when they married; in 1994 the parties moved to Mississippi to begin real estate development; (CP.123); Tonia took on the role as "gopher" in assisting Drake as a daily multi-tasker; in 2000 the parties began a construction and management business; in 2001 the parties created Legacy Holding, Inc., to build speculation and custom homes; the parties purchased various pieces of real estate, e.g. Suma, Richland, Pinehurst; (CP.124); Drake acquired separate assets, e.g. Hickory Hills, St. Martin, Swamp; the parties had no substantial retirement accounts or college funds for the kids; the real estate was their "future"; (CP.125); Legacy Holding, Inc., gross sales from 2001-2005 was a low of

$612,000 in 2001 increasing each year and rising to $2,400,000.00 in 2005; (CP.126); Drake postured for a 'poor' financial condition after the divorce was filed; Drake had two affairs, one in 2003 and the last with Tonia's purported best friend with whom Drake was living with during the pending divorce; when the divorce was filed Drake had control of Legacy Holding, Inc., and Tonia had no income; the chancellor ordered Drake to pay Tonia temporary spousal support totaling $4,883.00 a month for her and the children; (CP.127); Drake secretly received $28,848.00 from the parties' loan receivable from Legacy Holding, Inc. during the pending divorce; in September 2006 Drake began diverting business from Legacy Holding, Inc. to his venture called "Legacy Builders"[1]; Drake used the funds from Legacy Holding, Inc., to pay off his large credit card debts of $34,700.00, but left Tonia with her $7,044.00 in credit card debt with no funds to pay same (CP.128); the chancellor recited the foundations for equitable distribution citing *Draper, Yancey, and Ferguson;* the chancellor detailed his findings and analysis of each *Ferguson* factor by listing each factor and discussing the same: both parties contributed to accumulation, both held employments, both worked in the business, the parties' joint efforts were building their estate for the future, (CP.136); the marital estate had grown at a fast pace, when the divorce was filed Drake ended his efforts to 'grow' the estate, Drake took monies from Legacy Holding, Inc., by way of the loan payback and his credit card reduction, Drake was in the better position to be awarded Legacy Holding, Inc., and Tigerbend, (CP.137); there were no special tax or other economic consequences to be considered, because of the nature of the assets the court would make some provision for alimony, Tonia had a greater need for financial security from the assets awarded to her with due regard to the combination of assets,

[1] Interestingly, on remand Drake's CPA Doris Triplett testified he began this business in August 2008 but in 2007 he testified he had begun doing business as Legacy Builders in 2006 and this is referenced in the chancellor's 2008 Judgment.

income, and earning capacity, as Drake "took the major part in developing Legacy Holding, Inc.,", and Tonia would have to begin a new career, while raising the children also. (CP.138)

Chancellor's Findings on Remand- Legacy Holding, Inc. Value: The chancellor once again noted the parties jointly created the business that became known as Legacy Holding, Inc. He noted that in addition to in the business, Tonia was also the "stay at home mom". CP.247. The chancellor recognized how Drake and Tonia comingled their personal finances with those of Legacy Holding, Inc., and with those of the "trust" which Drake was involved in with his dad Gary Lewis. He noted how sloppy the business of Legacy Holding, Inc. had been conducted and he noted Tonia's role in its successes. The chancellor stated: "To all intents and purposes, Legacy Holding, Inc., appears not to have been run as a true corporate entity, but as an alter ego of the parties out of which they paid most of their personal expenses. They comingled monies and work back and forth between the trust and their personal expenses. [Tonia] also worked on the trust construction, acting in the capacity of an interior decorator, choosing paints, carpets and countertops. Within the business of Legacy Holding, Inc., [Tonia] assisted in handling some of the bookwork and bills". CP.248.

As to the valuation of Legacy Holding, Inc., on remand, the chancellor found himself in a familiar position: Drake provided no evidence of value. As stated by the chancellor: "[t]he Court is once again left with no firm basis on which to form an opinion". CP.248. The chancellor noted the remand had specifically 'struck down' the value of Legacy Holding, Inc., based upon the use of the QuickBooks and Quicken used at the 2007 trial. However, the chancellor noted with some dismay that in the 2012 remand trial Drake once again offered no expert testimony to establish Legacy Holding, Inc.'s 'net asset' value, if any.

As his witness to testify about the assets of Legacy Holdings, Inc., Drake offered the testimony of his new certified public accountant, Doris Triplett. Tr.39. After the January 2008 Judgment, Triplett prepared the 2008 tax return for Legacy Holdings, Inc. "Admittedly based upon information that was incomplete and without supporting documentation". CP.249. Triplett admitted the proper method to prepare correct tax returns for Legacy Holdings, Inc. would have been to amend the 2007 and earlier returns which she did not do. CP.248-49. Tr.39-131. The chancellor noted Drake had promised in the 2007 trial to bring his certified public accountant at that time to testify and explain the 2007 tax return, but he never did. "[Drake] has still failed to provide any information on which to base any conclusion as to the worth of Legacy Holding, Inc." CP.249. One thing was certain on remand: Drake's evidence showed Legacy Holdings, Inc., business continued to thrive after the 2007 trial.

The 2012 evidence showed the business of Legacy Holding, Inc. was all but dormant in 2007-2008. Recognizing the ongoing business of Legacy, the chancellor noted the significant financials of Legacy Holding, Inc. from 2007 forward. From the 2007 Legacy Holding, Inc. tax return the 'work in progress' at the beginning of 2007 was $988,758.00. Legacy Holding, Inc. had unimproved properties at the beginning of 2007 valued at $1,086,250.00. At the end of the year, it had 'work in progress' valued at $1,033,556.00 and unimproved property valued at $1,032,906.00 and receivables valued at $65,000.00. Evidently, Drake was busy in his construction endeavors within Legacy Holdings, Inc., in 2007. The return showed gross receipts in 2007 of $2,035,930.00.

The chancellor noted Legacy Holding, Inc. was closed by Drake in August 2008. However, Legacy Holdings, Inc. ended the nine month operating period ending August 2008 with gross receipts of $1,971,172.00, cash on hand of $82,465.00, and total assets of

$2,322,505.00. Interestingly, Triplett testified those assets and work in progress were transferred to Drake Lewis d/b/a Legacy Builders which is the new business under which Drake continued his construction business.[2] Interestingly, the chancellor noted that in 2008 Drake Lewis d/b/a Legacy Builders had receipts of $90,361.00 and by 2009 those receipts for the year had grown to $1,134,686.00, with a *net income(to Drake) of $18,953.00.* [emphasis ours]. CP.249.

The chancellor further recognized Triplett's testimony wherein she testified that by closing Legacy Holdings, Inc. Drake received the benefit of the business capital loss carryover of $314,187.00 which would (and did) benefit him on his future tax returns at $3,000.00 per year. He further had a net operating loss of $238,314.00 from the business which he could offset against future ordinary income without limitation thus will not pay taxes on each dollar of future ordinary income due to offset. CP.250. These losses to be enjoyed by Drake are in addition to any assets transferred to him from Legacy Holdings, Inc., e.g. work in progress, cash on hand, etc. Such benefits had value to Drake.

Notwithstanding Triplett's testimony of the benefits Drake received from the closing of Legacy Holdings, Inc., the chancellor stated in regards to Legacy Holdings, Inc.'s value: "There is no testimony upon which this Court can place a valuation other than a stab in the dark at goodwill, a door which has been definitely closed by the Supreme Court." CP.250. The chancellor found if there was any value to Legacy Holdings, Inc. the same would be awarded to Drake "as his own"; that any liabilities are to be Drake's, that Drake would hold Tonia harmless and indemnify Tonia of any and all tax liability (there was none)[3]. CP.250.

[2] This contradicts Drake's 2007 testimony and the chancellor's 2008 findings which indicated he began Legacy Builders in 2006.

[3] Tonia does not contest the chancellor's award of Legacy to Drake and whatever went with it, but does point out that Drake has and will benefit greatly from Legacy since this divorce began in 2006.

The chancellor then addressed the marital/non-marital status of the Swamp Road property which he declared non marital and awarded the property to Drake. CP.250. Tonia does not contest this finding on this appeal. The chancellor found the St. Martin property also to be non-marital property. CP.251. Tonia does not contest this finding on this appeal.

In view of the chancellor's changes from his 2008 Judgment with regard to Legacy Holdings, Inc.'s value, the designation of the Swamp Road property as non-marital, and the designation of the St. Martin property as non-marital, the chancellor found its previous equitable distribution must be amended. CP.252. In connection therewith the chancellor stated: "[T]his Court will revisit the applicable *Ferguson* and *Armstrong* factors." CP.252. [emphasis ours].

Following his findings on remand, the chancellor revised his prior distribution of assets to Tonia by removing the non-marital St. Martin property valued at $200,000.00 from her assets. CP.252. This placed her distribution value at $665,733.00. From his prior distribution of assets to Drake the chancellor added the St. Martin property to Drake's assets, but declaring it to be his separate asset and the chancellor declared the Swamp Road property to be Drake's separate asset. This placed Drake's distribution value at $649,100.00. CP.252. After adjusting the distributions to Tonia and Drake the chancellor then stated:

> "Thus the Court will revisit the factors in both *Ferguson* and *Armstrong* which deal with property brought into the marriage or acquired outside the marital estate. The Court finds all other *Ferguson* and *Armstrong* factors the Court previously analyzed remain the same." [emphasis ours]
>
> *Ferguson* directs the Court to evaluate, among other factors, the value of assets not ordinarily subject to 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. *This Court, in its original decision, carefully weighed all the factors, but this factor has been affected by the reclassification of assets*. [emphasis ours]. Drake Lewis was gifted by his father property valued at approximately $210,000.00. The Court finds after division of the property, Drake's assets, including his non-marital assets, outweigh Tonia's assets to the extent some sort of lump sum alimony must be awarded....The Court finds that in light of all *Ferguson* and *Armstrong* factors, and in order to equitably

divide the property, Drake Lewis shall pay Tonia Lewis Pagel $100,000.00 in lump sum alimony." [Ordered to pay at $2,500.00 per month].
CP.252-53.

Thus, the chancellor completed his assignment as instructed by this Court and the Mississippi Court of Appeals. The chancellor exercised his discretion in reclassifying marital assets, determining value where possible, considered the parties' separate estates and any disparity and made his equitable distribution based upon his findings in his January 2008 Judgment and on remand. The Judgment After Remand should be affirmed.

C. Order on Modification And Contempt-Drake's Assigned Errors

Both Drake and Tonia filed motions during the appeal of the first judgment. CP. 8, 36. The evidence related to Drake's motion to modify and Tonia's motion to modify and for contempt was received during the trial on remand. On March 7, 2013 the chancellor issued its separate Order on Modification and Contempt.[4] CP.410. Pertinent to the issues raised in Drake's appeal from said Order are as follows:

1. Drake requested a downward modification of child support. The chancellor noted Drake's testimony was his income had been reduced since 2008 when the judgment was entered, and his monthly gross income was now $4,613.04. Beginning September 2009, Drake unilaterally reduced his support many months prior to the trial to $849.00 per month and thereafter sometimes less. The chancellor found Drake should not have unilaterally reduced his support as he did. CP.412. The chancellor noted in 2007 Drake represented to the Court his income was $4,730.00 per month (per his financial declaration). CP.412. According to the chancellor: "The Court noted in the Judgment in 2008, that in addition to his income from his

[4] There were issues in both motions that were moot or dispensed with which are not issues on this appeal and therefore omitted.

construction business, he has investments in Louisiana that provided a source of income, and the children's needs were greater than the 22% he was ordered to pay." CP.412. Once again, the issue of child support was adjudicated in 2008 and Drake did not appeal that issue. In his March 7, 2013, order the chancellor concluded that the evidence presented did not show a change in circumstances meriting a downward modification. "Even if Drake's income has dropped since 2007, he is capable of earning a substantial income comparable to that which he earned at that time and he has substantial assets, and the Court finds the request to modify child support should be denied." CP.412. For the reasons set forth later in this briefing, the Chancellor should be affirmed on his denial of modification.

2. Turning to Tonia's request for modification, the Chancellor addressed her request that the prior Judgment be modified to provide that Drake be responsible for any and all tax liabilities arising out of the operation of Legacy Holding, Inc. Having awarded Drake Legacy, which Drake chose to close and liquidate in August 2008, the chancellor granted this modification. Tr. 413-14. For the reasons set forth later in this briefing, the Chancellor should be affirmed on his granting of this modification.
3. As to Tonia's claims for contempt, the chancellor found Drake was in contempt for failing to pay child support and medical bills as ordered in 2008 all of which totaled $28,589.39. Drake was ordered to pay this arrearage at $500.00 per month. This arrearage was documented and summarized in Exhibit 19. For the reasons set forth later in this briefing, the Chancellor should be affirmed on his finding of contempt.

4. The chancellor awarded Drake to pay Tonia attorney fees of $5,000.00 for his contempt. CP.416. For the reasons set forth later in this briefing, the Chancellor should be affirmed on his granting of these fees.

III. SUMMARY OF LEGAL ARGUMENT

The chancellor below set forth the most extensive findings and analysis of all factors necessary for him to equitably divide the marital estate of Drake and Tonia and the record is replete with substantial credible evidence to justify his findings. *Henderson v. Henderson,* 757 So. 2d 285, 289 (Miss. 2000). In *Ferguson v. Ferguson*, 639 So. 2d 921, 927 (Miss. 1994), the Mississippi Supreme Court introduced the concept of equitable division of marital property and specifically held that equitable division does not mean equal division. The chancellor below followed the *Ferguson* framework when he (1) classified Drake and Tonia's assets as marital or separate; (2) determined the value of those assets; (3) divided the marital estate equitably based upon the factors set forth in *Ferguson* and his discretion; and (4) finally the chancellor considered the appropriateness of lump sum alimony for Tonia who was left with a deficiency i.e. no separate estate as compared to Drake's separate estate. *Larue v. Larue*, 969 So. 2d 99, 104 (Miss. Ct. App. 2007).

On remand the chancellor reassessed the only affected *Ferguson* factor after declaring two additional properties as Drake's separate assets, i.e. he considered Drake's assets 'acquired outside the marriage' and then revised his equitable distribution of the marital assets. See *Ferguson*, infra. This Court is to presume that based upon the chancellor's findings and the stated factors that he has taken all of the factors into consideration. *Voda v. Voda* 731 So.2d 1152 (Miss. 1999). This Court must further give all reasonable inferences which may be drawn

from the chancellor's findings and which favor the upholding of those findings. *Singley v. Singley* 846 So.2d 1004 (Miss. 2002).

Drake cites *Miller v. Miller*, 874 So.2d 469 (Miss.Ct.Appeals 2004) for the proposition that lump sum alimony is not an 'equalizer' for equitable distribution and that the use of lump sum alimony in equitable distribution to equalize the distribution is improper. Drake is wrong. In the case of *Haney v. Haney* 907 So.2d 948 (Miss. 2005) it was held that "this Court has allowed lump sum alimony as an adjustment to property division to prevent unfair division" citing *Reeves v. Reeves* 410 So.2d 1300 (Miss. 1982). Justice Dickinson further reasoned that the *Cheatham* factors are "really nothing more than an earlier version of the *Ferguson* factors and both are used for the same purpose". In other words, when a chancellor addresses all of the *Ferguson* factors he has included each of the *Cheatham* factors in his analysis. *Id. at 954.*

Drake's argument for modification of the child support modification makes quantum leaps over the threshold requirement that he must have shown that since January 2008 there has occurred a material or substantial change in the circumstances not anticipated at the 2007 trial. *Bruce v. Bruce*, 687 So. 2d 1199, 1202 (Miss.1996). Just seventeen months following the Judgment of January 2008, Drake sought a reduction of his child support. By September 2009 Drake had chosen to work for his dad, Garry Lewis. 2012 Exhibit 15. Interestingly, Drake's wife also received a job paying $35,000.00 per year. Sometime prior to the Summer of 2011 Drake decided he wanted to be a lawyer and he entered law school in Louisiana. By the time of trial in the Summer of 2012, Drake was in law school and working for his father. 2012 Exhibit 15. The chancellor was in the best position to determine Drake's credibility and the credibility of the witnesses and their respective testimony and proof regarding the matter at issue. As is well-established, the chancellor is vested with assessment of witness credibility, and "the

interpretation of evidence where it is capable of more than one reasonable interpretation . . . ." *Crow v. Crow,* 622 So. 2d 1226, 1229 (Miss.1993*)*. The chancellor below commented in 2008 and 2012 as to Drake's lack of truthfulness and credibility.

In *Pullis v Pullis* 753 So.2d 480 (Miss. Cr. Appeals 1999) the husband voluntarily resigned his job due to the stress of his job. The chancellor in *Pullis* found no material change in circumstances justifying a reduction in child support payments: "...simply because David acted without malice toward the interests of the child, he is not automatically entitled to a reduction in child support. The conduct truly at issue is the voluntariness of David's departure in light of the indirect effects of the good faith or bad faith surrounding it". *Id.* While Drake may have not acted in bad faith, he certainly made the choice to remarry, to begin and end Legacy Builders, take his salaried position with his father, and to attend law school. Prior to any of this Drake was obligated to support his children as ordered in January 2008. He effectively compromised the best interests of his children by making the choices he made. *Id.*

The Mississippi Supreme Court held that even though the father may be able to get a better job later by improving himself through education now, "under the facts of the case at bar, the unilateral acts of the appellee do not justify a reduction in his child support obligation." *Tingle,* 573 So. 2d at 1393.

Even if a modification would have been in order, the chancellor still based his award upon his complete findings and analysis and specifically found that Drake was capable of earning a substantial income comparable to that which he earned at the time he was ordered to pay $1,606.00 per month in child support and he has substantial assets with which to make that possible. CP. 412. *McGehee v. Upchurch,* 733 So. 2d 364, 371 (P37) (Miss. Ct. App. 1999).

In Tonia's contempt action she sought unpaid child support and medical bills. Tonia met her prima facie case when she introduced her evidence (2012 Exhibit 19) that Drake failed to pay the support he was ordered to pay. *R.K. v. J.K.,* 946 So. 2d 764, 777-78 (Miss. 2007). This proof shifted the burden to Drake to demonstrate an applicable defense, and this proof must be clear and convincing. Drake offers no defense. *Id. at 778.* The Mississippi Supreme Court has held that "contempt can only be willful." *Id.* (citing *Mizell v. Mizell,* 708 So. 2d 55, 64 (P52) (Miss. 1998)). A contempt citation is proper when the contemnor has willfully and deliberately ignored the order of the court. *Id.* This Drake admittedly did.

It is within the chancellor's discretion of whether or not to award attorney fees in a contempt action. *Smith v. Smith,* 843 So.2d 735 (Miss. Ct. Appeals 2003). It is well settled that the establishment of the *McKee* factors is not necessary for one who successfully prosecutes a contempt action in order to recover attorney fees related to pursuing actions where a contemnor has willfully violated a lawful order of the court. To hold otherwise would cause no peril to those restrained from certain conduct if they violate the orders of a court." *Gardner v. Gardner,* 795 So. 2d 618 (P4) (Miss. Ct. App. 2001).

IV. LEGAL ARGUMENT

In his Amended Appellant Brief, Drake has listed "Arguments" I through IV. Each argument and its subparts will be addressed hereinbelow.

DRAKE'S ARGUMENT I AND ARGUMENT II: EQUITABLE DISTRIBUTION AND LUMP SUM ALIMONY

Drake identifies Argument I in his Amended Appellant's Brief as "The Chancery Court Erred in its Equitable Distribution". This argument is followed by multiple subparts, some identified by letters (A through D) and then some with just a title, i.e. Richland Road, Separate Property and *Ferguson,* Appellant's Brief P. 18-30.

Drake's "Amended Appellant Brief" changes a titled paragraph from his first brief ("Ferguson and Lump Sum Alimony" at P. 30) to his "ARGUMENT II: The Chancery Court Erred in Awarding Lump Sum Alimony". Here Drake complains in awarding lump sum alimony to Tonia of $100,000.00, the chancellor failed to account for the factors in *Cheatham v. Cheatham,* 537 So.2d 435 (Miss. 1988). [See Tonia's legal argument set forth herein below].

The chancellor followed the instructions of the decisions of this Court as well as those of the Mississippi Court of Appeals. After addressing the issues with Legacy Holding, Inc., Swamp Road, and St. Martin, the chancellor, as heretofore set forth, adopted all of its findings on the *Ferguson* factors from its 2008 judgment and then addressed the affected factor on the assets acquired outside the marriage, i.e. non marital Swamp Road and St. Martin now being awarded to Drake. The chancellor concluded by revising its equitable distribution and by awarding Tonia additional lump sum alimony to adjust the equities between the parties. There was no error.

In reality, in his "AGRUMENT 1" Drake brings back to this Court the same assignment of errors which he asserted in his 2008 appeal: "The Chancery Court erred in its Equitable Distribution". Without any supporting legal authority Drake complains the chancellor erred in finding Legacy Holding, Inc. a "valued asset" (the chancellor assigned no value), the chancellor erred in finding certain assets marital (the chancellor held Swamp Road and St. Martin properties to be non-marital), the chancellor erred in "including a non-existent property as an asset and treated loans as assets". Appellant's Brief, p.17.

Following a foundational paragraph of what Mississippi case law provides for equitable distribution, Drake acknowledged the chancellor's inability to value Legacy Holding, Inc. He acknowledged the chancellor's statement that Drake had "still failed to provide any information" for a valuation of Legacy. However, Drake is in error to imply that the chancellor failed to fulfill his duties as chancellor in not valuing Legacy because the chancellor "certainly noted the remand language about valuation using assets". Appellant's Brief Pp. 18-19. It is not simply about the value of assets. It is about following Mississippi law and providing expert testimony to perform a business evaluation on Legacy using the "net asset" approach. This proposition has been "hornbook" law for many years. *Singley v. Singley,* 846 So.2d 1004 (Miss. 2002). The failure is on Drake's part, not the chancellor.

Turning to Drake's continuing argument as to the valuation of Legacy, Drake once again maligns Tonia for "flagrant misleading of the court on the Legacy Holding, Inc., value previously in 2007". Appellant's Brief, p.19-21. The two page diatribe and attack on Tonia ignores the fact that all of this was covered during Tonia's cross examination in 2007, covered in the January 2008 Judgment when the chancellor clearly recognized the Legacy documents offered by Tonia in 2007 relevant to Legacy's value were not accurate, and covered by the

Mississippi Court of Appeals in its opinion. Notwithstanding, Drake continues his irrelevant argument that Tonia offered inaccurate Legacy Holdings, Inc., documents in 2007. The fact is she offered more than what Drake has ever offered and what she did obtain prior to the 2007 trial from Legacy's records was all that she had at her disposal. While Drake has now had two chances to provide the chancellor with an expert's valuation, in 2007 and 2012, he has chosen not to do so. However, he is once again critical of the work of the chancellor when it is Drake who has failed to place the evidence before the chancellor with which he could value Legacy. The Mississippi Supreme Court has recently reinforced its view of the burden of proof a party has to prepare the evidence touching on matters important to a party's position in a case:

> The only evidence presented to the trial court as to the value of the Back Clinic was the uncontroverted testimony of Henry. The chancellors of this state are not responsible for the evidence that is presented at trial. As the Court of Appeals has said, "it is incumbent upon the parties, and not the chancellor, to prepare evidence touching on matters pertinent to the issues to be tried." *Dunaway v. Dunaway*, 749 So.2d 1112, 1118 (Miss.Ct.App.1999). Where a party fails to provide information, the chancellor is entitled to proceed on the best information available. *Id.* The value of the Back Clinic was a factual finding supported by credible evidence. *Newsom v.Newsom*, 557 So.2d at 514 (Miss. 1990).
>
> [emphasis ours] *Irby v. Estate of Irby*, No. 2007-CA-00689-SCT.

Drake cites no legal authority in support of his complaints against Tonia.

Again without legal authority, Drake next asserts "the Court did not make a detailed analysis of the distribution on remand" in its Judgment After Remand. Appellant's Brief, p.21. Of course, the chancellor did do his detailed analysis by reincorporation and adoption of his previous findings and analysis as heretofore set forth.

Through a very confusing overview of what the chancellor's concluded in his equitable distribution on remand, Drake essentially complains that "Tonia was given substantially more of

the assets". Appellant's Brief, p.23. Once again, he cites no legal authority. Appellant's Brief, pp. 21-23.[5]

Drake's next claim of error under "Argument 1" is "The Court's Error in this [sic] Equitable Distribution". Appellant's Brief, p.23. Here, Drake does spread around a little basic law. He cites *Helmsley* and *Ferguson* as being the legal foundation for equitable distribution. Id. He recites the *Ferguson* factors. *Id.* He cites *Wells* and *Shoffner* for the proposition that equitable distribution need not be equal, just equitable. He cites *Johnson*, *Ferguson*, and *Bullock* for the proposition that after equitable distribution of the marital assets, the chancellor may then consider the disparity in the parties' separate estates and consider an award of alimony inappropriate in the chancellor's discretion. Appellant's Brief, p.24.

At page 25 of the Appellant's Brief, Drake again erroneously states: "The Chancery Court failed to make a detailed *Ferguson* analysis" when in fact the chancellor below most definitely did reincorporate, readopt and refer back to his 2008 analysis and findings as heretofore set forth. The chancellor further recognized the change in the distribution to Tonia due to the change in the status of certain assets on remand from marital to Drake's separate assets and in view of the resulting disparity in the separate estates of Drake and Tonia the chancellor awarded Tonia lump sum alimony of $100,000.00. CP.252-53.

Drake follows with another listing of "reasons" why the chancellor erred in his equitable distribution on remand (Appellant's Brief Pp. 25-26):

a) Drake complains that the chancellor in essence awarded Tonia a greater share of the assets than Drake.

[5] Drake makes reference to a lesser value of the St. Martin property due to "the real estate collapse" with no cites and no evidence offered of such.

b) Drake makes reference to the chancellor failing to note "Tonia did not have the debt on the Kennesaw property of $82,000.00" which does not concern any issue on remand pertaining to that asset. This is a marital asset affirmed by the Court of Appeals which Tonia was awarded initially and which remained in her assets on remand. There is no further expansion by Drake on this reference.

c) [# sic]Drake erroneously makes reference to the chancellor failing to address the "*Ferguson* factors in regard to the assets and the tax consequences". Appellant's Brief, p.25. The chancellor set forth his findings and analysis on all of the *Ferguson* factors and specifically found there was no evidence of any tax consequences created by the chancellor's equitable division. CP. 138. There is no further expansion by Drake on this comment.

d) Drake makes reference to the chancellor's failure "to review *Helmsley* as regards the separate property from the Richland sale and the failure to sequester this property". Tonia is not sure what Drake intends by this statement. Again, the Richland sale proceeds were determined to be a marital asset in 1998 and affirmed on appeal. There was not a remand issue on the Richland sale proceeds. The asset was awarded to Tonia in the equitable distribution on remand. Appellant's Brief, p.25, 26-29.

e) In Drake's second to last of his listings of reasons the chancellor should be reversed he provides: "Because of these factual and legal errors, the Chancery Court's equitable distribution does not comply with this court's *Ferguson* guidelines." There is no further expansion by Drake on this comment.

f) Lastly, Drake asserts the chancellor erred "in awarding lump sum alimony after that faulty *Helmsley-Ferguson* analysis in contravention to the rules set forth in *Cheatham v. Cheatham*, 537 So. 2d 435, 438-40 (Miss. 1988). Tonia is not sure what Drake intends by this statement. There is no further expansion by Drake on this comment.

Drake proceeds on page 26 of the Appellant's Brief under a heading "Richland Road, Separate Property and *Ferguson*". Once again, the Richland sale proceeds were determined to be a marital asset by the chancellor in 2008 and this classification was affirmed on appeal. There was not a remand issue on the classification of the Richland Road sale proceeds. The asset was awarded to Tonia in the chancellor's equitable distribution on remand.

Drake's next section of error is titled "Remand and *Ferguson* Analysis". Drake argues "there is no reason that Tonia needed more assets than Drake". Drake cites *Wells v. Wells,* 800 So. 2d 1239 (Miss.Ct.Appeals 2001), however, in that case the husband complained about receiving less of the assets than the wife just as Drake does. The *Wells* equitable distribution was affirmed. The *Wells* court reminded us that this Court does not conduct a *Ferguson* analysis anew. Where the chancellor sets forth his findings and his analysis in making his equitable distribution he will be affirmed. Id. Drake cites *Bresnahan v. Bresnahan,* 818 So.2d 1113 (Miss. 2002), however, the chancellor's division of the assets on a 55/45 basis in favor of the husband was affirmed. That case also reminds us that "[u]nder the system of equitable distribution the courts in Mississippi are not so inhibited [as courts in community property states]. The matter rather is committed to the discretion and conscious of the Court, having in mind all of the equities and other relevant facts and circumstances". *Id. at p. 1119*

Tonia's Legal Argument-Equitable Distribution-Chancellor should be Affirmed

The chancellor below set forth the most extensive findings and analysis of all factors necessary for him to equitably divide the marital estate of Drake and Tonia and the record is replete with substantial credible evidence to justify his findings. "In domestic relations cases the scope of review is limited by the substantial evidence/manifest error rule." *Jundoosing v. Jundoosing,* 826 So. 2d 85, 88 (Miss. 2002). "This Court may reverse a chancellor's findings of fact only when there is no 'substantial credible evidence in the record' to justify his finding." *Henderson v. Henderson,* 757 So. 2d 285, 289 (Miss. 2000). "[This Court's] review in domestic relations is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." *Johnson v. Johnson,* 650 So. 2d 1281, 1285 (Miss. 1994); *Morris v. Morris* 5 So. 3rd 476 (Miss. Ct. Appeals 2008).

As in Drake's first appeal, the ultimate question raised again in Drake's "Argument 1" is whether the chancellor erred in equitably dividing the marital estate. Drake argues that the chancellor erred in awarding Tonia a greater share of the marital estate. His implication is that the only way the estate can be equitably divided is for it to be divided equally. Drake cites no authority that requires the chancellor to equally divide the marital assets.

In *Ferguson v. Ferguson,* 639 So. 2d 921, 927 (Miss. 1994), the Mississippi Supreme Court introduced the concept of equitable division of marital property and specifically held that equitable division does not mean equal division. See also *Love v. Love,* 687 So. 2d 1229, 1232 (Miss. 1997); *Trovato v. Trovato,* 649 So. 2d 815, 818 (Miss. 1995); *Pierce v. Pierce,* 648 So. 2d 523, 526 (Miss. 1994); *King v. King* 862 So.2d 1287, 1289 (Miss. Ct. Appeals 2004). The

chancellor below is granted wide discretion in dividing Drake and Tonia's marital estate. *Jones v. Jones* 995 So.2d 706 (Miss. 2008); *Bullock v. Bullock*, 699 So.2d 1205, 1211 (Miss. 1997).

This Court's decision in *Ferguson* sets forth the proper framework for the chancellor's property designation and distribution. The chancellor below followed the *Ferguson* framework when he (1) classified Drake and Tonia's assets as marital or separate; (2) determined the value of those assets; (3) divided the marital estate equitably based upon the factors set forth in *Ferguson* and his discretion; and (4) finally the chancellor considered the appropriateness of lump sum alimony for Tonia who was left with a deficiency i.e. no separate estate as compared to Drake's separate estate. *Larue v. Larue*, 969 So. 2d 99, 104 (Miss. Ct. App. 2007) (citing *Ferguson*, 639 So. 2d at 928-29).

Much like Drake, the husband in *Wells v. Wells* 800 So.2d 1239 (Miss. Ct. Appeals 2001) complained the chancellor did not equitably divide the marital assets and that his wife received too much. In *Wells* the chancellor was affirmed. This case stands for the proposition that this Court's review of the chancellor's judgment is not to conduct a *Ferguson* analysis anew, but to review the judgment to ensure that the chancellor followed the appropriate standards and did not abuse his discretion. As did the chancellor in *Wells*, the chancellor below equitably divided Drake and Tonia's marital estate only after first setting forth his findings under *Ferguson* in his January 2008 judgment. Thereafter these findings were readopted in the chancellor's 2012 Judgment After Remand. The chancellor's findings under the *Ferguson* factors clearly set for the contributions of both parties to the marital estate and clearly showed Tonia had made very significant contributions.

On remand the chancellor reassessed the only affected *Ferguson* factor after declaring two additional properties as Drake's separate assets, i.e. he considered Drake's assets 'acquired

outside the marriage' and then revised his equitable distribution of the marital assets. See *Ferguson*, infra. As was the chancellor's analysis in *Wells*, the analysis of the chancellor was an act of his discretion based upon his factual findings and there was no error in his division of the marital property in question.

Recognizing the delineation of the *Ferguson* factors and the findings by the chancellor below, this Court is to presume that based upon the chancellor's findings and the stated factors that he has taken all of the factors into consideration. *Voda v. Voda* 731 So.2d 1152 (Miss. 1999); *Tanner v. Tanner,* 481 So. 2d 1063, 1064 (Miss. 1985) (quoting *Pickering v. Pickering,* 51 So. 2d 740, 741 (Miss. 1951) and citing *Gardiner v. Gardiner,* 230 Miss. 778, 93 So. 2d 638, 641, 90 So. 2d 668 (1957)). The record below clearly contains a full analysis of the *Ferguson* factors and this Court must accept that which supports or reasonably tends to support this analysis and the supporting findings of fact made by the chancellor. This Court must further give all reasonable inferences which may be drawn from the chancellor's findings and which favor the upholding of those findings. *Singley v. Singley* 846 So.2d 1004 (Miss. 2002); *Ezell v. Williams* ,724 So. 2d 396, 397 (Miss. 1998). Even if Drake were to point out particular evidence which may be contradictory to the chancellor's findings such does not warrant interference by this Court and this Court must generally affirm. *Boatner v. State,* 754 So. 2d 1184, 1191-92 (Miss. 2000).

Drake erroneously asserts the chancellor failed to make the sufficient findings under the *Ferguson* factors. As stated herein above the chancellor covered each and every *Ferguson* factor applicable to the equitable division of Drake and Tonia's marital estate. See [Jan 08 and 12]. When the chancellor was called upon on remand to revisit the marital/non marital status of Swamp Road and St. Martin properties the chancellor revisited the affected *Ferguson* factor and

made his revised equitable distribution of the marital estate. Even if this Court were to determine the chancellor did not address a particular *Ferguson* factor, this Court has held not every case requires consideration of all eight of the factors. *Morris v. Morris* 5 So.3d 476, 491 (Miss. Ct. Appeals 2008)[wife awarded greater portion of assets; affirmed). Rather, the chancellor at his discretion "may consider only those factors he finds 'applicable' to the property in question." *Id.*

On remand, the chancellor below reclassified the Swamp Road and St. Martin properties and declared these assets as Drake's separate estate which added to those assets he was already awarded in the first trial as his separate assets. Having made these changes, the chancellor recognized that the distribution to Drake and Tonia had been affected and Tonia's value had decreased. Having before him all of the chancellor's prior findings from 2008 and along with his new findings in 2012 the chancellor had the discretion to re-evaluate the equities between the parties, consider each party's contributions to the marital estate, and to consider each party's separate estate (Tonia had none, Drake had aplenty) as provided in *Ferguson.* As in *Welch v. Welch,* 755 So. 2d 6 (Miss. Ct. Appeals 1999) the chancellor awarded Tonia more of the marital assets. In *Welch* the chancellor's recognition of the wife's sizable separate estate as compared to the husband's, awarded the husband 2/3rds of the marital assets and was affirmed. While reviewing each of these factors, we must also consider that an *equal* division of the marital estate is not mandated but rather an *equitable* division. *Chamblee v. Chamblee,* 637 So. 2d 850, 863-64 (Miss. 1994).

Once again, a chancellor's greater award to a wife who had no separate estate as compared to that of the husband was affirmed in *Dickerson v. Dickerson,* 34 So.2d 6 (Miss. Ct. Appeals 1999). There the chancellor found there to be a substantial disparity between the

husband and the wife's estates given that the wife had no separate estate. *Id.* The Miss. Ct. of Appeals also emphasized that the chancellor in *Dickerson* considered the husband's marital fault, just as the chancellor below noted Drake's adulterous affair and the chancellor noted the wife's significant contributions to the marital estate, just as the chancellor below noted Tonia's contributions. *Id.*

Tonia's Legal Argument-Lump Sum Alimony-Chancellor should be Affirmed

Drake erroneously asserts the chancellor erred in awarding Tonia lump sum alimony in his equitable distribution of the marital assets on remand. It is well settled under Mississippi law that the decision of whether to award alimony and the amount of the award is a matter left to the chancellor's discretion. *Lofton v. Lofton,* 924 So. 2d 596, 599 (P12) (Miss. Ct. App. 2006) (citing *Voda v. Voda,* 731 So. 2d 1152, 1154 (P7) (Miss. 1999)). Lump-sum alimony is used as a tool to prevent unfair property division as determined in the chancellor's discretion. *See Ferguson,* 639 So. 2d at 926.

Drake complains that not only was lump sum alimony improperly granted but the chancellor also failed to apply the *Cheatham* factors to determine whether lump-sum alimony was appropriate. See, e.g., *Davis v. Davis*, 832 So. 2d 492, 499 (P26) (Miss. 2002); *White v. White*, 868 So. 2d 1054, 1058 (P9) (Miss. Ct. App. 2004). Here, the *Cheatham* factors would include consideration of: 1) Substantial contribution by Tonia to the accumulation of the total wealth of Drake either by quitting a job to become a [homemaker], or by assisting in the family businesses. 2) Drake and Tonia's 15 year-long marriage. 3) That Tonia had no separate income or the separate estate is meager by comparison to that of Drake. 4) Without the lump sum award Tonia would lack financial security. While the chancellor below may not have specifically cited *Cheatham* in his findings and analysis, the chancellor covered each and every one of these

factors under *Ferguson* and *Armstrong* and such is sufficient. *Bland v. Bland,* 629 So.2d 582, 588-89 (Miss. 199

Drake cites *Miller v. Miller, 874 So.2d 469* (Miss.Ct.Appeals 2004) for the proposition that lump sum alimony is not an 'equalizer' for equitable distribution and that the use of lump sum alimony in equitable distribution to equalize the distribution is improper. Drake is wrong. In a more recent case issued by the Mississippi Supreme Court in the case of *Haney v. Haney* 907 So.2d 948 (Miss. 2005)[6] it was held that "this Court has allowed lump sum alimony as an adjustment to property division to prevent unfair division" citing *Reeves v. Reeves* 410 So.2d 1300 (Miss. 1982). Justice Dickinson went further to write that although since *Ferguson* lump sum alimony has greatly diminished, it has not disappeared. *Id. at 953.* Justice Dickinson further reasoned that the *Cheatham* factors are "really nothing more than an earlier version of the *Ferguson* factors and both are used for the same purpose". In other words, when a chancellor addresses all of the *Ferguson* factors he has included each of the *Cheatham* factors in his analysis. *Id. at 954.* In making his *Ferguson* findings and analysis the chancellor below did exactly that: he covered each and every *Cheatham* factor.

In *Bland, infra,* the chancellor failed to specifically cite *Cheatham*, however, it appeared "at least in part" that he relied upon the factors in making the award of lump sum alimony. The chancellor in *Bland* found the wife had abandoned a good job with a future of owning an interest in the business, just as Tonia lost her "good job" in the business of Legacy Holding, Inc. As was the wife in *Bland,* Tonia was a hardworking and devoted wife doing the work of a "gofer" as she described herself. Such findings support the chancellor's equitable distribution to Tonia, including the award of lump sum alimony.

[6] Haney was a 17 month marriage and the award of ½ of the growth on his retirement account was reversed.

In conclusion, on remand the chancellor properly followed the instructions of this Court. After withstanding Drake's second failed attempt to offer proof of the value of Legacy, the chancellor assigned its value at zero[7] (however, chancellor did note the benefits Drake received from closing Legacy i.e. transfer of work in progress, use of losses on future tax returns, receipts of cash on hand, etc.). The chancellor's award to Tonia was equitable. There was substantial credible evidence in the record supporting the chancellor's findings. There was no manifest error or abuse of discretion. The chancellor's equitable distribution should be affirmed *in Toto*.

DRAKE'S ARGUMENT III AND ARGUMENT IV: CHILD SUPPORT MODIFICATION AND CONTEMPT

Arguments III and IV deal with Drake's appeal from the chancellor's Order denying the modification of child support and finding Drake in contempt. CP.410. Drake lists (Appellant Brief Pp. 33-34) five asserted errors on appeal of the order, however, he overlooks one important hurdle to his request to reduce his child support as discussed herein below. Three of the five assertions deal with child support, one deals with no retroactive application of the modification of the responsibility for college expenses, and the remaining issue deals with the finding of contempt and awarded attorney fees.

First, the issue of child support. What is of the utmost importance for the reader to be reminded of here is that Drake sought a modification of the chancellor's 2008 child support award of $1,606.00 per month. He did not appeal that award in 2008. He paid $1,606.00 per month in child support until he unilaterally reduced his child support in September 2009. Exhibit 19. He had previously filed his Motion for Modification on June 6, 2009. CP.8.

[7] Tonia has no issue with Drake being awarded Legacy and everything that went with it.

In his March 7, 2013, Order the chancellor concluded that the evidence presented did not show a change in circumstances meriting a downward modification. "Even if Drake's income has dropped since 2007, he is capable of earning a substantial income comparable to that which he earned at that time and he has substantial assets, and the Court finds the request to modify child support should be denied." CP.412. The chancellor noted Drake's testimony was his income reduced since 2008, when the judgment was entered, and his monthly gross income is now $4,613.04. Beginning September 2009, Drake unilaterally reduced his support many months prior to the trial to $849.00 per month and thereafter sometimes less. The chancellor found Drake should not have unilaterally reduced his support as he did. CP.412. The chancellor noted in 2007 Drake represented to the Court his income was a little over a $100.00 more per month at $4,730.00 per month. CP.412. According to the chancellor: "The Court noted in the Judgment in 2008, that in addition to his income from his construction business, he has investments in Louisiana that provided a source of income, and the children's needs were greater than the 22% he was ordered to pay." CP.412. Once again, the issue of child support was adjudicated in 2008 and Drake did not appeal that issue. For the reasons set forth later in this briefing, the Chancellor should be affirmed on his denial of modification.

a. The Chancellor Correctly Denied a Modification of Child Support

Drake sought to have the chancellor modify downwards the amount of child support ordered by the Court in its January 2008 judgment. It is important to realize that all of Drake's argument makes quantum leaps over the threshold requirement that he must have shown that since January 2008 there has occurred a material or substantial change in the circumstances not anticipated at the 2007 trial. *Bruce v. Bruce*, 687 So. 2d 1199, 1202 (Miss.1996) (citing *Shipley*

v. Ferguson, 638 So. 2d 1295, 1297 (Miss.1994); *Morris v. Morris*, 541 So. 2d 1040, 1042-43 (Miss.1989))

During the 2007 trial and the 2012 trial on remand, Drake has always asserted that Legacy Holding, Inc. was a failing business and there were no profits. Drake has always painted his financial status as poor. Just seventeen months following the Judgment of January 2008, Drake sought a reduction of his child support by his Amended Complaint for Modification as to Support and Custody filed in June 2009. By September 2009 Drake had begun working for his dad, Garry Lewis. 2012 Exhibit 15. Sometime prior to the Summer of 2011 Drake decided he wanted to be a lawyer and he entered law school in Louisiana. By the time of trial in the Summer of 2012, Drake was in law school and working for his father. 2012 Exhibit 15.

For the year 2008 after the judgment of divorce in January 2008, Drake operated Legacy Holding, Inc. until August 2008. Then he operated Drake Lewis d/b/a Legacy Builders from August 2008 through December although he previously testified in 2007 he began Legacy Builders in 2006. For the tax year 2008 Drake filed a "married filing joint" return with his new wife (and former paramour). 2012 Exhibit 4. This tax return included $57,425.00 (vs. $42,800.00 claimed by Drake in the 2012 Exhibit 14) in wages paid to Drake (See Mississippi Return breakout). The return showed on his Schedule D he was operating Legacy Builders (August to December only), on his Schedule E's Drake had four rental properties, and from the closing of Legacy Holdings, Inc., Drake showed on his Schedule D Capital Gains and Losses long term loss of -$111,719.00 and a long term gain of $37,032.00 with a net loss of $74,687.00. Id. Under his 2008 Schedule E "Income or Loss From Partnerships and S Corporations Drake showed a non-passive loss flowing from Legacy Holding, Inc., of -$298,588.00. Id. For 2008, Drake earn wages of $57,425.00 but because of the losses, he paid only paid taxes for he and his

new wife for that year of $1,924.00 in Federal tax (got refund of $6,457.00) and $0.00 in State Taxes. *Id.*

For the tax year 2009 Drake again filed a "married filing joint" return. 2012 Exhibit 4. This tax return included $31,134.00 (vs. $19,310.00 claimed by Drake in the 2012 Exhibit 14) in wages paid to Drake (See 2010 Mississippi Return breakout). The return showed on his Schedule C he was operating Legacy Builders and had gross receipts of $1,134,686.00 with a net profit of $18,953.00 (after a deduction for mysterious business "relocation" expense of $4,000.00), on his Schedule D he showed capital loss carryover of -$242,000.00 from the closing of Legacy Holding, Inc., and on his Schedule E's Drake again had four rental properties (with increased rents and expenses). For 2009, Drake earn wages of $31,134.00 but because of the losses, he paid only paid taxes for he and his new wife for that year of $3,221.00 in Federal tax (got refund of $3,073.00) and $0.00 in State Taxes. *Id.*

For the tax year 2010 Drake again filed a "married filing joint" return. 2012 Exhibit 4. This tax return included $90,772.00 (vs. $57,785.00 claimed by Drake in the 2012 Exhibit 14) in wages paid to Drake (See 2010 Mississippi Return breakout). The return showed no Schedule C for Legacy Builders in 2010, on Line 21 of Form 1040 he showed a 2009 net operating loss carryover of -$213,96.00 from the 2008 closing of Legacy Holding, Inc., and on his Schedule E's Drake again had four rental properties (with increased rents and expenses). For 2010, Drake earn wages of $90,772.00 but because of the losses, he paid only paid taxes for he and his new wife for that year of $1,748.00 in Federal tax (got refund of $13,334.00) and $0.00 in State Taxes but with a tax refund from Louisiana of $2,649.00 as shown on his Louisiana return. *Id.*

For the tax year 2011 Drake again filed a "married filing joint" return. 2012 Exhibit 4. This tax return included $55,785.00 in wages paid to Drake which Drake breaks out on the 2012

Exhibit 14. The return showed no Schedule C for Legacy Builders in 2011, and while available to him to claim there was no claim for the 2010 net operating loss carryover related to the 2008 closing of Legacy Holding, Inc., and on his Schedule E's Drake again had four rental properties (again, with increased rents and expenses). For 2011, Drake's earned wages, although not distinguished, were included in the $88,954.00 wages shown on Form 1040. Without claiming his net loss carryovers, he paid only paid taxes for he and his new wife for that year of $4,498.00 in Federal tax (got refund of $4,979.00) and $2,180.00 in State Taxes but with a tax refund from Louisiana of $325.00 as shown on his Louisiana return. *Id.*

At the time of the remand trial in 2012, Drake reported on his 8.05 Financial Declaration that his monthly gross income was $4,613.04 which would calculate to $55,356.00 for the calendar year. 2012 Exhibit 13. Thus his annual income in 2012 was within $2,100.00 of his annual income of $57,425.00 for the year 2008, the year of the Judgment of Divorce. 2012 Exhibit 4.

At some point prior to the Summer of 2011 Drake unilaterally made the decision to attend law school to become a lawyer. While we know from the tax returns that in 2009 he generated over $1,134,686.00 in gross receipts with a net profit of $18,953.00, we do not know what became of the business, its assets, its work in progress, its cash on hand, etc. We do know that simultaneous with Drake's exit from Legacy Builders was his filing for a reduction in his child support obligation in June 2009. We do know that Drake was in full control of his choice of work and what he would earn, along with the assistance of his father, Garry Lewis, who he worked for at the time of the 2012 trial while attending law school.[8] As to the real reason for

[8] Note during this transition of Drake moving to work for his dad with lesser income, the wife Stephanie was also put on the payroll at $35,000.00. See Exhibit 4; Tr.313-338.

Drake's shift in employment and his reduction in pay it all depended upon the credibility of Drake.

The chancellor was in the best position to determine Drake's credibility and the credibility of the witnesses and their respective testimony and proof regarding the matter at issue. As is well-established, the chancellor is vested with assessment of witness credibility, and "the interpretation of evidence where it is capable of more than one reasonable interpretation . . . ." *Crow v. Crow,* 622 So. 2d 1226, 1229 (Miss.1993);(quoting *Rainey v. Rainey,* 205 So. 2d 514, 515 (Miss.1967)*)*. The chancellor below commented in 2008 and 2012 as to Drake's lack of truthfulness and credibility.

In regard to the specific issue of child support, a chancellor can modify an award of child support only if there is a material or substantial change in the circumstances of one of the parties. *Bruce v. Bruce*, 687 So. 2d 1199, 1202 (Miss.1996) (citing *Shipley v. Ferguson*, 638 So. 2d 1295, 1297 (Miss.1994); *Morris v. Morris*, 541 So. 2d 1040, 1042-43 (Miss.1989)).

In *Pullis v Pullis* 753 So.2d 480 (Miss. Cr. Appeals 1999) the husband voluntarily resigned his job due to the stress of his job. This was three years after the judgment of divorce and the order for child support. He secured another lower paying job as a security guard. Id. at 482. No reduction of support was warranted. The chancellor in *Pullis* found no material change in circumstances justifying a reduction in child support payments. Both parties debated what would constitute "bad faith" on an obligor's part in relation to reducing child support payments as defined in *Parker v. Parker*, 645 So.2d 1327, 1331 (Miss. 1994). *Id. at 484.* The record in *Pullis* reflected the father "David quit because he was ready to try something different in order to reorganize his private life". "However simply because David acted without malice toward the interests of the child, he is not automatically entitled to a reduction in child support. The conduct

truly at issue is the voluntariness of David's departure in light of the indirect effects of the good faith or bad faith surrounding it. *Id.* Once again, Drake is similarly situated. While Drake may have not acted in bad faith, he certainly made the choice to remarry, to begin and end Legacy Builders, to take his salaried position with his father, and to attend law school. Prior to any of this Drake was obligated to support his children as ordered in January 2008. He effectively compromised the best interests of his children by making the choices he made. *Id.*

Another analogous case is the case of *Bailey v. Bailey,* 724 So. 2d 335 (P 1) (Miss.1998). This case rested upon the issue of whether the payor/wife newly born child constituted a condition warranting a reduction in child support owed to the father. In *Bailey*, the non-custodial mother quit her job to stay home with her new baby, thereby losing income necessary to pay child support to the custodial father of their children. *Id. at 335*. The court noted that while relative financial conditions and earning capacities of the parties are one factor to be considered in determining whether to modify child support, they have never allowed a reduction in pre-existing child support obligation due to voluntary termination of employment. *Id. at 337*. Our supreme court went on to explain although the mother didn't expressly intend to jeopardize the interests of her older children, her voluntary retirement from work effectively compromised the best interests of her older children for that of her new baby. *Id. at 338*. Further, the court decided that the mother's conduct amounted to "a neglect or refusal to fulfill some duty . . . by some interested . . . motive", a definition of "bad faith" as listed in Black's Law Dictionary. *Id at 338* (citing *Black's Law Dictionary* 139 (6th Ed.1990)).

In yet another analogous case, in the *Tingle* case, the divorced father quit his job and enrolled in a course of computer study at a state university. *Tingle v. Tingle,* 573 So. 2d 1389, 1390 (Miss. 1990). The Mississippi Supreme Court held that even though the father may be able

to get a better job later by improving himself through education now, "under the facts of the case at bar, the unilateral acts of the appellee do not justify a reduction in his child support obligation." *Tingle,* 573 So. 2d at 1393.

To effect a modification of child support, Drake had the burden of showing a material change in his circumstances as a result of events which arose after the entry of the original judgment of January 2008. *Morris v. Morris,* 541 So. 2d 1040, 1042-43 (Miss. 1989). This Court has held that the proponent of modification of a financial obligation must establish a material change in circumstances of one or more of the interested parties, either the father, mother, or children, arising subsequently to the rendering of the original decree. *McEachern v.McEachern,* 605 So. 2d 809, 813 (Miss.1992). As found by the chancellor Drake failed to meet this threshold burden and therefore was not entitled to a reduction of his child support obligation.

Even if a modification would have been in order, the chancellor still based his award upon his complete findings and analysis and specifically found that Drake was capable of earning a substantial income comparable to that which he earned at the time he was ordered to pay $1,606.00 per month in child support and he has substantial assets with which to make that possible. CP. 412. Drake was methodical in his move away from Legacy Holding, Inc., his move away from Legacy Builders, his move away from his rental properties by testifying "he turned them over to his father, his shifting some $35,000.00 in income to his new wife who now "works" for his father in Louisiana and the same father who sets Drake's salary which by the way is within a few hundred dollars of what Drake earned in salary in 2008 through 2011. "The amount of child support to be awarded in Mississippi is controlled by statute with some discretion left to the chancellor." *McGehee v. Upchurch,* 733 So. 2d 364, 371 (P37) (Miss. Ct. App. 1999).

"*[Mississippi Code Annotated] [s]ection 43-19-101(2)* requires a 'written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate . . . as determined under the criteria specified in *[section] 43-19-103*' in order to effectively overcome the statutory presumption." *McGehee,* 733 So. 2d at 371 (P37). "Similarly, *[section] 43-19-101(4)* reads in part, 'the court shall make a written finding in the record as to whether or not the application of the guidelines established' is reasonable." *Id.* The Mississippi Supreme Court has held that "these provisions, operating in conjunction, at a minimum require some written reference to the guidelines being bypassed and some explanation as to why." *Id.* (citing *Knutson v. Knutson,* 704 So. 2d 1331, 1334-35 (P23) (Miss. 1997)*)*. "When a chancellor makes a ruling without specific findings of fact and a party raises the issue of the amount of child support awarded, this Court will send the issue back to the lower court for the mandatory specific findings of fact as to why the chancellor deviated from the guidelines." *Id.* The chancellor below fulfilled his duty under the instructions of this guideline.

Finally, Drake complains any modification of child support should have been retroactive back to the time he filed his motion. It is well settled that child support and similar obligations for children cannot be retroactively modified. See *Howard v. Howard,* 913 So.2d 1030,2005 Miss.App.LEXIS 311 (Miss.Ct.App.2005).

The Chancellors finding no basis for modification of child support should be affirmed.

b. <u>Contempt</u>

Tonia's 2012 Exhibit 19 summarizes each payment of child support left unpaid by Drake from September 2009 through June 2012. Beginning in September 2009, Drake unilaterally reduced his child support by $849.00 per month. In January, February and March of 2010 he reduced his monthly support by $1,059.13 per month, and thereafter he continued to reduce his

support each month per his calculation. By June 2012, Drake owed Tonia unpaid child support of $28,200.39. 2012 Exhibit 19.

In Tonia's contempt action she sought unpaid child support and medical bills. Tonia met her prima facie case when she introduced her evidence (2012 Exhibit 19) that Drake failed to pay the support he was ordered to pay. *R.K. v. J.K.,* 946 So. 2d 764, 777-78 (P40) (Miss. 2007) (citing *Lahmann v. Hallmon,* 722 So. 2d 614, 620 (P19) (Miss. 1998)). This proof shifted the burden to Drake to demonstrate an applicable defense, and this proof must be clear and convincing. Drake offers no defense. *Id. at 778.*

The Mississippi Supreme Court has held that "contempt can only be willful." *Id.* (citing *Mizell v. Mizell,* 708 So. 2d 55, 64 (P52) (Miss. 1998)). A contempt citation is proper when the contemnor has willfully and deliberately ignored the order of the court. *Id.* This Drake admittedly did. A chancellor has substantial discretion in deciding whether a party is in contempt. *Id. at 777* (P39). The Chancellor below was correct in finding Drake in contempt.

c. Attorney Fees

Drake complains of the chancellor's award of $5,000.00 in attorney fees to Tonia for his contempt. It is within the chancellor's discretion of whether or not to award attorney fees in a contempt action. *Smith v. Smith,* 843 So.2d 735 (Miss. Ct. Appeals 2003); *Gray v. Pearson,* 797 So. 2d 387 (Miss. Ct. App. 2001). It is well settled that the establishment of the *McKee* factors is not necessary for one who successfully prosecutes a contempt action in order to recover attorney fees related to pursuing actions where a contemnor has willfully violated a lawful order of the court. To hold otherwise would cause no peril to those restrained from certain conduct if they violate the orders of a court." *Gardner v. Gardner,* 795 So. 2d 618 (P4) (Miss. Ct. App. 2001).

V. CONCLUSION

In summary, in arriving at his result the Chancellor applied the appropriate legal standards, carefully analyzed the evidence, and made his equitable distribution. His determinations and designation of the marital assets was supported by the credible evidence offered. The chancellor's denial of modification of child support was proper for the lack of showing of a substantial and material change in circumstances warranted same. The chancellor's finding of contempt against Drake was supported by the evidence and the award of attorney fees was proper. All of the chancellor's findings and conclusions were supported by substantial evidence and it cannot be said that the Chancellor was manifestly wrong. Tonia should be awarded attorney fees equal to those awarded by the chancellor below.

Respectfully submitted, this the 5th day of December 2014.

TONIA D. LEWIS, APPELLEE

BOYCE HOLLEMAN & ASSOCIATES

BY: /s/Dean Holleman
DEAN HOLLEMAN

CERTIFICATE

I, DEAN HOLLEMAN, do hereby certify that I have on this date forwarded a true and correct copy of the above and foregoing Brief of Appellee to Thomas W. Teel, Post Office Box 7158, Gulfport, MS 39506, and to Chancellor Carter Bise, Post Office Box 1542, Gulfport, MS 39502, by United States Mail, postage prepaid.

DATED, this the 5th day of December 2014.

/s/Dean Holleman
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