

SUPREME COURT AND COURT OF APPEALS  
STATE OF MISSISSIPPI

NO. 2013-CA-01631

DRAKE L. LEWIS, APPELLANT

VERSUS

TONIA D. LEWIS, APPELLEE

APPEAL FROM

THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT

HONORABLE CARTER BISE, PRESIDING TRIAL JUDGE

# APPELLANT'S BRIEF

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IN THE SUPREME COURT AND COURT OF APPEALS  
STATE OF MISSISSIPPI

NO. 2013-CA-01631

DRAKE L. LEWIS

APPELLANT

VS.

TONIA D. LEWIS

APPELLEE

**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 Court may evaluate possible disqualifications or recusal.

1. Drake L. Lewis, Appellant.
2. Tonia D. Lewis, Appellee.
3. Dean Holleman, Boyce Holleman and Associates, 1720 23<sup>rd</sup> Avenue,  
Gulfport, Mississippi, Attorney for Appellee.
4. Honorable Carter Bise, Chancellor of Place One, Post Office Box 1542,  
Gulfport, Mississippi.
5. Thomas W. Teel, Perry, Murr, Teel & Koenenn, P.A., Post Office Box 7158,  
Gulfport, Mississippi, Attorney For Appellant.

Respectfully submitted, this the \_\_\_\_\_ day of \_\_\_\_\_, 2014.

s/ THOMAS W. TEEL  
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### **STATEMENT OF THE ISSUE**

Appellant Drake Lewis asserts as follows:

The Court erred in carrying out the terms of the remand and erred in its determination of marital assets and valuations; therefore, the Court erred in making an equitable distribution of assets and liabilities, erred in its award of child support and erred in its award of college expenses.

### **STATEMENT OF THE CASE**

The parties have been divorced, had that matter appealed and remanded, and then tried the remand and modification actions, from which this appeal derives. Appellant would show that the remand is found at *Lewis v. Lewis*, 54 So.3d 233 (Miss. Ct.App. 2009) and *Lewis v. Lewis*, 54 So.3d 216 (Miss. 2011). Thereafter, the lower court heard the remand, post Judgment pleadings, and motions to reconsider and rendered three orders that are dealt with in this appeal: the Judgment After Remand; the Order on Modification and Contempt; and the Order. Additionally, there are multiple post divorce judgment orders concerning the Richland Roads funds.

The parties, Drake and Tonia Lewis married in 1991 and separated in June 2006 in Jackson County, Mississippi. The parties had three children, ages, at the time of the divorce, 16,10, and 8. On August 30, 2006, Appellee, Tonia D. Lewis (hereinafter "Tonia") filed her Complaint For Divorce and Motion For Temporary Relief against the Appellant, Drake L. Lewis (hereinafter "Drake"). After answers and pleadings and discovery, the trial was held on July 19 and 20, 2007.

### **Court's Initial Judgment**

On January 11, 2008, the Chancery Court of Harrison County, First Judicial District, entered its Judgment Incorporating Findings of Fact and Conclusions of Law, from which Drake filed his first appeal.

### **First Appeal**

Your Appellant Drake Lewis filed his first appeal asserting that the equitable division was in error. The Court of Appeals rendered its opinion on December 8, 2009 wherein this matter was remanded in part as follows:

On remand, the chancellor must revalue Legacy using all relevant data, rather than relying on Tonia's admittedly inaccurate exhibits. The chancellor must also consider whether the Swamp Road acreage is marital property in light of Tonia's statements regarding the property, and whether the St. Martin property is marital property in light of the 1031 exchange. After considering all of these things, the chancellor must address the proper value of the marital estate and then make an equitable distribution of the marital estate, taking into account the new value of Legacy and any other property which has undergone a change in marital status. In so doing, the chancellor must not consider Lot 13 of Hickory Hills, which both parties agreed is no longer owned by either party. (C.P. Volume 1, Page 35)

In addition, the Court declined to accept that income can only be considered if it is achieved from non-diminishing assets; however, in the footnote, the Court stated:

We accept that the chancellor's treatment of the loan will most likely mean that the amount of child support will have to be adjusted in the future, once Drake has recouped the value of the loan. *Lewis v. Lewis*, 54 So. 2d 233 (FN2, Miss. Ct. App. 2009)

### **Post First Appeal Motions**

On February 9, 2010, Tonia filed her Counter Motion For Citation Of Contempt and For Modification and Other Relief alleging Drake had failed to pay child support, provide insurance for

the minor children and to provide for the college education of the parties oldest child. (C.P. Volume 1, Pages 36-41). On March 28, 2010, Tonia filed her Answer to Amended Complaint For Modification as to Support and Custody. (C.P. Vol 1, Pages 56-61)

On March 17, 2010 Drake filed his Motion to Compel and For Sanctions due to Tonia's failure to respond to Interrogatories and Requests for Production which had been served on her on October 22, 2008. (C.P. Volume 1, Pages 43-55). Further, on April 16, 2010, Drake filed his Answer and Affirmative Defenses to Counter Motion for Citation and for Modification and Other Relief. (C.P. Volume 1, Pages 62-65). Additionally, on April 16, 2010, Drake filed a Motion for Protective Order alleging that he should not be compelled to answer any discovery and should be granted a protective order. (C.P. Volume 1, Pages 66-67)

Drake after several attempts, had the matter set for hearing on October 4, 5, and 6, 2010 but, after meeting with the parties' counsel, the Court declined to hear the matter and wanted to wait for the appeal. ( See T. Pages 169-273; see also C.P. Volume 3 Pages 410,412).

### **On Writ of Certiorari**

On February 3, 2011, the Supreme Court of Mississippi remanded this matter as follows:

Upon remand, the chancellor shall cause the marital assets to be reevaluated consistent with the instructions of this opinion and those of the Court of Appeals, with the exception of considering goodwill equity. (C.P. Volume 1, Page 88)

### **Post Writ of Certiorari Motions**

Thereafter, the parties again filed matters in Chancery. A Motion for Scheduling Order and Trial Setting was filed on behalf of Tonia on August 30, 2011. (C.P. Volume 1, Pages 96-97) . On June 6, 2012, Drake file a Motion In Limine re: Shenandoah & Suma Hills wherein he sought to



have the Court limit proceedings and grant relief from judgment by ordering Tonia to repay \$130,497.50 received by Tonia from the sale of Shenandoah and \$12,000.00 in damages for contempt of the Court orders and an order clearing title regarding Suma Hills. (C.P. Volume 1, Page 98), on July 9, 2012, Drake filed his Memorandum in Support of Motion In Limine re: Shenandoah and Suma Hills. (C.P. Volume 1, Pages 144 to 150 and Volume 2, Pages 151 to 244)

Additionally, Drake filed a Motion Under Rule 60 on June 18, 2012 against Tonia wherein Drake sought relief from the Court to reconsider the entire asset valuation and equitable distribution and correct its other errors under Rule 60. (C.P. Volume 1, Pages 99-143)

### **Judgment After Remand**

On February 15, 2013, the Court entered its Judgment After Remand wherein the Court ruled as follows:

Ordered and Adjudged that if there is any value to Legacy Holdings, Inc. that the same should be distributed to Plaintiff Drake Lewis as his own, that any liabilities are to be distributed to the Plaintiff, and that he hold harmless and indemnify Defendant Tonia Pagel of any and all tax liability for which she might be "saddled" based upon Plaintiff's post-divorce 2007 Legacy return. (C.P. Volume 2, Page 253)

Ordered and Adjudged that the Swamp Road property was gifted to the Plaintiff Drake Lewis outside the marital estate, and therefore, it is non-marital property belonging to Drake Lewis. (C.P. Volume 2, Page 253-254)

Ordered and Adjudged that the Hickory Hills property was a gift from Drake Lewis' father to Drake Lewis, and thus the St. Martin property which was obtained through the 1031 exchange is separate property belonging to Drake Lewis. (C.P. Volume 2, Page 254)

Ordered and Adjudged that Drake Lewis shall pay Tonia Lewis Pagel \$100,000.00 lump sum alimony, payable at \$2,500.00 per

month, beginning March 1, 2013. (C.P. Volume 2, Page 254)

Ordered and Adjudged that the issues of contempt and modification are reserved for further Order. (C.P. Volume 2, Page 254)

Ordered and Adjudged that the Court incorporates fully its Judgment Incorporating Findings of Fact and Conclusions of Law, dated January 11, 2008, and Order Altering and Amending Judgment, dated March 31, 2008, as if reproduced herein, and adopts all findings of facts and discussions of relevant factors as contained therein, with the exception of the findings stated *supra*. (C.P. Volume 2, Page 254)

### **Motions Post Judgment After Remand**

On February 22, 2013, Drake filed his Motion to Reconsider Under MRCP 59 and 60. (C.P. Volume 2, Pages 255-300 and Volume 3, Pages 301-304)

### **Order on Modification and Contempt**

By Order dated March 7, 2013, the Court ordered Plaintiff's rehabilitative alimony to terminate as of the date of Tonia's remarriage, ordered each party to be responsible for one-half of the minor children's college education and related expenses, awarded Drake a total of three weeks summer visitation, held Drake responsible for any liabilities of Legacy Holdings, Inc., found Drake in contempt of court for failing to pay child support and entered a judgment in the amount of \$28,589.39, ordered the parties to split any orthodontic expenses not covered by insurance and awarded Tonia \$5,000 in attorney fees. All other requests were denied. (C.P. Volume 3, Pages 305-313)

**Motion to Reconsider the Order on Modification and  
Contempt of March 7, 2013 under MRCP 59 and 60**

On March 14, 2013, Drake filed his Motion to Reconsider seeking relief from the Order on Modification of Contempt. (C.P. Volume 3, Pages 314-407)

**Order**

The Court entered its Order on September 17, 2013 on the Plaintiff's Motion To Reconsider Under MRCP 59 and 60. In this Order, the Court retroactively modified the Plaintiff's child support based upon the oldest reaching the age of majority; however, denied all other relief requested in the Motion. (C.P. Volume 3, Page 408-418)

**Notice of Appeal and Corrected Notice of Appeal**

On September 26 and September 27, Drake filed his Notice of Appeal alleging that the Court erred in its distribution of assets, award of child support, and award of college expenses by denying the Plaintiff's Motion to Reconsider under MRCP 59 and 60. (C.P. Volume 3, Pages 419-424.

**STATEMENT OF FACTS**

**Facts Related to Asset Issues**

This is the second appeal on this case. The first appeal ruling was by the Court of Appeals, in *Lewis v. Lewis*, 54 So. 2d 233 (Miss. Ct. App. 2009), which ruled in Drake's favor regarding issues related to the Court's property rulings and equitable distribution. That matter was taken on certiorari and affirmed in most respects by the Supreme Court in *Lewis v. Lewis*, 54 So.3d 216 (Miss. 2011). The current appeal revolves around the remand decision and the post divorce actions filed and eventually tried in 2012.

The current case still centers on valuation and distribution. Drake argued at the initial 2007 divorce hearing that Legacy Holdings, Inc., had no value. The Chancery Court used documents provided by Tonia and made its equitable distribution wherein Tonia received \$855,747.00 and Drake received \$1,807,822.00 as per the Court's calculation:

A. To Tonia Lewis Pagel

Asset	Value	Debt	Equity
Home: 9021 Marina Avenue Ocean Springs, Mississippi	\$250,000	\$146,000	\$104,000
Proceeds from sale of Lots 15, 16 Grasslands	\$93,000.00	n/a	\$93,000
Proceeds from sale of Richland Road, Columbia, MO	\$265,624	n/a	\$132,812
St. Martin 10 acres	\$200,000	n/a	\$200,000
4912 Kennesaw Dr. Shenandoah Baton Rouge, LA	\$250,000	\$82,000	\$168,000
2003 Yukon	\$20,000	\$17,586	\$2,414
AIM 5256	\$2,304	n/a	\$2,304
AIM 1916	\$3,141	n/a	\$3,141
IRA (Drake)	\$5,300	n/a	\$5,300
IRA (Tonia)	\$2,950	n/a	\$2,950
Tax Refund	\$9,000	n/a	\$9,000
Lot 29 Hickory Hills Jackson County, MS	\$10,000	n/a	\$10,000

TOTAL NET VALUE TO TONIA: \$855,747.00

To Drake Lewis, along with any debt associated with a particular asset:

Asset	Value	Debt	Equity
Suma Hills, Lot 7 Livingston, LA	\$190,000	\$142,000	\$48,000
Lot 13, Hickory Hills	\$10,512	n/a	\$10,512
Lots 1-4 Pinehurst Spec Homes	\$680,000	\$421,000	\$259,000
Swamp Road	\$30,000	n/a	\$30,000
Tiger Bend Apartments Baton Rouge, LA	\$130,000	33,505	\$96,545
2000 Corvette	\$27,000	n/a	\$27,000
2004 SK1	\$27,000	n/a	\$27,000

Loan to Legacy Holdings, LLC	\$156,555	n/a	\$156,555
Bayliner	\$5,000	n/a	\$5,000
Legacy Holdings, LLC	\$1,148, 270		\$1,148,270

TOTAL NET VALUE TO DRAKE: \$1,807,882.00

The first appeal ruling was by the Court of Appeals, in *Lewis v. Lewis*, 54 So. 2d 233 (Miss. Ct. App. 2009), which stated that the Court must “revalue Legacy”, reconsider whether Swamp Road and St. Martin properties were marital, then the court, on remand, was to “address the proper value of the marital estate and then make an equitable distribution of the martial estate, taking into account the new value of Legacy and any other property which has undergone a change in marital status.”(R.E. Page 29 ¶38.). As noted above, that matter was taken on certiorari and affirmed in most respects by the Supreme Court in *Lewis v. Lewis*, 54 So.3d 216 (Miss. 2011).

In the remand, Drake sought to prove that Legacy Holdings, Inc. ( sometime mistakenly referred to as an LLC) had no value, owned no real property, and owned no large personal property in the company name. Further, he sought to prove that Tonia’s valuation in 2007 was knowingly false as her valuation documentation clearly contained assets that Legacy did not own. ( referring to the 2007 divorce exhibits 1,4,and 7, R.E. Pages 899, 933 and 934).

Testimony in the 2012 remand verified that argument.

First, Tonia presented no new documents or evidence other than what she had in 2007. In fact, Tonia in 2012, agreed that the divorce exhibits had showed that Legacy owned real property, vehicles, and large account receivables; however, she then admitted having no deeds, title or documents showing that Legacy owned any real property or vehicles. Further, Tonia could not produce any documents to show value, no deeds or titles on anything supposedly owned by Legacy, nor did she have any experts. (T. Pages 21-22, 25-27, and 160-162).

Second, Tonia had no documents to challenge Drake's 2007 listing of assets and values of Legacy. She was shown Exhibit 2 from the divorce trial (R.E. Page 910), and admitted that the eight properties were not owned by Legacy, nor was the Corvette or Yukon. (T. Pages 31-2). When shown Exhibit 4 from the divorce trial, Tonia admitted that the "1999 Dodge Caravan to Lewis Trust, Martin Bluff, Shenandoah, Grasslands, Swamp Road, Tiger Bend "are personal assets not part of Legacy.(T. Pages 33-34). Tonia was shown Exhibit 7 from the divorce trial (R.E. Page 934) and admitted that the Legacy balance sheet she used at court contained items that were not Legacy assets, such as : the Marina house was their marital home, was titled in their name as was the debt (T. Pages 34 and 138),Elderbrook was a former personal home (T. Page 35), the 5037 Deborah property had been sold in 2004 but still listed as a current asset (T. Page 36); she had no titles to any vehicles in the name of Legacy (T. Page 135); Suma Hills was in Drake's name and not Legacy (T. Page 140); Lot 13 Hickory Hills did not exist then (T. Pages 140-141); Pinehurst was not in Legacy name (T. Page 142). Also, Tonia had previously, and still, claimed ownership of Swamp Road property (T. Page 145 ), but admitted that she had no documents that evidenced that any family trust property was turned over to Drake individually (T. Pages 147-148). As a general matter, Tonia admitted that the Legacy spreadsheet she used for values in the divorce matter had all assets listed including things she owned, that Drake owner, that Legacy owned, and that the Trust owned. Tonia admitted that there is only Legacy Holdings, Inc., and there is no Legacy Holdings, LLC (T. Page 156-7); further, she admitted that using the spreadsheets from the divorce trial, if the properties noted as Legacy assets were taken out, it would change Legacy's value (T. Page 157). All these things she knew in 2007.

Third, Tonia had no documents to challenge Drake's rendition of value ( T. Page 28), nor an expert or CPA (T. Pages 26-27 ) Tonia had no evidence in 2007 or now to contradict the tax filings of 2007 and 2008, the Pinehurst property construction had no profit. (T. Page 157) There was no property or vehicles, Tonia knew that there was only office equipment of minimal value (T. Page 159).

Fourth, Tonia offered no deeds or documents as evidence to dispute Drake's other property assertions. Tonia also generally admitted that she had no documents or deeds to dispute the 1031 exchange on the trust property, but still claimed it should be partially hers (T. Page 154); whereas, Drake as well as his father Jordan Lewis testified on the 1031 exchange (T. Pages 326-327) and produced the deeds and 1031 exchange documents to verify that transaction and Tonia's very limited participation. (T. Page 152) Similarly, Tonia sought the entire proceeds of the Richland Road sale, but Tonia also admitted that Exhibit 6 (2012 trial R.E. Page 810) is an agreement to sell the Richland Road property and that she agreed that one half would be her separate property (T. Page 155); moreover, Drake as well as his father Garry Lewis testified and provided documents to verify that transaction and its particular wording. (T. Page 332-333).

Fifth, Drake produced all the documents noted above, his various personal and business tax returns, and had the CPA Doris Triplett testify about the Court's valuation of Legacy at \$1,148, 270 and the erroneous information supplied by Tonia. Of course, Tonia recognized that the tax documents for Legacy established that the company had a negative value (June 18, 2012 hearing, T. Page 17). Tonia also admits that the Quicken and Quickbooks programs she used had faulty information (see above).

As facts, Drake established that the company had no real value. Primarily, Drake established that the Legacy value included the home, properties valued quite high ( i.e., Richland Roads at \$936,000 and it was not in Legacy name) through his testimony (T. Page 238 ) and through Tonia's (T. Pages 33-35 and 128-145 ). Additionally, Drake produced at the divorce trial his 8.05 ( Exhibits 2 and 2A, R.E. Pages 910 and 920) and correctly explained those at court, again, in 2012 (T. Page 232), stating:

- 1 Q. Okay. Now, as to the Legacy sheet, explain how
- 2 you arrived at the value of Legacy on your Exhibit 2 A
- 3 from the prior hearing.
- 4 A. I went and listed all of the cash that was on
- 5 hand and the accounts receivable that the books showed
- 6 and then the trailers and miscellaneous tools, the
- 7 assets that Legacy actually had and then the liabilities
- 8 that Legacy had and came up with the net worth that's
- 9 shown there.
- 10 Q. What is that net worth?
- 11 A. A negative \$7,195.08. That's dated July of
- 12 '07, 18<sup>th</sup>.

Further, Tonia, upon reviewing Exhibit 2 (from divorce trial R.E. Page 910) was aware that Drake's evaluation on his exhibit showed a negative value for the company as Drake's 8.05 had divided the assets into personal assets and company assets. (T. Pages 31-32 ). Finally, Doris Triplett, the CPA, noted that Legacy had tax or book assets (those things listed on the accounting programs) but actually had no real property in Legacy name and very little personal property. Further, Doris noted that the Tonia valuation number for Legacy of \$1,148,000 was not in any of the Quickbook ledgers she reviewed (T. Page 26) and, affirmatively, that Legacy never made money and had a negative value for tax purposes. (T. Pages 27-29). Doris also noted that Drake made two loans to the company, one for \$132,000 and the other for \$156,555 to the company, which would not get repaid.



(T 31,100-101). Prior to the original divorce ruling, Drake deposited his entire half of the Richland Road Proceeds into Legacy to complete the Pinehurst homes. Doris also testified that Legacy had a January 1, 2008 value based upon cash and accounts payable and receivable of about \$32,000; however, this number is after Drake had deposited his half of the Richland Road proceeds of \$132,000 into Legacy to complete Pinehurst homes. (T. Page 37)

The Court issued its ruling over two orders, February 2013 and September 2013.

In the February 2013 ruling, the Court noted that Drake had not sent a finding of fact; however, Drake filed his Post Trial Brief with the Court (C.P. Volume 2, Page 261). The Court noted that it had no “firm basis on which to form an opinion” as to Legacy’s value, noting that Drake “still failed to provide any information” for a Legacy valuation. However, the Court notes that Legacy owned no titled “real or personal properties.

The Chancery Court did find that Swamp Road was a gift to Drake ( held in the trust) and non-marital; further, the Court found that the Lot 13 Hickory Hills should not have been included in the equitable distribution and that the St. Martin property was also a gift and non marital. Further, the court noted ( C.P. Volume 1, Page 252) :

In light of the new determinations this Court has made after the remand and the new evidence presented as a result, the Court will now re-evaluate the distribution of the marital estate.

In response to the remand, the Court addressed Legacy in the September 2013 Order, stating only this

ORDERED AND ADJUDGED, that Drake Lewis is re responsible for any liabilities of Legacy Holdings, Inc., and he shall hold harmless and indemnify Defendant Tonia Pagel of any and all tax

liability for which she might be “saddled” as a result of the post-divorce returns filed by Plaintiff Drake Lewis.

(C.P. Volume 3, Page 417). The Court also noted (C.P. Volume 3, Page 416) that Tonia was to get the entirety of the Richland proceeds so as to bring her total assets to ”\$865,733.00”.

In the property discussion, the Court in the 2007 divorce did not believe Drake credible; however, the Court in 2012 did not comment on Tonia’s credibility whose testimony was flavored with phrases of assumption and supposition and not fact. Certainly, Tonia presented some false evidence. Tonia’s 2007 value evidence was based on her familiarity with the business and computer programs, but she had to have known, as noted above, that the Legacy valuation documents she produced had personal property as part of the value, such as the marital home. (T. Page 461).

#### **Facts Related to the Family Issues**

Drake Lewis and Tonia Pagel were divorced on January 11, 2008.

In the divorce, the parties were granted joint legal custody, with Tonia having physical custody; further, Drake was granted alternating weekend visitation, one weeknight a week, holiday and Summer visitation. Further, the parties were to “share the decision making rights, responsibilities and authority relating to the health, education and welfare of the minor children”.

Two months after the divorce, on March 29, 2008, Tonia married Ted Pagel, the preacher with whom she had a pre-divorce relationship (T. Page 360 ). On July 4<sup>th</sup>, Drake discovered that Tonia was planning on moving to Idaho, after which they had a short and non-productive meeting on July 9<sup>th</sup> 2008, to which he voiced disagreement and thereafter wrote her two notes, disagreeing with her move. On July 24<sup>th</sup>, 2008, Tonia and Ted Pagel moved to Idaho, some 2000 miles away (T. Page 361). Tonia sent the parties oldest child, Jordon, to live with her sister, Patti Snyder, in Apopka,

Florida 32712. Drake discovered the plans to move the son to Florida and promptly told Tonia that he did not approve and wanted custody. Shortly, after this, Drake filed his complaint against Tonia for contempt and custody. In August of 2008 Drake was forced, due to the poor housing market, to dissolve Legacy Holdings and make plans to move to Baton Rouge. In 2009, Drake moved to Baton Rouge to work for his father realized he could not meet his support obligations under the Court's divorce ruling and amended his complaint to include a modification of support.

Tonia filed contempt on support issues thereafter. The matters were set for hearing on October 4, 2010 (R.E. Page 953), but Court held all matters in abeyance because the first appeal was extant. (T. Pages 169-273; see also C.P. Volume 3, Pages 410,412).

#### Custody

As the matter was not tried until 2012, the custody issues were somewhat mooted. The oldest child, Jordon, born August 20, 1991, went to college in Florida for one year, then left and went to Idaho, then left and came to Baton Rouge, living with the father's family and attending college at LSU (T. Page 366). He turned age 21 in August of 2012. Drake had also maintained that Tonia did *not* discuss, as per joint custody, all the college plans, sending the child to Florida, and the college costs, though he has paid every bill sent to him by Jordon. (T. Pages 173,176)

#### Child Support

Child support was set by the Court's judgment at 1,660 (T. Page 184) . According to both parties Drake paid that amount, \$1,660, until he started working for his father in Louisiana around 2009, (T. Pages 171-172 ) as the construction business was unsupportable and Legacy closed in 2008 due to the housing market crash. (T. Page 255) Drake had filed his modification of support in October 10, 2008 (C.P. Volume 1, Page 1, R.E. Page 15) and the matter was set for October 4, 2010,

at which time the court held all motions in abeyance until the appeal was completed (T. Pages 169-273; see also C.P. Volume 3, Pages 410,412) Thereafter, Drake paid 22% of his income there, which was \$836. Drake produced an Excel spreadsheet where he kept track of his expenses for the children ( support, insurance, medicals, transportation, college, etc) and then his extrapolation of those expenses. Exhibit 10 and 14( See T. Pages 169- 175, 264-267 and 272; see R.E. Pages 826 and 880).

During these intervening years, Jordon went to University of Central Florida (two semesters), then Boise State (two semesters) (T. Pages 172-177), and then for last year or so, LSU. Drake paid all the college and living costs for Jordon between Fall 2008 and the time of hearing in 2012. Drake produced his personal and business tax returns to show his income and had his 8.05 about his expenses (R.E. Page 866). Drake argued that support should reflect his actual income and not a perceived income (R.E. Page 880) based upon repayment of a loan that was not collectable due to legacy having no assets and closing in 2008.

According to Drake's 8.05 (Exhibit 13, R.E. Page 866), his tax return, and the pay stub (R.E. Page 822) in evidence, Drake's actual gross income was \$4,613.04 and his net was \$3,806.94 (T. Page 260), twenty percent of that would be \$761.00.

Drake argued that his support should not have been more than 20% after July 2008, as he was paying all the college costs for Jordon, including not only all the college costs, but the living costs of room and board. (T. Pages 272-4). Further, Drake sought an adjustment on his support due to the travel costs associated with the travel for visitation, which, of course, also severely limited his time with his children.

The Court made an assertion that he was capable of earning more money and that the children's needs were "greater than the 22% he was ordered to pay".

Tonia's 8.05 was not introduced into evidence in the 2012 hearing. She chose not to work since the divorce. (T. Page 359)

### This Appeal

In the modification filed by Drake Lewis (C.P. Volume 1, Page 1), he sought several things: contempt over the parties not discussing nor reaching agreements on Tonia's move to Idaho, sending the parties oldest child to Florida, college, refusal to quitclaim property and other matters, modification on visitation, modification on child support, modification of rehabilitative alimony, and modification of college costs. These matters were addressed after the initial modification filing and the Court agreed to reserve ruling back in time due to the unfinished appellate process. (T. Pages 443-444)

After depositions and before trial, Drake filed a *Motion Under Rule 60* as the parties apparently read the appeals decisions differently: Tonia believes that the orders are specific remands. Drake believes that the remand on the issues, especially the Legacy valuation and division, require the Court to readdress the entire equitable division. (T. Pages 5-7) The Court denied the motion at Court and after the trial, Drake asserts that the Court failed to take those issues on remand into consideration.

Appellant filed post trial motions and, unable to have the matter corrected, filed this his second appeal, asking this court to make a thorough review of the record, the prior appeal, the orders of the Chancery Court, and the dictates of case law, statutory guidelines and general equitable principles of fairness.

## **SUMMARY OF ARGUMENT**

The Chancery Court was manifestly wrong and erred in its equitable distribution of assets; further, the Court erred in its award of child support and erred in its award of college expenses and attorney fees.

As to the marital assets, the Chancery Court failed to follow the remand and erred in its equitable distribution of the assets; moreover, the Court was manifestly wrong in certain fact findings, as evidence in documents and testimony; moreover, certain rulings on the facts are not consistent with the rules as to non-marital property and commingling; therefore, the equitable distribution was manifestly wrong and error, as was the imposition of lump sum alimony, which was not granted in the original divorce.

As to the family support issues, the Court was manifestly wrong in not addressing the father's actual income and, therefore, erred in not lowering and adjusting child support commensurate with the father's actual income and dating same to when the changes occurred.

### **ARGUMENT 1 :**

#### **The Chancery Court Erred in its Equitable Distribution**

Appellant Drake Lewis asserts that the Chancery Court of Harrison County was manifestly wrong in its equitable distribution and asserts that the Court erred in including Legacy Holdings as a valued asset, erred in finding certain assets marital, erred in including a non-existent property as an asset, and treated loans as assets. These errors affected the overall value of the parties' marital estate and therefore made the overall equitable division of assets wrong and outside the scope of case law.

## 1. Equitable Distribution

Mississippi's rules as to equitable distribution are general, but with clear intent. The Supreme Court has set up a number of guidelines for chancellors to follow during equitable distribution. The chancellor must: (1) classify the parties' assets as marital or separate, (2) value those assets, and (3) divide the marital assets equitably. *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss.1994). Marital property generally consists of assets acquired or accumulated during the course of the marriage. *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss.1994). Separate property consists of property acquired before or outside of the marriage. *MacDonald v. MacDonald*, 698 So.2d 1079, 1083 (Miss. 1997). All assets acquired during the course of the marriage are presumed to be marital. *Hemsley*, 639 So.2d at 915, but there are a number of exceptions, including, as noted by Deborah H. Bell, Mississippi Family Law, § 6.03 (1st ed. 2005), gifts, inheritances, income and appreciation from separate property, with personal injury awards, worker's compensation awards, certain loan proceeds, life insurance proceeds, trust income and others. *Id.* at § 6.06. As the Court has stated, "fairness is the prevailing guideline in marital division." *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss. 1994).

### A. The Court's Judgment After Remand

The Chancery Court noted in its February 15, 2013 Judgment After Remand that it had no "firm basis on which to form an opinion" as to Legacy's value, noting that Drake "still failed to provide any information" for a Legacy valuation noting that value would be "what a willing buyer under no compulsion would pay to a willing seller under no compulsion." (C.P. Volume 2, Page 246) The Court did note ( C. P. Volume 2, Page 252) as follows:

In light of the new determination this Court has made after the remand and the new evidence presented as a result, the Court will now re-evaluate the distribution of the marital estate.

Further, in the September 2013 Order, the Court then put all the debt on Drake:

ORDERED AND ADJUDGED, that Drake Lewis is responsible for any liabilities of Legacy Holdings, Inc., and he shall hold harmless and indemnify Defendant Tonia Pagel of any and all tax liability for which she might be "saddled" as a result of the post-divorce returns filed by Plaintiff Drake Lewis. (C.P. Volume 3, Page 417)

The Court also noted that Tonia was to get the entire proceeds of the Richland proceeds so as to bring her total assets to "\$865,733.00". (C.P. Volume 3, Page 416)

#### B. The Valuation of Legacy

Although the Chancery Court made a general finding that there was no valuation of Legacy (C.P. Volume 2, Page 250), the Court certainly noted the remand language (C.P. Volume 2, Page 245) about a valuation using assets. It is noteworthy then that the Chancery Court in that same order specifically found that Legacy owned no titled "real or personal properties".

What is surprising about the Chancery Court's findings was not just the outcome, but that the court did not mention Tonia's flagrant misleading of the court on the Legacy value previously in 2007 or in 2012. In particular, Tonia knew or should have known that the documents she presented to the court in 2007 gave a wildly erroneous view of Legacy assets. In 2007, the Court order noted Tonia's business knowledge of Legacy, her bookkeeping and daily handling of subcontractors, all of which Tonia used to bolster her valuation of Legacy. Conversely, in 2012, having been caught in this false and misleading evidence, Tonia expresses a lack of knowledge on business matters. Indeed, as the 2012 testimony illustrates, Tonia could have gone through and



eliminated the known problem areas— previously owned properties, the family home, property in other names, etc— and presented a more accurate view of Legacy assets in 2007. (T. Pages 406-407). Had Tonia been forthright and honest in 2007, the lower court might have been able to render a better decision. In 2012, Tonia states:

Q. Did you say to the court in any form or fashion  
21 in the way you might have spoken, that you have to  
take  
22 these documents as something that I can't verify? Did  
23 you say that to the court?  
24 A. No, I did not.

Additionally, though neither party presented a business valuation expert, the Court did not mention Drake's specific and detailed review of all the 2007 evidence, brought up to date in 2012, in attempting to show the value of Legacy. First, Drake took Tonia's false and misleading exhibits used at the prior hearing and , through deeds and her admission, was able to deduct all the things of value. By eliminating the major assets from Tonia's false Exhibit 7 (2007 trial exhibit, R.E. Page 934), Legacy had tangible assets of a few thousand dollars of office equipment and then the remaining debt and account receivables , which was consistent with Drake's divorce version of the assets owned by Legacy. Second, Drake had the CPA, Doris Triplett, show that Legacy had no financial assets after accounts receivables and payment of debt. (T. Page 64 ). Again, this was consistent with Drake's assertion that Legacy had around \$7,000 negative net worth in 2007. (Exhibit 2 2007 Trial Exhibit, R.E. Page 910). Fourth, Drake brought this forward from 2007 to the trial by placing his income taxes into evidence. (T. Page 194 ). Therefore, Drake showed that Legacy had no market value as, according to the Supreme Court instruction, it had no real property, little to

no other property, and no improvements that it owned on real property owned by others. *Lewis*, 54 So.3d at 217.

### C. The Courts Equitable Distribution on Remand

Finally, the Court did not make a detailed analysis of the distribution as it had in 2007; however, if we take the Court's 2007 listing of assets and adjust, Tonia Pagel received the following from the Chancery Court's equitable distribution of marital assets:

Asset	Value	Debt	Equity
Home: 9021 Marina Avenue Ocean Springs, Mississippi	\$250,000	\$146,000	\$104,000
Proceeds from sale of Lots 15, 16 Grasslands	\$93,000.00	n/a	\$93,000
Proceeds from sale of Richland Road, Columbia, MO	\$265,624		\$265,624
St. Martin 10 acres	0		
4912 Kennesaw Dr. Shenandoah Baton Rouge, LA	\$250,000	\$82,000	\$168,000
2003 Yukon	\$20,000	\$17,586	\$2,414
AIM 5256	\$2,304	n/a	\$2,304
AIM 1916	\$3,141	n/a	\$3,141
IRA (Drake)	\$5,300	n/a	\$5,300
IRA (Tonia)	\$2,950	n/a	\$2,950
Tax Refund state tax refund	\$9,000	n/a	\$9,999
Lot 29 Hickory Hills Jackson County, MS	\$10,000	n/a	\$10,000
lump sum alimony			100,000
<b>TOTAL NET VALUE TO TONIA:</b>		<b>\$766,732</b>	

Additionally, Tonia got the Kennesaw property without the \$82,000 debt (T. Pages 415-416, C.P. Volume 3, Page 301 ) and took a state tax refund not awarded to her in the 2008 Judgment of Divorce (T. Pages 161-170) which then would logically raise her actual value to \$849,809.

Conversely, Drake gets the following marital property:

Asset	Value	Debt	Equity
Suma Hills, Lot 7 Livingston, LA	\$190,000	\$142,000	\$48,000
Lot 13, Hickory Hills	0		does not exist
Lots 1-4 Pinehurst Spec Homes Swamp Road	\$680,000	\$421,000	\$259,000 family trust
Tiger Bend Apartments Baton Rouge, LA	\$130,000	\$33,505	\$96,545
2000 Corvette	\$27,000	n/a	\$27,000
2004 SK1	\$27,000	n/a	\$27,000
Loan to Legacy Holdings, LLC		removed as Doris Triplett CPA testimony	
Bayliner	\$5,000	n/a	\$5,000
Legacy Holdings, LLC		removed as it has a negative value	
Proceeds from sale of Richland Road, Columbia, MO	0	removed as Court gave to Tonia	
Subtotal Value			<u>\$462,545</u>
Minus Lump Sum Alimony:			-100,000
Subtotal After Lump Sum Alimony:			\$362,545

With this distribution, Tonia gets \$766,732 and Drake gets \$362,545; however, to further adjust these numbers with marital assets and debts, the Court also placed all debt from Legacy on Drake, which includes any tax debt (T. Page 64 ), but to further delineate the problem of Legacy, it includes Drake's two loans to Legacy which total \$288,555 (C.P. Volume 3, page 301)

Additionally, the Court's 2008 Order awarded Tonia all of the cash assets (1/11/08 Judgment, p.23, ¶32) while Drake was left with property tied up in the appeals process while rapidly depreciating in the real estate crash. Why, without the bad debt, was Tonia entitled to two thirds of the assets and Drake stuck with any lingering debt? Certainly, if the lump sum alimony is taken out, the numbers are better- Tonia gets \$666,732 and Drake gets \$462,545, but the court noted that Drake's separate property was being considered. That separate property is limited:

St. Martin 10 Acres	\$200,000	n/a	\$200,000
Swamp Road	\$30,000	n/a	\$30,000
Total			\$230,000

The value of the St. Martin property has been greatly reduced; however, due to the real estate collapse. Tonia's 8.05, submitted in 2010 for the modification hearing but not placed in evidence, listed its value at \$100,000. Even including Drake's separate property into the mix, the division with lump sum alimony is \$766,732 and Drake gets \$592,545 ( \$362,545 plus \$230,000). Tonia still was given substantially more of the assets.

#### D. The Court's Error in this Equitable Division

Equitable Distribution rules for the last twenty years have their foundation in *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss.1994) and *Ferguson v. Ferguson*, 639 So.2d 921 (Miss.1994). Under *Hemsley*, the Court determines the character of the asset as marital or non-marital; then, using those factors set in *Ferguson v. Ferguson*, 639 So.2d 921 (Miss.1994), the chancellor makes an equitable division of marital assets using the following factors: (1) economic and domestic contributions by each party to the marriage, (2) expenditures and disposal of the marital assets by

each party, (3) the market value and emotional value of the marital assets, (4) the value of the nonmarital property, (5) tax, economic, contractual, and legal consequences of the distribution, (6) elimination of alimony and other future frictional contact between the parties, (7) the income and earning capacity of each party, and (8) any other relevant factor that should be considered in making an equitable distribution.

Our case law clearly states that divisions need be not be equal, just equitable, and that the appellate court shall review property divisions to ensure that the chancellor followed the appropriate standards and did not abuse his discretion. *Wells v. Wells*, 800 So.2d 1239, 1243 (Miss. Ct. App.2001); *Shoffner v. Shoffner*, 909 So. 2d 1245, 1249-50 (Miss. Ct. App. 2005).

The purpose of this examination is “self sufficiency”. *Ferguson*, 639 So.2d at 929. As the Johnson court stated:

If there are sufficient marital assets which, when equitably divided and considered with each spouse's nonmarital assets, will adequately provide for both parties, no more need be done. If the situation is such that an equitable division of marital property, considered with each party's nonmarital assets, leaves a deficit for one party, then alimony based on the value of nonmarital assets should be considered.

*Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994). This self sufficiency is an “ attempt to finalize the division of assets and conclude the parties' legal relationship, leaving them each in a self-sufficient state, where the facts and circumstances permit total dissolution.” *Ferguson*, 639 So.2d at 929; cited in *Bullock v. Bullock*, 699 So. 2d 1205, 1211 (Miss. 1997). Therefore, courts must look to the liabilities as well as the assets. *Bullock*, 1212.

The Chancery Court failed to make a detailed *Ferguson* analysis, which, after the remand and the flagrant misleading testimony of Tonia Lewis, would have seemed in order. Drake Lewis alleges error in the Court's distribution for a number of specific reasons:

1. Although the Court provided \$100,000 in Lump Sum alimony to have Tonia reach an amount of assets valued at \$865,733.00", the Court's award, factually, does not do that. Instead, had the Court prepared a listing as it did in 2007, thus doing a *Ferguson* analysis, the numbers would have shown what is listed above, that Tonia got \$666,732 and Drake got \$462,545, which would then raise Tonia by \$100,000 and lower Drake by that amount in adding the lump sum alimony; further,
2. Failing to review the *Ferguson* factors, the court failed to note that Tonia had an increase in her value because she did not have to assume the debt on the Kennesaw property of \$82,000 (T. Volume 415-416);
4. Failed to review the *Ferguson* factors in regard to the assets and the tax consequence, though Drake was saddled with the tax issues of Legacy (C.P. Volume 3, Page 417; T. Page 64) .In *Louk v. Louk*, 761 So. 2d 878, 883 (Miss. 2000) the court reversed for specific discussion on tax consequences.
5. Failed to review *Hemsley* as regards the separate property from the Richland sale and then failure to sequester this property in the initial *Ferguson* analysis ( discussed below).

6. Because of these factual and legal errors, the Chancery Court's equitable distribution does not comply with this court's *Ferguson* guidelines.
7. Additionally, in the final analysis, the Court made an error in awarding lump sum alimony after that faulty *Hemsley-Ferguson* analysis in contravention to the rules set forth in *Cheatam v Cheatam*, 537 So.2d 435, 438-40 (Miss. 1988) ( discussed below).

#### Richland Road, Separate Property and *Ferguson*

The Chancery Court's ruling does not correctly identify the Richland Road sale proceeds. Tonia, in 2007, had Richland listed as a separate property, but was also listed as an asset of Legacy ( see, e.g., T. Pages 58 and 238). Richland was sold with the agreement of both parties during the divorce litigation but prior to the divorce hearing by both parties ( see T. Pages 137, 154- 7, 224-225 and 230; Exhibit 6 R.E. Page 810 ). The document in evidence clearly stated that the proceeds were separate property. Tonia, reviewing Exhibit 6, had this conversation:

- Q. And that says that, in addition to the 96,000  
22 each, which shall be the separate property of each  
23 seller, including the deposit of 5,000, buyers agree to  
24 pay an additional 88,000 to sellers which shall be used  
25 as follows. It says, separate property, correct?  
26 A. Yes.
- 27 Q. And then on C underneath there, it says, The  
28 balance shall be divided equally between sellers to be  
29 their separate property; is that correct?  
A. Yes.
- 2 Q. And that was signed in March of 2007, correct?

3 I'm sorry, ma'am; is that correct?

4 A. Yes.

(T. Pages 155-156)

similarly, Drake stated (T. Page 230):

Q. Okay. And at the time of the trial when

19 Exhibit 7 was entered into evidence, do you know whether

20 or not Tonia was aware that Richland Road property had

21 already been transferred?

22 A. Yes. She knew it was sold. She knew that my

23 parents had purchased it, and she had her separate

24 \$132,000, and I had my separate 132,000, which is what

25 the agreement that we both signed says.

Drake asserts that this post nuptial contract takes the Richland proceeds out of marital property and makes them separate for classification in equitable distribution. From the divorce judgment and clerks papers, we know that Tonia filed her divorce in 2006, that there was a temporary hearing in September 2006, and the trial was in July 2007; however, this transaction was completed on March 6, 2007, prior to trial and prior to the January 11, 2008 divorce Judgment. We also know that both parties had attorneys and that the validity of this transaction was not attacked as fraudulent or involuntary or without consideration.

Exhibit 6 evidences not a property settlement agreement but a contract to remove one piece of property from argument by the parties in the divorce by selling that asset, agreeing to each get half the proceeds, and to hold that property specifically as separate property. Again, this transaction was after the temporary hearing, a common demarcation line of marital and separate property. See, *Hensarling v. Hensarling*, 824 So.2d 583,591-592 (Miss. 2002). There is no dispute that it is a valid



contract. Postnuptial agreements, like prenuptial agreements, are just contracts. The Court in *Roberts v. Roberts*, 381 So.2d 1333,1335 (Miss. 1980) noted as follows:

The rules applicable to the construction of written contracts in general are to be applied in construing a postnuptial agreement. Such a contract must be considered as a whole, and from such examination the intent of the parties must be gathered. Such construction should be given the agreement, if possible, as will render all its clauses harmonious, so as to carry into effect the actual purpose and intent of the parties as derived therefrom.

Cited in *Barton v. Barton*, 790 So.2d 169, 171 (Miss. 2001); see also, Bell on Mississippi Family Law at § 6.03[3].

Additionally, the failure to classify properly under *Hemsley* is reversible error. See, e.g. *Pittman v. Pittman*, 791 So.2d 857 (Miss. Ct. App.2001) and *Thompson v. Thompson*, 894 So. 2d 603, 606-07 (Miss. Ct. App. 2004); see also, Bell on Mississippi Family Law at § 6.02[1].

Noteworthy, the *Pittman* court stated:

The equitable division that must be made is “based upon a determination of fair market value of the assets, and these valuations should be the initial step before determining division.” *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss.1994). No overall value for the marital and separate estates was determined in the initial decree, and that should be corrected on remand.

*Pittman*, at 867 (Miss. Ct. App. 2001) Classification errors are especially troublesome where there is no specific *Ferguson* analysis in questions. See, *Thompson*, 606-607.

Besides the court’s misclassification of Richland Road proceeds, neither party listed these proceeds as marital property. No requests was made to distribute this money. In fact, Drake’s portion was used to finish houses which Tonia noted were incomplete. ( *Lewis* appeal, ¶ 13). Although part

of the remand, the Court made the divorce judgment ruling, then rendered a second order in March 2008 that stated these monies were Tonia's, then did another post judgment order in July of 2008 that appeared to confirm that the \$132,000 proceeds were Drake's.

#### Remand and *Ferguson* Analysis

On a remand, the trial court has a unique factual perspective. At the time of a divorce, a court must use current facts and testimony to forecast what might happen in the future. In contrast, on a remand, the Court can review that prior forecast in relation to actual post judgment facts. In this case, there is much to consider.

As noted in *Johnson, Bullock, and Ferguson, supra*, , an equitable distribution is to fully separate spouses as self-sufficient persons. In 2007 and in the January 2008 Judgment, the trial court had to forecast the future, but in 2012, it did not. Tonia remarried just 2 months after the divorce and prior to the remand. Tonia went from working four or five days with Drake, to not really working at all after the divorce. ( T. Pages 397 and 399) In retrospect, there is no reason that Tonia needed more assets than Drake in an equitable distribution. Prior to even the divorce hearing, Tonia had \$132,000 from the Richland Road sale (T, Pages 155-156 and Page 230). Tonia was awarded rehabilitative alimony and not periodic alimony, but certainly, her remarriage two months after the divorce establishes no need for extra assets to eliminate alimony, which effectively she did by her actions. On remand, there is no evidence of a greater need by Tonia, nor greater contribution to assets. See, *Wells v. Wells*, 800 So. 2d 1239, 1243-44 (Miss. Ct. App.2001) [greater need] and *Bresnahan v. Bresnahan*, 818 So.2d 1113, 1119 (Miss. 2002)[greater contribution].

### *Ferguson and Lump Sum Alimony*

When the Chancery Court rendered its post remand order, the court found that the reclassification of Drake Lewis's assets now "outweigh Tonia's assets to the extent that some sort of lump sum alimony must be awarded." (C.P. Volume 2, Page 253) Further, the Court re-visited the alimony award, stating that it needed to re-visit the "Armstrong factor regarding needs and assets of the parties in light of the non-marital property awarded to Drake Lewis." Then, the court stated that Drake's separate assets were approximately worth \$210,000 and to "equitably divide the property", he gave Tonia "\$100,000 in lump sum alimony". (C.P. Volume 2, Page 254).

The Chancery Court erred in several ways here. *Armstrong* is not the test for lump sum alimony. In *Cheatham v. Cheatham*, 537 So. 2d 435, 438-40 (Miss. 1988), the Court laid out the test for the appropriateness of lump sum alimony:

- 1) Substantial contribution to accumulation of total wealth of the payor either by quitting a job to become a housewife, or by assisting in the spouse's business. *Tutor v. Tutor*, 494 So.2d 362 (Miss.1986); *Schilling v. Schilling*, 452 So.2d 834 (Miss.1984);
- 2) A long marriage. *Jenkins v. Jenkins*, 278 So.2d 446, 449 (Miss.1973); *Tutor* and *Schilling*, *supra*;
- 3) Where recipient spouse has no separate income or the separate estate is meager by comparison. *Jenkins*, *Tutor* and *Schilling*, *supra*;
- 4) Without the lump sum award the receiving spouse would lack any financial security. *Abshire v. Abshire*, 459 So.2d 802, 804 (Miss.1984).

A closer analysis of these cases, however, reveal that the single most important factor

undoubtedly is the disparity of the separate estates.

See also, *Bland v. Bland*, 629 So. 2d 582, 587-88 (Miss. 1993); *Haney v. Haney*, 788 So. 2d 862, 865-66 (Miss. Ct. App. 2001).

Like equitable distribution, the Chancellor must make findings consistent with a *Cheatam* analysis or be reversed. See *Haney v. Haney*, 788 So. 2d 862, 865-66 (Miss. Ct. App. 2001).

In those cited cases, the spouse had a meager estate, unlike Tonia. Lump sum alimony is not about fault (*Miller v. Miller*, 847 So. 2d 469, 472-73 (Miss Ct. App. 2004). As noted in the *Miller* case,

When lump sum alimony is paid as an “equalizer,” it is because the property distribution has left one spouse's assets out of balance to the other in such a way as to be inequitable. See N. Shelton Hand, Jr., Mississippi Divorce, Alimony & Child Custody § 11-1 (2002), at 340 (“lump sum alimony may be ordered as a substitute for the allocation of property, per se, where the court finds either that there is no property or that the division of the property is difficult to achieve” in an equitable manner.)

And then,

Fault should not be weighed when lump sum alimony is awarded for purposes of balancing property distribution.

*Miller v. Miller*, 874 So. 2d 469, 472-73 (Miss. Ct. App. 2004). It is noteworthy that the spouse in *Miller* had “poorly presented financial information”, whereas Tonia did not produce her 8.05 or financial information for evidence. *Id.*, 473. Further, as *Miller* notes at 475 :

Even so, operating with the evidence available, there was error. Lump sum alimony was ostensibly used here to equalize equitable distribution, but the distribution was already in favor of the recipient spouse. It is not modifiable, which is part of the danger of it. No equalizer was appropriate in this case from the former husband to his former wife.

The Chancery Court therefore, used the wrong test, on imperfect information, and factually attempted to equalize with separate property outside the bounds of any *Cheatam* analysis.

## **ARGUMENT 2 :**

### **The Chancery Court Erred in the Decision on Child Support**

#### **Contempt and Related Matters**

Appellant Drake Lewis asserts that the Chancery Court of Harrison County was manifestly wrong in its decision on child support and asserts that the Court erred in not reducing support, not relating that reduction back to first trial date, and then finding contempt. Drake asserts that the court wrongfully imputed income to him.

In March 2008, some two months after the divorce judgment on January 11, 2008, Tonia Lewis married Ted Pagel, her minister, and then she moved about 2,000 miles away to Idaho with the two youngest children and let the oldest child move to Florida against the father's wishes. The first trial date on Drake's modification was in October 2010 and, as the first appeal was on-going, the Court held all trial matters in abeyance, agreeing that the Court could return to that date on issues on file, which were custody, support and related matters. (T. Pages 169 and 273; see also C. P. Volume 3, Pages 410 and 412) These matters all came to hearing, along with the remand, in 2013.

Your Appellant, Drake Lewis, asserts that the Chancery Court erred as follows:

1. The Court did not follow the statutory guideline and rules regarding child support;
2. The Court erred in imputing income; and

3. The Court erred in not dating the modification back to the original trial date.
4. The Court erred in not dating the college change back to Tonia's marriage date.
5. Further, these errors led the court to find contempt and award attorney fees.

#### The Statutory Guidelines

Since 1989, the statutory child support guidelines have given local courts clear rules and methodology for setting child support. Primarily, the statutes provide rules regarding obtaining a payor parent's gross income and then reducing that by legally mandated deductions to arrive at adjusted gross income. Then, the guidelines establish a rebuttable presumption for awarding or modifying child support at a percentage of adjusted gross income: 20% for two; 22% for three children. Further, the statutes consider variances on that amount:

(2) The guidelines provided for in subsection (1) of this section apply unless the judicial or administrative body awarding or modifying the child support award makes a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined under the criteria specified in Section 43-19-103.

*Miss. Code. Ann.* § 43-19-101 (West). Additionally, the statutes also provide for variances, stating as follows:

The rebuttable presumption as to the justness or appropriateness of an award or modification of a child support award in this state, based upon the guidelines established by Section 43-19-101, may be overcome by a judicial or administrative body awarding or modifying

the child support award by making a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined according to the following criteria:

*Miss. Code. Ann.* § 43-19-103 (West).

In our Lewis case , the Chancery Court stated that Drake's income was "\$4,730 per month, basically the same amount he submitted in 2007." (C.P. Volume 3, Page 307). The Court noted generally that the "children's needs were greater than the 22% he was ordered to pay." Also, the Court stated that Drake is "capable of earning a substantial income" and denied the modification. ( C. P. Volume 3, Page 307). The divorce judgment set his child support at \$1,606 , "which is 22% of his net income". Later, once the matter was pointed out, the Court did reduce the child support to \$1,460, which was 20% as of August 20, 2012, when the oldest child Jordon became 21. ( Sept 2013 order, page 1),

In Exhibit 13, Drake set forth his income. His gross was \$4,613.04 and his net was \$3,806.94. (R.E. Page 866). This was corroborated by pay stubs (R.E. Page 882) and by his father. At one point after the divorce, Drake had little income, then no income, and then the current amount (T. Page 260). What the court noted in the 2008 judgment, was a net income of \$7,300, from which the court took 22% and found child support at \$1,606. (C.P. Volume 3, page 408; See also, *Lewis v. Lewis*, 54 So.3d 233,243 (Miss. Ct. App. 2009) *aff'd in part, rev'd in part*, 54 So. 3d 216 (Miss. 2011). Drake's income in 2009 and since has been much less. His net income now is \$3,806.94, almost half of the 2007 income. Twenty-two percent of that actual net is \$837.32 a month, not \$1,606. Drake asserts that the Chancery Court did not do the required analysis under both *Miss. Code. Ann.* § 43-19-101 and § 43-19-103 finding the guideline unjust or inappropriate and therefore

should have used the guideline to set child support. This is especially true as Tonia did not present any 8.05 financial affidavit as required under Chancery Court, which subjected her to potential contempt under the rules. See, *Uniform Chancery Court Rules*, 8.05.

Our courts consistently look to the 8.05 and an establishment of both the payor's income and the children's needs. In *Gray*, the court stated:

However, without an accurate finding as to what James Gray's salary is, it cannot be determined whether the award was in excess of the statutory guidelines. The only information provided in the record is that James' adjusted income is \$912 per month. Given that income, an award of \$300 per month per child exceeds the statutory guidelines of 20%. If the chancellor found the application of the guidelines to be unjust or inappropriate, a deviation is permitted if it is accompanied by a written finding or specific finding on the record detailing the reasons for said deviation. It appears that the chancellor was skeptical of James' adjusted income, and rightfully so, nevertheless, he failed to specifically determine on the record the adjusted gross income.

Without having the benefit of the chancellor's findings of fact, it cannot be said that the guidelines were either followed or not followed. Therefore, we vacate the judgment in part as to the award of child support, and we remand so that the chancellor may reconsider this issue and provide specific findings of fact to support his award.

*Gray v. Gray*, 745 So. 2d 234, 237 (Miss. 1999) See also, *Seghini v. Seghini*, 42 So. 3d 635, 641 (Miss. Ct. App. 2010)

#### The Court Erred in Imputing Income

The Court had no evidence that Drake made more money than he listed. Drake, as noted, placed all his financial information into evidence. His income was contained on his pay vouchers and was reflected in his 8.05 financial statement. (R.E. Page 866). He made no income from any other source. (T. Page 255). Although he did have some property assets from the divorce, Drake was losing those assets and had to turn them over to his father because Drake was unable to maintain



payment on them; further, the properties did not produce income greater than the debt (T. Pages 256-257).

Whenever a court looks to set child support, it must find adjusted gross income; further, if the court deviates from the guideline methods and rules, the Chancery Court must apply those guidelines to see if the application would be unjust. One court noted:

¶ 20. While we recognize the authority of the chancellor to deviate from the statutory guidelines, such deviation must be supported by specific written findings of fact. In the case *sub judice*, the chancellor failed to make the preliminary determination of adjusted gross income. Without having the benefit of the chancellor's finding of adjusted gross income, this Court cannot say that the guidelines were either followed or not followed. Likewise, assuming there to have been a deviation, either up or down, this Court cannot say that the chancellor did not abuse his discretion. In the absence of specific findings of fact to support a deviation from the child support guidelines, the chancellor's award is not entitled to the presumption of correctness under the statute. *Rakestraw v. Rakestraw*, 96-CA-0118-COA (¶ 15) (Miss.App.1998). We, therefore, reverse and remand this matter to the chancery court for proceedings not inconsistent with this opinion on the issue of child support. *Osborn v. Osborn*, 724 So. 2d 1121, 1125 (Miss. Ct. App. 1998).

Drake established his income, but also established that he had no income from other sources. In particular, Doris Triplett, the CPA, testified as to the taxes of Legacy and the resulting debt; further, Garry Lewis and Drake both testified as to Drake's income and what occurred about his salvaged divorce assets. Drake did not leave a good income, that income and business left him. There was no bad faith in his inability to continue Legacy and none was alleged. As noted in *Howard v. Howard*, 968 So. 2d 961, 972 (Miss. Ct. App. 2007),

While usually a spouse's actual income is assessed in determining the amount of child support, income will be imputed to a child support payor who, in bad faith, voluntarily worsens his financial position.

*Parker*, 645 So.2d at 1331. The payor need not harbor an express intent to harm the children; bad faith may be found when a payor effectively compromises the children's interests by voluntarily terminating his employment. *Bailey*, 724 So.2d at 338(¶9). However, income will not be imputed to a payor who establishes a reduced earning capacity due to matters beyond the payor's control. For example, in *Kennedy v. Kennedy*, 650 So.2d 1362, 1368 (Miss.1995), a spouse was entitled to a reduction in separate maintenance payments because he retired from employment as a roustabout due to injuries that left him unable to do the job.

Similarly, the *Wells* court stated:

16 ¶ 47. Forrest argues that income should be imputed to Reyna because she is working at less than full capacity. This Court has held that “income will be imputed to a child[-]support payor who, in bad faith, voluntarily worsens his financial position.” *Howard v. Howard*, 968 So.2d 961, 972 (¶ 25) (Miss.Ct.App.2007). “[A]n obligor's financial position cannot be voluntarily worsened in an attempt to lessen his [or her] child[-]support obligation.” *Swiderski v. Swiderski*, 18 So.3d 280, 286 (¶ 25) (Miss. Ct. App. 2009). There is no evidence that Reyna reduced her work hours. *Wells v. Wells*, 35 So. 2d 1250, 1260 (Miss. Ct. App. 2010)

In our appeal matter, Tonia simply ignored rule 8.05 and presented no evidence of her income or expenses, much less the children's needs. Indeed, Drake did, in fact, note that Tonia's 2008 move costs him both important time with the children and increase expenses to effectuate any visitation; further, Drake also noted that Tonia did not have realistic custody of Jordon. Jordon moved from her home in 2008. Thereafter, Drake paid 100% of Jordon's school, housing and meal tickets, but got no consideration on a reduction in support during those years. *See, Fancher v. Pell*, 831 So.2d 1137, 1140 (Miss. 2002) and *Kirkland v. McGraw*, 806 So. 2d 1180, 1183 (Miss. Ct. App. 2002), citing *Sumrall v. Sumrall (Munguia)*, 757 So.2d 279 (Miss.2000).

Drake therefore argues that the court should not impute income where there is no basis of that imputation, where there is no bad faith, and when there is no proof of any such income, especially in contravention to the statutory guidelines as well as the direction from case law above.

#### The Court Erred in Not Dating the Modification

#### Back to the Original Trial Date.

It is understood that, as a general rule, child support reduction does not modify retroactively. See, *Howard*, supra. However, here, the remand notes the need for change:

We accept that the chancellor's treatment of the loan will most likely mean that the amount of child support will have to be adjusted in the future, once Drake has recouped the value of the loan.

*Lewis v. Lewis*, 54 So.3d 233, FN2 (Miss. Ct. App. 2009). That referred to loan was the \$156,555, which will not be repaid. ( see C.P. Volume 1, Page 34, ¶35)

Thus, the child support can relate back to the remand date; however, as an alternative position, Drake sought to have the modification relate back to the original trial date in October 2010. All parties and the Court noted that the matter had been held in abeyance during the appeals and post appeal matters. (T. Pages 169 and 273; see also C. P. Volume 3, Pages 410 and 412).

Again, in a remand, there is a unique viewpoint as we no longer must guess what occurs after the divorce judgment. Here, we know that Legacy had no value, has debt, and closed business. (T. Page 17). We know that Tonia remarried and moved 2000 miles away while sending the oldest to live with her sister in Florida. (T. Page 361 ). We know that Drake paid all Jordon's college costs and that Jordon eventually came to live with him and his family in Louisiana (T. Pages 172-177 and Pages 272-4). We know that Drake kept records: Drake produced an Excel spreadsheet where he kept track of his expenses for the

children ( support, insurance, medicals, transportation, college, etc) and then his extrapolation of those expenses. Exhibit 10 and 14( See, T. Pages 169- 175, 264-267 and 272 re business, see R.E. Page 826 and 880).

We also know what Drake's income and payments to support were from Exhibit 14 and the supporting documents: in 2007, his **net** income was \$7,300; his 2008 **gross** income was \$42,800; his 2009 **gross** income was \$19,310; his 2010 **gross** income was \$55,785.60; his 2011 **gross** income was \$55,785.60; and he projected his 2012 income would be the same. This is consistent with his 8.05, which in Exhibit 13, shows a **gross** of \$4,613.04 and a **net** of \$3,806.94.

Drake asserts there was ample proof and reason to not only reduce support but to follow the remand and the law of the case due to the abeyance of action in 2010.

#### Retroactive College Costs

The Court found that Tonia's marriage in March 2008 was a change in circumstance. The Order on Modification and Contempt states: "Additionally, since Defendant has remarried and her circumstances have changed since the entry of divorce," the court made both parties responsible for half the college costs of the children.

As Jordon has not lived with Tonia since June of 2008 and since Drake has paid all the college costs, Tonia should have been directed to pay Drake back or Drake should get a set off of all college expenses paid since Tonia's change in circumstances, her remarriage. College costs paid in Exhibit 14 (R.E. Page 880) and supporting documents totaled \$28,426.12, all occurring after Tonia's remarriage.

## Residual Matters: contempt and Attorney Fees

Drake was found in contempt and ordered to pay attorney fees. This action relates to support issues and so must be addressed here. The Court found Drake owed Tonia \$28,589.39 in back child support and attorney fees of \$5,000. (March 2013 Order, R.E. 292, C.P. Volume 3, Page 305),

As to the contempt, set offs should have more than covered any contempt amounts. First, the claimed child support is not only child support, but plane tickets ( part of an agreement) and minor expenses at college not contained in the original court order. Second, the Court terminated retroactively the rehabilitative alimony as of March 2008. Drake would note that the lump sum alimony paid after marriage was \$20,000, not \$18,000 as the Court erroneously concluded as the first payment was in February 2008. February and March payments totaling \$4,000, are all that should have been paid, yet Drake paid \$24,000 as ordered so is due \$20,000 in reimbursement. Third, the Court should have offset the college expenses of Jordon, some \$28,426.12, which would have given Drake an extra \$14,213.06 credit. With these, Drake would not be in contempt at all. Further, had the Court made the support modification correctly and set it according to the remand or at the time of the first hearing where the court held all matters in abeyance, there would be no arrears to offset.

Additionally, when Drake was unable to pay, he quickly petitioned the Court. As noted in *Grissom v. Grissom*, 952 So.2d 1023 (Miss. Ct App. 2007), the paying party should not be held in contempt when they promptly seek a modification.

As to the attorney fees, the exhibits do not show an attorney fee bill nor the essential matters which must occur to award attorney fees under *McKee*, as stated in *Speights v. Speights*

,126 So. 3d 76, 81-82 (Miss. Ct. App. 2013):

An award of attorney's fees should be 'fair and should only compensate for services actually rendered after it has been determined that the legal work charged for was reasonably required and necessary.' *Jordan*, 105 So.3d at 1135 (§ 20) (quoting *Dunn*, 609 So.2d at 1286). It has long been the practice of trial courts to apply the factors in *McKee v. McKee*, 418 So.2d 764, 767 (Miss.1982), in awarding attorney's fees. Although it is not necessarily reversible error for the chancellor not to make an on-the-record analysis of \*82 the *McKee* factors,<sup>2</sup> without any evidence of fees in the record, we have absolutely no way of determining whether the chancellor's award was reasonable. Tonia did not place any attorney fee bill into evidence ( See, T. Page 377; see exhibits); therefore, there was no basis of the attorney fee award.

#### CONCLUSION

Appellant Drake Lewis submits that the Chancery Court was manifestly wrong and committed error as regards to the matters set forth above. Appellant Drake Lewis urges this court as follows:

1. That this Court reverse the Chancery Court as regards the equitable distribution, directing the Court to follow the remand, but also to declare that Legacy Holdings, Inc. has no value, that Richland Road proceeds are separate property, and that overall the court needs to do a more equitable division of assets based on the case law cited
2. That this Court reverse the lump sum alimony award.
3. That this Court reverse the child support award and direct the court to set support based on the evidence of income presented and on the statutory guidelines;
4. That this Court direct that support modification be retroactive to the remand date or, alternatively October 2010;

5. That this Court find that the Chancery must review any contempt after the retroactive modification and, alternatively, find that the court needs to use the \$20,000 change in lump sum alimony and ½ of college expenses as set off;
6. That this Court reverse on attorney fees .

Appellant Drake Lewis asserts that this Court should do the following: reverse and render, or remand with specific instructions as to the equitable distribution, support, contempt, attorney fees and the issues presented above.

RESPECTFULLY SUBMITTED, this the 12th day of March, 2014.

DRAKE LEWIS, APPELLANT

BY: s/ THOMAS WRIGHT TEEL  
THOMAS WRIGHT TEEL

#### CERTIFICATE OF SERVICE

I, Thomas W. Teel, Attorney for the Defendant/Appellant, do hereby certify that I have on this date filed this Brief of the Appellant with the Clerk of this Court, and have served a copy of same via MEC filing to the Honorable Carter Bise, Chancellor, Harrison County Chancery Court and Dean Holleman, Esquire, Boyce Holleman & Associates, Attorney for the Plaintiff/Appellee.

So certified this the 12th day of March, 2014.

S/THOMAS WRIGHT TEEL  
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