

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

LEA ANN BYRD

PLAINTIFF/APPELLANT

VS.

No. 2011-CA-01410

Bolivar County Chancery Court District 1

Case No. 2009-0093

JONATHAN WAYNE BYRD,
HIGHWAY 49, INC., 1 GREEN ACRE, INC.,
FARRELL, INC.,
HILLHOUSE, INC., HIGHWAY ONE, INC.,
GREEN GROVE, INC., AND BYRD SONS
RESIDUAL TRUST, JONATHAN BYRD AND
KEITH BYRD, CO-TRUSTEES

DEFENDANTS/APPELLEES

**BRIEF OF THE APPELLANT, LEA ANN BYRD
ORAL ARGUMENT REQUESTED**

NATURE OF THE PROCEEDING: APPEAL

Kay Farese Turner [REDACTED]
Emily L. Hamm # [REDACTED]
Kay Farese Turner & Associates
Attorneys for Appellant, Lea Ann Byrd
530 Oak Court Drive, Suite 255
Memphis, Tennessee 38117
(901) 529-4040

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEA ANN BYRD

PLAINTIFF/APPELLANT

VS.

No. 2011-CA-01410
Court Appealed From: Bolivar County
Chancery Court
Trial Court # 2009-0093


JONATHAN WAYNE BYRD,
HIGHWAY 49, INC., 1 GREEN ACRE, INC.,
FARRELL, INC.,
HILLHOUSE, INC., HIGHWAY ONE, INC.,
GREEN GROVE, INC., AND BYRD SONS
RESIDUAL TRUST, JONATHAN BYRD AND
KEITH BYRD, CO-TRUSTEES

DEFENDANTS/APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

Lea Ann Byrd
Jonathan Wayne Byrd
Highway 49, Inc.
1 Green Acre, Inc.
Farrell, Inc.
Hillhouse, Inc.
Highway One, Inc.
Green Grove, Inc.
Byrd Sons Residual Trust, Jonathan Byrd and Keith Byrd, Co-Trustees



Kay Varese Turner # [REDACTED]
Kay Varese Turner & Associates
Attorneys of Record for Plaintiff/Appellant, Lea Ann Byrd
530 Oak Court Drive, Suite 255
Memphis, Tennessee 38117
(901) 529-4040

I. TABLE OF CONTENTS

TABLE OF AUTHORITIES.....4

TABLE OF ABBREVIATIONS.....5

STATEMENT OF ISSUES.....6

STATEMENT OF THE CASE.....6

STATEMENT OF THE FACTS.....13

SUMMARY OF THE ARGUMENT.....18

ARGUMENT.....21

A. THE TRIAL COURT MANIFESTLY ERRED IN ITS STATEMENT OF HUSBAND’S INCOME....21

B. THE TRIAL COURT MANIFESTLY ERRED IN ITS VALUATION OF HUSBAND’S ONE-THIRD INTEREST IN THE BSRT.....22

C. THE TRIAL COURT MANIFESTLY ERRED IN ITS CLASSIFICATION OF HUSBAND’S ONE-THIRD INTEREST IN THE BSRT AS HUSBAND’S SEPARATE PROPERTY.....26

D. THE TRIAL COURT MANIFESTLY ERRED IN ITS IDENTIFICATION, CHARACTERIZATION, AND VALUATION OF CERTAIN MARITAL PROPERTY.....32

 1. Value of Duncan, Mississippi residence.....32

 2. Value of Wife’s 2001 Cadillac.....33

 3. Payments made by Husband toward credit card debts for which Husband refused to produce statements or bring forth evidence to show a reasonable purpose for the creation of such debts.....34

 4. Additional dissipation by Husband of marital monies.....35

E. THE TRIAL COURT MANIFESTLY ERRED IN MAKING AN EQUITABLE DIVISION OF MARITAL PROPERTY PURSUANT TO THE *FERGUSON* FACTORS.....36

F. THE TRIAL COURT MANIFESTLY ERRED IN FAILING TO AWARD SUFFICIENT ALIMONY TO WIFE BY (1) FAILING TO PROPERLY APPLY THE *ARMSTRONG* FACTORS, (2) FAILING TO TAKE INTO ACCOUNT THE SUBSTANTIAL DISPARITY IN THE PARTIES’ FINANCIAL POSTURES PRE- AND POST-DIVORCE, AND, BECAUSE THERE WAS SUCH A SUBSTANTIAL DISPARITY, (3) FAILING TO TAKE INTO ACCOUNT HUSBAND’S INTEREST IN THE BSRT AS A SOURCE OF FUNDS FROM WHICH TO PAY ALIMONY.....39

G. THE TRIAL COURT MANIFESTLY ERRED IN ORDERING WIFE TO VACATE THE NOLAND TOPPER RESIDENCE ON OR BEFORE OCTOBER 1, 2012 AND/OR IN FAILING TO ORDER HUSBAND TO PROVIDE A HOME FOR WIFE AND THE CHILDREN.....	45
H. THE TRIAL COURT MANIFESTLY ERRED IN ITS APPLICATION OF THE MISSISSIPPI CHILD SUPPORT GUIDELINES AND CALCULATION OF CHILD SUPPORT OBLIGATIONS OF THE PARTIES.....	46
1. The Trial Court manifestly erred in ordering Wife, beginning on July 1, 2012, to share, equally with Husband, in the payment of all tuition and educational expenses for the benefit of the children, including private school and college, and to share, equally with Husband, in the payment of all health and hospitalization insurance premiums for the benefit of the children.....	48
2. The Trial Court manifestly erred in failing to order Husband to maintain life insurance and/or other security for the payment of Husband's child support obligations in the event of Husband's death prior to the youngest child's attaining her age of majority.....	49
3. The Trial Court manifestly erred in failing to address the issue of payment of uninsured medical expenses to be paid for the benefit of the minor children.....	50
4. The Trial Court manifestly erred in considering Husband's two sons, born outside the parties' marriage and neither of which is the subject of a child support order, in making determinations relative to Husband's obligations for the support of this marriage.....	51
I. THE TRIAL COURT MANIFESTLY ERRED IN FAILING TO AWARD WIFE ALL ATTORNEY FEES, EXPERT FEES, AND LITIGATION EXPENSES WHICH SHE HAD INCURRED THROUGHOUT THE DIVORCE LITIGATION.....	51
J. THE TRIAL COURT MANIFESTLY ERRED IN FAILING TO SANCTION HUSBAND'S COUNSEL FOR HIS MISCONDUCT DURING THE PENDENCY OF THIS CASE.....	53
CONCLUSION.....	56

II. TABLE OF AUTHORITIES

Cases

<i>A & L, Inc. v. Grantham</i> , 747 So.2d 832 (Miss. 1999).....	passim
<i>Armstrong v. Armstrong</i> , 618 So. 2d 1278 (Miss. 1993).....	36
<i>Ferguson v. Ferguson</i> , 639 So. 2d 921 (Miss. 1994)	34
<i>Hemsley v. Hemsley</i> , 639 So.2d 909 (Miss. 1994).....	24, 26, 29
<i>Johnson v. Johnson</i> , 650 So. 2d 1281, 1287 (Miss. 1994).....	38
<i>Johnson v. Johnson</i> , 877 So. 2d 485 (Miss. Ct. App. 2003).....	37, 38, 39, 40
<i>Jones v. Jones</i> , 995 So.2d 706 (Miss. 2008).....	20, 21, 30, 32
<i>Kilpatrick v. Kilpatrick</i> , 732 So. 2d 876 (Miss. 1999).....	37
<i>Mabus v. Mabus</i> , 910 So. 2d 486 (Miss. 2005)	49
<i>McKee v. McKee</i> , 418 So. 2d 764 (Miss. 1982)	48
<i>McKissack v. McKissack</i> , 45 So.3d 716 (Miss. Ct. App. 2010)	24, 25, 26
<i>Miss. Bar v. Land</i> , 653 So. 2d 899 (Miss. 1994)	51
<i>Miss. Bar v. Mathis</i> , 620 So. 2d 1213 (Miss. 1993)	51
<i>Patterson v. Patterson</i> , 20 So. 3d 65 (Miss. Ct. App. 2009)	49
<i>Pittman v. Pittman</i> , 791 So. 2d 857 (Miss. Ct. App. 2001).....	24, 26, 27
<i>Sanderson v. Sanderson</i> , 824 So. 2d 623 (Miss. 2002)	38, 39
<i>Seymour v. Seymour</i> , 960 So. 2d 513 (Miss. Ct. App. 2006)	34
<i>Smith v. Smith</i> , 614 So. 2d 394 (Miss. 1994).....	47
<i>Suber v. Suber</i> , 936 So. 2d 945 (Miss. Ct. App. 2006).....	44, 45
<i>Tatum v. Tatum</i> , 54 So. 3d 855 (Miss. Ct. App. 2010).....	44, 45
<i>Trim v. Trim</i> , 33 So. 3d 471 (Miss. 2010).....	20, 30, 32, 51
<i>Williamson v. Williamson</i> , No. 2010-CA-00400-COA, 2012 WL 48025 (Miss. Ct. App. Jan. 10, 2012).....	49

Statutes

Miss. Code Ann. § 43-19-101 (2012).....	43, 47, 48
---	------------

Miss. Code Ann. § 43-19-103 (2012) 44

Treatises

Deborah H. Bell, *Bell on Mississippi Family Law* (2005) 37

III. TABLE OF ABBREVIATIONS

BSRT	Byrd Sons Residual Trust
Husband	Defendant/Appellee, Jonathan Wayne Byrd
Trial Court	Chancery Court of the First District of Bolivar County, Mississippi
Wife	Plaintiff/Appellant, Lea Ann Byrd

IV. STATEMENT OF ISSUES

- A. Whether the Trial Court manifestly erred in its statement of Husband's income.
- B. Whether the Trial Court manifestly erred in its valuation of Husband's one-third interest in the BSRT.
- C. Whether the Trial Court manifestly erred in its classification of Husband's one-third interest in the BSRT as Husband's separate property.
- D. Whether the Trial Court manifestly erred in its identification and valuation of marital property.
- E. Whether the Trial Court manifestly erred in making an equitable division of marital property pursuant to the *Ferguson* factors.
- F. Whether the Trial Court manifestly erred in its application of the *Armstrong* factors and in failing to award Wife sufficient alimony.
- G. Whether the Trial Court manifestly erred in ordering Wife to vacate the Noland Topper Road residence on or before October 1, 2012.
- H. Whether the Trial Court manifestly erred in his application of the Mississippi Child Support Guidelines and calculation of child support obligations of the parties.
- I. Whether the Trial Court manifestly erred in failing to award Wife all attorney fees which she had incurred throughout the divorce litigation.
- J. Whether the Trial Court manifestly erred in failing to sanction Husband's attorney for his misconduct during the pendency of this case.

V. STATEMENT OF THE CASE

On August 3, 2009, Wife filed her "Complaint for Absolute Divorce." (R. at vol. 1, 14-22.) On September 3, 2009, Husband filed his "Answer to Complaint and Counterclaim for Divorce Absolute & Custody of Minor Children" (R. at vol. 1, 48-57). On October 7, 2009,

Wife filed her “Answer to Affirmative Allegations and Averments Contained in Husband’s Answer to Complaint and Wife’s Answer to Counterclaim for Divorce Absolute & Custody of Minor Children.” (R. at vol. 1, 60-63.)

Two causes were consolidated with this divorce action during the course of the proceedings. The first such action, which was consolidated with the divorce action by order of the Trial Court (R. at vol. 3, 421-22), was a pre-divorce action pertaining to the custody and support of the parties’ minor children. On February 27, 2008, Husband filed his “Action to Establish Visitation Rights.” (Supplemental R. at vol. 1, 4-6.) As a part of this action, the Trial Court entered a series of Orders: “Order Allowing Visitation,” filed on March 5, 2008 (Supplemental R. at vol. 1, 9-10), “Order Establishing Visitation Rights,” filed May 15, 2008 (Supplemental R. at vol. 1, 11-12), and “Order Concerning Visitation Rights,” filed January 15, 2009 (Supplemental R. at vol. 1, 13-14). The Trial Court awarded Wife primary custody of the parties’ minor children, with Husband having scheduled visitation, and Husband was ordered to pay to Wife \$400.00 per week in child support as well as continue to pay the other expenses Husband has been presently paying, pursuant to the “Order Establishing Visitation Rights.” (Supplemental R. at vol. 1, 11-12.)

The second consolidated action involved Wife’s seeking to set aside certain fraudulent conveyances. On January 24, 2011, Wife filed her “Complaint to Set Aside Fraudulent Conveyances Pursuant to Mississippi Code Annotated §11-5-75,” which named Husband, individually, and Byrd Sons Residual Trust, Husband and Keith Byrd, Co-Executors, as defendants. (R. at vol. 8, 1143-89.) On January 28, 2011, Husband filed his “Answer and Counter Claim to Complaint to Set Aside Fraudulent Conveyances Pursuant to Mississippi Code Annotated §11-5-75.” (R. at vol. 8, 1195-vol. 9, 1219.) On February 14, 2011, Wife filed her “Response to Affirmative Matters Contained in Husband’s Answer to Complaint to Set Aside

Fraudulent Conveyances Pursuant to Mississippi Code Annotated §11-5-75 and Answer to Counter Claim.” (R. at vol. 9, 1260-63.) Such action was consolidated with the divorce matter by the consent of the parties and the Co-Trustees of the Byrd Sons Residual Trust. (R. at vol. 12, 1779.)

During the course of these proceedings, both parties sought to amend their respective Complaints. On June 10, 2010, the Court entered its “Order Allowing Amended Counter Claim for Divorce Absolute & Custody of Minor Children” (R. at vol. 2, 295), and Husband filed his “Amended Counter Claim for Divorce Absolute and Custody of Minor Children” on the same date (R. at vol. 2, 283-94). Such amendment by Husband addressed primarily issues relating to the children, alleging that there had been a substantial and material change in circumstances since Wife had been awarded primary custody of the parties’ minor children, pursuant to the “Order Establishing Visitation Rights,” filed on May 15, 2008. (R. at vol. 2, 283-94.) On June 17, 2010, Wife filed her “Amended Answer to Affirmative Allegations and Averments Contained in Husband’s Answer to Complaint and Wife’s Amended Answer to Counterclaim for Divorce Absolute & Custody of Minor Children” (R. at vol. 2, 296-300), and, on August 25, 2010, Wife filed her “Answer to Amended Counterclaim for Absolute Divorce and Custody of Minor Children” (R. at vol. 4, 455-58).

On August 25, 2010, the Trial Court filed its “Order on Wife’s Motion to Amend Complaint for Divorce” (R. at vol. 3, 450-vol. 4, 451), and Wife filed her “Amended Complaint for Absolute Divorce” on the same date (R. at vol. 4, 459-69). Such amendment by Wife addressed the parties’ void divorce of 1993. (R. at vol. 3, 303-22.) The parties were married on October 31, 1991, and subsequent to such marriage, Husband filed a Complaint for Divorce in Coahoma County, Mississippi. (R. at vol. 4, 460.) Neither Husband nor Wife was a resident of Coahoma County, Mississippi at the time of filing such Complaint. (R. at vol. 4, 460.)

Consequently, the Final Divorce Decree that Husband ostensibly obtained by default in Coahoma County, Mississippi on August 6, 1993 was void for lack of jurisdiction, pursuant to Miss. Code Ann. § 93-5-11. (R. at vol. 4, 460.) In its Findings of Fact, the Trial Court found that the parties had been married since October 31, 1991. (R. at vol. 12, 1753.)

Wife filed two contempt petitions against Husband during the course of this litigation. On July 9, 2010, Wife filed her "Petition for Citation of Civil Contempt," alleging that Husband had violated multiple Orders by failing and/or refusing to pay full child support to Wife, failing and/or refusing to pay all household expenses routinely paid by him, and exposing the children to his paramour. (R. at vol. 3, 323-36.) On July 16, 2010, Husband filed his "Response to Petition for Citation for Civil Contempt and Counter Matters for Citation for Civil Contempt." (R. at vol. 3, 372-84.) On December 14, 2010, Wife filed her "Second Petition for Civil Contempt," alleging that Husband had continued to violate multiple Orders by failing and/or refusing to pay all household expenses routinely paid by him. (R. at vol. 7, 914-31.)

The Trial Court set the hearing on Wife's two contempt petitions for December 30, 2010. In the resulting "Order on Petition for Citation for Contempt and Second Petition for Citation for Contempt," which was filed on February 3, 2011, the Trial Court granted Wife's two Petitions for Contempt in that Husband had admitted his guilt and purged his contempt. (R. at vol. 14, 2078-80.)

The issue of the custody of the children was addressed by the Trial Court separately from the financial matters and other matters at issue in this divorce. On May 17, 2010, the Trial Court held a hearing on Husband's prayer for temporary custody of the parties' minor children. (R. at vol. 3, 423.) The Trial Court then filed, on August 9, 2010, its "Order on Wife's Ore Tenus Motion in Limine and Order Setting Trial and Scheduling Deadlines," which, in part, set

Husband's petition for a change for custody for hearing on dates separate from those for the hearing on the financial matters at issue in the divorce. (R. at vol. 3, 423-25.)

The Trial Court held a hearing on July 19, 2010 and July 20, 2010 regarding Husband's prayer for a change of custody of the parties' four minor children. (R. at vol. 3, 415.) On August 9, 2010, the Trial Court filed the resulting "Order Dismissing Husband's Petition for Change of Custody," which reaffirmed the "Order Establishing Visitation Rights" and awarded Wife permanent custody of the parties' minor children, reserving the issue of child support and attorney fees for further hearing. (R. at vol. 3, 415-18.)

However, after the final adjudication of the child custody matter, Husband continued to issue subpoenas for the parties' four minor children to testify at the trial of the financial matters (R. at vol. 9, 1237-38, 1287-88, 1289-90, 1291-92), and he served a subpoena duces tecum and a subpoena to trial to Dr. Subbu Rayudu, the psychologist for Preslea Byrd, the parties' then 15-year-old daughter (R. at vol. 6, 832-36). Husband also attempted to call the parties' oldest daughter, then 20-years-old, as a witness on the issue of child support at the trial of the financial matters as part of an attempt to prove Mother was not spending money on the children. (R. at vol. 21, 988:11-1002:3.) Moreover, in his "Answer to Motion to Reconsider, Alter, or Amend Opinion and Final Judgment of Divorce," filed on July 12, 2011, Husband attached an affidavit, executed by Ashlea Byrd, who was then 21 years of age (R. at vol. 13, 1858-63), again trying to raise issues of custody upon which the Trial Court had already ruled.

Husband and/or his counsel refused throughout the litigation to comply with Wife's discovery requests or to cooperate with Wife's efforts to obtain discovery. Husband and/or his counsel took a consistently recalcitrant position with regard to their refusal to produce documents. (R. at vol. 12, 1775-76.) Consequently, Wife was forced to serve 28 subpoenas on various banks and financial institutions to obtain Husband's financial records and the financial

records relative to Husband's assets, which Husband persistently failed and/or refused to produce voluntarily, and to supplement those records as to their current values as a result of multiple continuances of the trial date due to Husband's non-compliance with discovery. (R. at vol. 1, 96-98, 99-101; vol. 3, 438-41, 442-45; vol. 4, 494-96, 497-99, 537-39, 540-42, 543-46, 547-49, 550-52, 553-55, 556-59, 560-63; vol. 7, 953-55; vol. 8, 1087-89, 1090-92, 1093-95, 1096-98, 1099-1101, 1102-04; vol. 9, 1243-46, 1247-49, 1250-53, 1271-73, 1274-76, 1277-79, 1280-82.) Such 28 subpoenas did not include the 11 subpoenas Wife served on various witnesses (R. at vol. 1, 94-95, 124-25, 126-27; vol.7, 956-57, 958-59, 960-61, 962-63, 985-87, 991-93; vol. 8, 1085-86; vol. 9, 1269-70) and five additional subpoenas Wife served on other entities to obtain additional information that Husband failed and/or refused to produce voluntarily and to discover facts that Husband had intentionally obfuscated and admittedly misrepresented in his deposition and in various hearings. (R. at vol. 4, 500-01; vol.7, 964-66, 967-69, 970-72; vol. 8, 1193-94; vol. 14, 2074-75.)

Further due to Husband's persistent non-compliance with discovery requests, Wife filed a "Motion to Compel" on February 2, 2010, stating that Husband's answers to 14 interrogatories and 17 requests for production of documents were deficient. (R. at vol. 1, 137-47; vol. 2, 154-81.) Moreover, the trial of the financial matters in this action was continued multiple times due to the willful failure of Husband and/or his counsel to produce all of the documents requested by Wife in her discovery requests. The Trial Court continued the trial of the financial matters from August to November of 2010 and further ordered Husband to produce all documents that had been requested by Wife's counsel or Wife's expert and to respond fully to all Interrogatories propounded upon him, pursuant to its "Order Compelling Discovery and Continuing Trial on All Remaining Issues Including Divorce, Division of Property, Spousal Support and Child Support and Hearing on Plaintiff's Petition for Contempt." (R. at vol. 4, 502-05.)

However, as a result of Husband and/or his counsel's having still not complied with Wife's discovery requests and Husband's continuing to be in willful violation of the Trial Court's order as of the reset date of the trial of the financial matters in November 2010, Wife was forced to file a number of Motions not only to allow additional time for discovery but also to seek temporary financial relief. Wife filed, on November 15, 2010, a "Motion for Continuance" (R. at vol. 4, 566-600), "Motion for Sanctions Pursuant to Rule 37 of the Mississippi Rules of Civil Procedure" (R. at vol. 5, 601-34), "Motion for Interim Attorney Fees" (R. at vol. 5, 649-57), and "Motion to Increase Child Support and to Award Temporary Alimony" (R. at vol. 5, 658-70.)

On December 30, 2010, the Trial Court held a hearing on Wife's prayers for temporary financial relief, sanctions, declaratory judgment, and Wife's two Petitions for Contempt, and Wife prevailed on almost every issue in those Motions. In the "Order on Motion to Increase Child Support and to Award Temporary Alimony" (R. at vol. 9, 1296-1300), "Order on Motion for Interim Payment of Attorney Fees" (R. at vol. 14, 2069-71), and "Order on Motion for Sanctions Pursuant to Rule 37 of the Mississippi Rules of Civil Procedure" (R. at vol. 14, 2074-77), the Trial Court granted Wife's Motions, including \$35,000.00 in interim attorney fees (R. at vol. 14, 2070) and \$15,000.00 in sanctions, which latter sum represented the attorney fees and litigation expenses she had incurred as a result of Husband's obfuscating the discovery process (R. at vol. 14, 2076). In its "Order on Motion for Declaratory Judgment," the Trial Court reserved Wife's "Motion for Declaratory Judgment" for final hearing. (R. at vol. 14, 2072-73.) In its "Order on Petition for Citation for Contempt and Second Petition for Citation for Contempt," the Trial Court granted Wife's two Petitions for Contempt in that Husband had admitted his guilt and purged his contempt just prior to the hearing. (R. at vol. 14, 2078-80.)

The trial of all remaining issues pending before the Trial Court, excluding the already-decided issue of child custody, took place over six days, February 2, 2011, February 3, 2011, February 4, 2011, February 28, 2011, March 2, 2011, and March 3, 2011. (R. at vol. 12, 1779.) On June 13, 2011, the Trial Court filed its “Opinion,” which included its Findings of Fact and Conclusions of Law (R. at vol. 12, 1753-77), and on June 30, 2011, the Trial Court filed the “Final Judgment of Divorce,” which incorporated by reference the Trial Court’s “Opinion” of June 13, 2011 (R. at vol. 12, 1779-84).

On July 11, 2011, Wife filed her “Motion to Reconsider, Alter, or Amend Opinion and Final Judgment of Divorce.” (R. at vol. 12, 1785-vol. 13, 1854.) On July 12, 2011, Husband filed his “Answer to Motion to Reconsider, Alter, or Amend Opinion and Final Judgment of Divorce.” (R. at vol. 13, 1858-63.) On August 25, 2011, the Trial Court filed its “Order” regarding Wife’s “Motion to Reconsider, Alter, or Amend Opinion and Final Judgment of Divorce,” which amended Paragraph 11 of the “Final Judgment of Divorce.” (R. at vol. 14, 2052-53.) Wife filed her “Notice of Appeal” on September 20, 2011. (R. at vol. 14, 2054-55.) Husband filed no cross-appeal.

VI. STATEMENT OF THE FACTS

On October 31, 1991, Husband and Wife were married. (R. at vol. 12, 1753.) The parties had four children together, one prior to their marriage and three during their marriage: Ashlea Ann (April 2, 1990), Preslea Ann (February 14, 1995), Kaylea Ann (September 13, 1996), and Natalea Ann (March 17, 1999). (R. at vol. 1, 15.) Husband also has two additional children, one of which was born during his marriage to Wife. (R. at vol. 12, 1753.)

The parties separated in 2003, and they lived apart since that time. (R. at vol. 12, 1753.) During their separation, Wife was completely supported by Husband until she earned her nursing degree and began working as a registered nurse. (R. at vol. 12, 1754.) Thereafter, Husband

continued to support Wife and the children by providing a house, owned by the Byrd Sons Residual Trust, and paying for most of the expenses for the house and the private educational expenses of the children. “In all ways, except for living together, they remained married.” (R. at vol. 12, 1754.) However, in April 2009, when Husband’s child with his paramour was born, Husband stopped paying many of the expenses for Wife and the parties’ children. (R. at vol. 16, 224:11-15.)

Wife was a stay-at-home mother who provided a stable home for Husband and their children. (R. at vol. 12, 1768.) Wife made sure the children were maintaining good grades in school, was the disciplinarian for the children, took them to church, and transported the children to and from their many activities. (R. at vol. 3, 416-17; vol. 12, 1768.) Wife’s contributions to the marriage were substantial “in kind” contributions to the household. (R. at vol. 12, 1768.)

In contrast, Husband had been involved in numerous extra-marital affairs, including one such affair with Julie Clark, which resulted in a child being born to Husband and Julie Clark while Husband was still married to Wife. (R. at vol. 12, 1755.) Husband admitted this adultery. (R. at vol. 12, 1755.) Moreover, Husband admitted in his sworn testimony that, contrary to the orders of this Court, he has been drinking around the minor children and that, in violation of the Orders of the Trial Court, he has repeatedly travelled with the minor children and his girlfriend, Julie Clark, who testified before the Court and, likewise, openly admitted such conduct. (R. at vol. 3, 416.) Moreover, Husband admitted in his sworn testimony that, contrary to the laws of the State of Mississippi, he has been drinking and driving with the minor children in his vehicle, and he has allowed the parties’ then-20-year-old daughter to drink alcoholic beverages in his presence and in the presence of her younger sisters. (R. at vol. 3, 416.)

Shortly after the birth of the parties’ first child, Wife went to nursing school and obtained her nursing degree in 1994. (R. at vol. 18, 490:4-13.) After working for two years, Wife, with

Husband's consent, stayed at home to raise the parties' four children, three of whom were born after Wife obtained her nursing degree. (R. at vol. 18, 490:16-491:4, 495:26-496:24.) Wife resumed working as a nurse in 2008 (R. at vol. 18, 496:25-497:5), but she chose to continue her education, and she enrolled in nurse practitioner school in 2009, becoming a full time student in July 2010 (R. at vol. 17, 392:25-27). However, before Wife can become established as a nurse practitioner, she would need three years to finish her program, pass her boards, and find a physician sponsor. (R. at vol. 17, 392:28-393:2, 401:1-5; vol. 18, 499:26-27.)

Husband has been involved in various agricultural operations throughout the course of the marriage. (R. at vol. 12, 1754.) Husband and his two brothers were also one-third partners in two farming partnerships, St. Charles Plantation and Forrest Plantation. (R. at vol. 12, 1756.) However, both partnerships are now defunct, since Husband and his brothers began leasing out the farmland owned by the entities in 2008. (R. at vol. 12, 1756.)

Husband also had access to and possession of a large amount of cash over the past several years, having withdrawn at various times \$85,649.05 in cash from his personal account and having cashed \$381,300 in checks at casinos between 2008 and 2010. (R. at vol. 12, 1754.) Husband offered no credible evidence as to what happened to the sum of \$466,949.05 in cash he had acquired during this period, and the Trial Court found that this sum had been dissipated by Husband and should have been available as a potential marital asset. (R. at vol. 12, 1754.)

Husband is a one-third beneficiary and a co-trustee of the BSRT. (R. at vol. 12, 1755.) The BSRT is a testamentary trust, established by Husband's father for the benefit of Husband, his brothers, Keith and Barry Byrd, and their children. (R. at vol. 12, 1755.) The BSRT owns a number of assets, including real property in various states, bank accounts, and other business interests. (R. at vol. 12, 1755.) All assets from the BSRT will be distributed to Husband and his brothers, one-third each, in September 2014. (R. at vol. 12, 1755.) However, as co-trustee of the

BSRT, Husband, with the blessing of his co-trustee, had used the trust as his personal piggy bank, treating it as if it was his left back pocket instead of his right. (R. at vol. 19, 702:24-26.) Husband continually took money out of the BSRT, with no accounting, and used it to pay for his and his family's personal expenses, and, furthermore, shifted money between himself, various farming partnerships, and the BSRT. (R. at vol. 19, 702:26-28.)

Husband and his brother Keith Byrd purchased in their individual names a furnished condominium, boat slip, and residence in Baldwin County, Alabama between January and August of 2009. (R. at vol. 12, 1757.) On April 9, 2010, after the filing of Wife's Complaint for Divorce, Husband and Keith Byrd executed three warranty deeds purporting to transfer these properties from their individual names to the BSRT. (R. at vol. 12, 1758.) The Trial Court found that Husband and Keith Byrd intended for these properties to be put in their individual names and be used by their families and that any purported transfers of these properties into the BSRT were fraudulent in nature. (R. at vol. 12, 1762-64.) It was further revealed that the deeds of fraudulent conveyance were signed by Husband and his brother in the office of Husband's counsel in this divorce matter.¹ Accordingly, the Court found that, for the purpose of the divorce proceeding, Husband had a one-half interest in these properties and that they were not assets of the BSRT. (R. at vol. 12, 1764.)

The egregious conduct by Husband and his counsel during the course of the litigation, attempting to conceal assets and the values of assets and Husband's lying under oath, contributed significantly to the substantial time spent and cost incurred by Wife as well as the time expended by the Trial Court in this litigation. As a result of Husband's conduct, Wife was forced to seek extra help and incur additional expenses, including the services of a forensic accountant, to

¹ On the face of the deeds, it is reflected that, though the deeds were prepared by attorneys in Alabama, Husband and his brother signed the deeds in Coahoma County, Mississippi and that Kim Crouch, who is the assistant to Husband's counsel in this divorce, notarized the deeds. (R. at Exhibits vol. 1, 325-29; Exhibits vol. 2, 348-49.)

determine the amount and location of Husband's assets. (R. at vol. 12, 1774.) Because of Husband's failure to comply truthfully with discovery requests, many contempt issues had to be litigated. (R. at vol. 12, 1774.) Moreover, Husband filed numerous Rule 8.05 Financial Disclosures and continuously supplemented them because of his constant failure to provide accurate information, and, as a result, Wife was obligated to file numerous responses and additional motions to compel Husband to provide truthful responses and accurate information. (R. at vol. 12, 1774.) Additionally, Husband lied under oath about purchasing a \$55,000 car for his paramour and attempted to have his paramour lie about it as well. (R. at vol. 12, 1774.) If Wife had not subpoenaed the sales documents from the car dealership, Husband's dishonesty would not have been discovered. The Trial Court specifically stated, "[Husband's] charades were nothing short of an attempt to deceive the court and thwart the legal process. Even after being caught, he continued to defy the court's orders and continued his cunning pattern in an attempt to camouflage assets." (R. at vol. 12, 1775-76.)

The "Final Judgment of Divorce" provided, in part pertinent to this appeal, as follows:

4. Wife is hereby awarded a divorce from Husband on the ground of uncondoned adultery pursuant to Miss. Code Ann. Section 93-5-1, and both parties are hereby restored to all of the rights and privileges of unmarried persons.

5. The Court adopts the following provisions from its Order on Motion to Increase Child Support and to Award Temporary Alimony dated January 26, 2011 NUNC PRO TUNC to December 30, 2010:

A. Husband shall pay to Wife the sum of \$3,000.00 per month as child support for the parties' three remaining minor children. Said sum shall be due and payable on the tenth day of each month. In the event Wife does not receive payment on or before the fifteenth day of the month, Husband shall pay to Wife the additional sum of \$500.00 for each late payment.

B. As additional child support for the benefit of the minor children, Husband shall be solely responsible for the payment of all private school tuition and educational expenses, college tuition and all expenses related thereto, and all premiums incident to health and hospitalization insurance until July 1, 2012. Beginning July 1, 2012 and continuing each month thereafter, the parties shall share equally (50/50) in all such expenses.

.....
7. Wife's Complaint to Set Aside Fraudulent Conveyances is hereby granted to the extent that Husband is found to have a one-half interest in the furnished Alabama

condominium, the Alabama residence, and the Alabama boat slip, all of which are marital in nature and subject to equitable division. The value of Husband's one-half interest in these three properties has been considered by the Court in dividing the marital estate, however, Husband shall not be required to re-deed such property to himself and his brother.

8. As an equitable division of marital property, Wife shall receive the 2001 Cadillac she is presently driving and all furnishings contained in the residence on Noland Topper Road in which she is residing

9. As a further division of marital property, Wife shall receive a fifty percent division of the value of the remaining marital property. Accordingly, Husband shall pay to Wife the sum of \$918,233.75, of which sum \$459,116.88 shall be due and payable within ninety (90) days from the entry of the Final Judgment of Divorce and the remaining sum of \$459,116.87 shall be due and payable on or before the expiration of six months following the entry of the Final Judgment of Divorce.

10. Husband shall continue to pay to Wife temporary alimony in the amount of \$3,000.00 per month as specifically set forth in the February 3, 2011 Order on Motion to Increase Child Support and to Award Temporary Alimony until such time as Wife has received the first installment payment of \$459,116.88 at which time such temporary alimony obligation shall cease.

11. Wife shall vacate the residence on Noland Topper Road within ninety (90) days of her receipt of the first installment from Husband in the amount of \$459,116.88.

12. Wife's request for alimony is hereby denied except as otherwise stated herein.

13. As a result of Husband's continual attempts to deceive the Court and thwart the legal process, Husband is hereby ordered to pay cash sanctions to Wife in the amount of \$150,000.00, and Wife is hereby awarded attorney's fees in the amount of \$75,000.00 Such sums are in addition to all previous orders of sanctions and/or attorney's fees awarded to Wife, which amounts contained in previous orders of sanctions and/or attorney fees shall not be deducted from the sanctions and attorneys' fees awarded herein

(R. at vol. 12, 1781-83.)

On August 25, 2011, the Trial Court filed its "Order" regarding Wife's "Motion to Reconsider, Alter, or Amend Opinion and Final Judgment of Divorce," which amended the Final Judgment to allow Wife to remain in the Noland Topper residence, where she had lived throughout the marriage, until October 1, 2012. (R. at vol. 14, 2053.) To assist her in maintaining the residence, Husband was ordered to pay to Wife \$1,500 per month in temporary alimony for so long as Wife continued to occupy the residence or until October 1, 2012. (R. at vol. 14, 2053.)

VII. SUMMARY OF THE ARGUMENT

The standard of review in domestic relations matters is limited such that the appellate court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied the wrong legal standard. *E.g., A & L, Inc. v. Grantham*, 747 So.2d 832, 838 (Miss. 1999) (citations omitted).

It is Wife's position that the primary reason for the Trial Court's manifest error with regard to the equitable distribution of property, alimony award, and child support was its fundamental failure to take into account the disparity both in income and assets that exists between Husband and Wife. Though it is undisputed that Wife would be able to earn substantially more as a nurse practitioner than as a nurse, there was no evidence to suggest that the respective incomes of Husband and Wife would not still be substantially disparate. Moreover, Wife's testimony was clear that she would not be able to become established as a nurse practitioner, and thereby realize her full earning potential, for a period of three years from the date of the trial. During that time, while she is still in school and preparing to take her board exams, she would be without independent income and without means of improving her credit, which was virtually non-existent at the time of the trial. Moreover, though Wife received a substantial cash sum as her equitable distribution of marital property, she received no assets of any significant value and no assets that would be income-producing. In light of her credit history and lack of income, she would be forced to expend a significant portion of her cash distribution in order to support herself until she could earn income as a nurse practitioner and in order to purchase a home for herself and the parties' children.

In contrast, Husband earned substantial income from the BSRT, and the Trial Court correctly recognized that Husband, in addition, had access to substantial cash as a result of his interest in the BSRT. Moreover, Husband had deposited marital monies into the BSRT in addition to using funds from the BSRT to pay for personal or marital expenses, and he

continually moved funds between the BSRT, two separate farming partnership entities in which Husband owned a marital interest, and his own personal accounts, resulting in his one-third interest in the corpus of the BSRT becoming inextricably commingled with marital assets. Therefore, because the Trial Court failed to consider this permanent disparity between the parties, it manifestly erred in making an equitable division of marital property in accordance with the *Ferguson* factors, in failing to award Wife sufficient alimony in accordance with the *Armstrong* factors, calculating the parties' child support obligations, and ordering Wife to vacate the residence on Noland Topper Road on or before October 1, 2012, which house she had occupied for over 20 years and in which the children had lived continuously since their respective births.

It is Wife's position that the primary reason for the Trial Court's manifest error in valuing the BSRT as well as in valuing certain other marital property and in failing to award Wife all her attorney fees was that the Trial Court effectually allowed Husband to benefit from his misconduct and untruthfulness in the discovery process in this litigation. The Trial Court specifically found that Husband had attempted "to deceive the court and thwart the legal process" by concealing assets and as well as skewing and misrepresenting the values of assets, and such attempts resulted in multiple contempt issues. Moreover, Husband offered virtually no support for the values he assigned to various assets in his various Rule 8.05 Financial Disclosures. In contrast, Wife produced substantial documentation as well as expert testimony regarding the values she assigned to the same assets, and Wife was caused to incur substantial expense in identifying and valuing Husband's assets as a result of Husband's continuous attempts to deceive the Trial Court and to obstruct the administration of justice. Therefore, Husband's valuations were entitled to no presumption of correctness or accuracy, and, by adopting those values without credible proof, the Trial Court directly contravened not only

standards enunciated by the Mississippi Supreme Court but also principles of equity. For the same reasons, the Trial Court manifestly erred in failing to award Wife all the attorney fees and expenses she had incurred as part of this litigation, which litigation was protracted and expensive as a direct result of Husband's misconduct.

Finally, the Trial Court manifestly erred in failing to sanction Husband's attorney for his clear assistance to Husband in concealing assets and their values as well as Husband's attorney's suborning perjury in this litigation. The Mississippi Supreme Court has stated clearly that such dishonesty is not to be tolerated. Moreover, there is substantial evidence that Husband's attorney's complicity in Husband's misconduct in discovery and in Husband's perjured testimony caused Wife to incur substantial attorney fees and expenses to discover, by other means, the truth behind Husband's misrepresentations. Therefore, the Trial Court manifestly erred in failing to sanction Husband's attorney for his egregious and unethical conduct in this litigation.

VIII. ARGUMENT

A. THE TRIAL COURT MANIFESTLY ERRED IN ITS STATEMENT OF HUSBAND'S INCOME.

The Trial Court erroneously found that Husband receives \$135,000.00 in income from the BSRT yearly. The figure of \$135,000.00 represents Husband's gross income of \$175,000.00 less taxes of \$40,000.00. (R. at vol. 21, 956:7-957:4.) However, it was shown at trial that the BSRT paid Husband's personal taxes. (R. at vol. 21, 978:26-979:4.) Moreover, Husband's 2009 tax return showed that he earned an adjusted gross income of \$282,936 (R. at vol. 20, 889:19-27; Exhibits vol. 1, 27), and his 2010 tax returns showed that he earned an adjusted gross income of \$207,949 (R. at vol. 20, 888:16-889:11; Exhibits vol. 3, 856). The Trial Court, furthermore, specifically found that Husband had full access to large amounts of cash in addition to the income he was receiving. (R. at vol. 12, 1754.) Therefore, the Trial Court manifestly erred in its

statement of Husband's income. The Trial Court's manifest error in calculating the parties' child support obligations is discussed in Section VIII(H), and the Trial Court's manifest error in failing to award Wife sufficient alimony is discussed in Section VIII(F).

B. THE TRIAL COURT MANIFESTLY ERRED IN ITS VALUATION OF HUSBAND'S ONE-THIRD INTEREST IN THE BSRT.

The Trial Court manifestly erred in its valuation of Husband's one-third interest in the BSRT because such valuation was largely based on the values listed by Husband on his Rule 8.05 Financial Disclosure of February 28, 2011 even though the Trial Court had found that Husband had repeatedly attempted to deceive the Trial Court and thwart the legal process (R. at vol. 12, 1775-76.)

A trial is a proceeding designed to be a search for the truth. *Jones v. Jones*, 995 So.2d 706, 711 (Miss. 2008) (citations omitted). When a party attempts to thwart such a search, the courts are obligated to ensure that such efforts are not only cut short, but that the penalty will be sufficiently severe to dissuade others from following suit. *Id.* (citations omitted). Moreover, the Supreme Court has expressly stated that a party's intentional filing of a substantially false Rule 8.05 Financial Disclosure constitutes a fraud on the court. *Trim v. Trim*, 33 So. 3d 471, 478 (Miss. 2010).² Such affirmative statements by the Mississippi Supreme Court, coupled with the clean hands doctrine in equity, demand that Husband not be permitted to benefit from his attempts to conceal assets and misrepresent their values when a court assigns values to such concealed or misrepresented assets. *Cf. id.* at 715 (affirming a trial court's finding that the wife's coming to court with unclean hands did not affect the *Ferguson* analysis of whether the wife was

² The Supreme Court in *Trim v. Trim* stated further, "We find that the intentional filing of a substantially false Rule 8.05 statement is misconduct that rises above mere nondisclosure of material facts to an adverse party. A Rule 8.05 statement is a mandatory filing with the chancery court that provides that court with accurate financial information to assist in its equitable distribution of the divorcing parties' assets. Miss. Unif. Ch. R. 8.05. In many divorce cases, a chancellor undertaking equitable distribution has the power to control virtually every asset the parties possess. It is vital to the effective administration of justice in the domestic relations arena that chancellors undertake this task while in possession of accurate financial information." 33 So. 3d at 477-78.

entitled to a weighted division of the marital assets in a case where there was no apparent dispute as to the value or characterization of the marital assets).

Here, Husband's recalcitrant position relative to the production of any documents pertaining to the BSRT caused Wife to incur significant expense in issuing subpoenas for financial information and in retaining a forensic accountant to identify the nature and value of Husband's interest in the BSRT. (R. at vol. 12, 1774.) The Trial Court further recognized that, as a result of Husband's constant failure to provide accurate information, Wife was obligated to file numerous motions to compel Husband to provide truthful responses and accurate information. (R. at vol. 12, 1774.) Even after such conduct, there were still assets that Husband had failed to value. (R. at vol. 12, 1774.) The Trial Court even went so far as to compare Husband to the wife in *Jones*, who committed perjury and destroyed evidence, stating, "[Husband's] 'career' in lying, providing false financial information, failing to abide by court orders and failure to turn over legal documents is extensive and widespread Actually, Mrs. Jones' violations were just a 'drop in the bucket' compared to those of [Husband]." (R. at vol. 12, 1774-75.) However, the Trial Court adopted the values assigned by Husband to the following assets: Lafayette County property, Bolivar County and Coahoma County properties, NYE County, Nevada property, and Delta Farm Store interest, and in doing so, committed a manifest error.

With regard to the Lafayette County property, Husband had responded to Wife's discovery requests on or about December 23, 2009 that no appraisals existed and did not disclose that he had entered into any contracts. (R. at vol. 19, 607:7-20.) However, Wife discovered independently that Husband had entered into a contract, dated September 3, 2009, to sell the Lafayette County property for \$2 million, and the contract, moreover, reflected that Husband was represented by his counsel in this divorce action in that sale. (R. at Exhibits vol. 2, 439-44.)

Moreover, Wife had learned independently that an appraisal of the property had been conducted, and Husband's counsel failed and/or refused to produce such appraisal, which was dated August 29, 2009, until he was ordered by the chancellor during the trial to go to his office and retrieve it. (R. at vol. 20, 885:12-25.) Such appraisal reflected that the Lafayette County property was worth \$1,840,000.00 (R. at vol. 19, 607:1-3; Exhibits vol. 2, 353-89,) and Husband and his brother Keith Byrd had, furthermore, valued the property at \$1,800,000+ on a loan application (R. at Exhibits vol. 2, 390-92). Even after this evidence was introduced at trial, Husband only valued the Lafayette County property at \$952,068 in his Rule 8.05 Financial Disclosure of February 28, 2011, without offering any evidence in support of such valuation.

Regarding the Bolivar County and Coahoma County properties, Husband admitted that he had knowingly omitted 565 acres of land relative to the property located in these counties. (R. at vol. 20, 861:9-24.) Instead of the 5,083 acres that Husband claimed the BSRT owned, there were actually 5,648 acres that were owned by the BSRT. The Trial Court adopted Husband's value of the property, which was based on 5,083 acres at \$2,500 per acre, even though the Trial Court in the same paragraph also adopted Wife's assertion that the property was comprised of 5,648 acres. (R. at vol. 12, 1755.) Husband offered the value of \$2,500 per acre (R. at Exhibits vol. 2, 845), Wife offered the value of \$2,700 per acre (R. at Exhibits vol. 1, 162), and there was no proof that the value of the property was less than \$2,500.

Wife presented credible proof of her valuation of the property located in NYE County, Nevada, namely tax assessment values for the properties, obtained from the assessor's office for NYE County, Nevada. (R. at vol. 19, 634:14-22; Exhibits vol. 2, 491-94.) Husband offered no proof to support his valuation of the property.

Regarding the value of the 2/3 interest in Delta Farm Store, Husband offered a bill of sale, dated June 2006, wherein the BSRT purchased a one-third interest in Delta Farm Store from

Lola Striplin for \$250,000. (R. at vol. 21, 944:27-945:5.) However, a loan application, relied upon by Wife in support of her valuation (R. at vol. 19, 660:16-661:6), purporting to be for the purpose of purchasing the one-third interest of Delta Farm Store from Lola Striplin, indicated that the value of the total 2/3 interest, after the acquisition of Lola Striplin's interest, would be \$1 million + (R. at Exhibits vol. 2, 541). Clearly, the loan application refutes and is, therefore, more credible than the bill of sale offered by Husband.

Under the principles enunciated by the Mississippi Supreme Court and the principles of equity as well as in light of the fact that Husband failed to present any credible proof to refute or challenge that offered by Wife in support of her values, it was manifest error for the Trial Court to rely on any values for the assets of the BSRT that were asserted by Husband as a result of Husband's continuous attempts to obfuscate the value of the assets held by BSRT. To allow otherwise would result in Husband's benefiting from his incontrovertible misconduct.

The Trial Court, additionally, made several other errors in its valuation of the BSRT, which errors are clearly contradicted based on the proof offered at trial. The Trial Court omitted the \$150,000 note receivable owed to the BSRT by Eric and Kelly Peyton (E & K Package, Inc.). The Rule 8.05 Financial Disclosures of both Husband and Wife listed this receivable as an asset of the BSRT. (R. at Exhibits vol. 1, 169; Exhibits vol. 2, 845.) Additionally, the Trial Court erroneously included a debt to First National Bank of Clarksdale as a liability of the BSRT. This debt was owed on the residence in which Husband was residing and which residence was not owned by the BSRT, and both parties listed such debt as a marital debt on their Rule 8.05 Financial Disclosures. (R. at Exhibits vol. 1, 170; Exhibits vol. 2, 840.)

Therefore, the gross value of the BSRT should have been \$17,750,827, broken down as follows:

Lafayette County	Parcel numbers a. 158-34-007.00	\$1,840,000
------------------	------------------------------------	-------------

	b. 158-35-005.00 c. 157-26-090.00	
Bolivar and Coahoma Counties	Parcel numbers a. 20-20-900-00-002000 (381 acres) b. 20-21-900-00-00500 (2.8 acres) c. 20-19-900-00-00100 (317 acres) d. 20-20-900-00-00100 (40 acres) e. 4,907.2 acres	\$14,120,000
Sharp County, Arkansas	Parcel number: 2800045700	\$2,500
NYE County, Nevada Properties	Parcel numbers: a. 38-851-33 b. 38-851-32 (.688)	\$29,110
Greene County, Arkansas	80 acres	\$200,000
Delta Farm Store	2/3 interest	\$1,000,000
First National Bank of Clarksdale	Checking account #277142	\$357,654.12
Covenant Bank	Savings account #5070024	\$3,563.16
Diamond and gold ring		\$48,000
Note Receivable from Eric & Kelly Peyton (E&K Package, Inc.)		\$150,000
TOTAL		\$17,750,827.28

The total liabilities of the BSRT should have been \$4,569,730.26. The net value of the BSRT should have been found to be \$13,181,097.02, and Husband's one-third interest should have been valued at \$4,393,699.00, which proper value is \$1,054,848.94 greater than the manifestly erroneous value assigned to Husband's interest in the BSRT by the Trial Court.

C. THE TRIAL COURT MANIFESTLY ERRED IN ITS CLASSIFICATION OF HUSBAND'S ONE-THIRD INTEREST IN THE BSRT AS HUSBAND'S SEPARATE PROPERTY.

There are two distinct aspects to the commingling of Husband's interest in the BSRT: commingling of income or other funds paid out of the BSRT to Husband and commingling of the undistributed corpus of the BSRT. Neither Husband nor Wife has appealed the Trial Court's finding that once money was withdrawn from the BSRT, it was no longer property of the BSRT and, by its use in purchasing marital assets, such payments out of the BSRT became marital assets (R. at vol. 12, 1762). However, Wife alleges that the Trial Court manifestly erred in classifying Husband's one-third interest in the undistributed corpus of the BSRT as Husband's separate property.

The burden is on the spouse claiming assets to be non-marital to demonstrate to the court their non-marital character, *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss. 1994), and this

burden goes beyond a mere demonstration that the asset was acquired prior to the marriage or by gift or by inheritance, *A & L, Inc. v. Grantham*, 747 So.2d 832, 839 (Miss. 1999). Assets which are classified as non-marital, such as inheritances, may be converted into marital assets if they are commingled with marital property or utilized for domestic purposes, absent an agreement to the contrary. *E.g.*, *McKissack v. McKissack*, 45 So.3d 716, 720 (Miss. Ct. App. 2010) (citations omitted). Additionally, one spouse's separate property that has been utilized for family purposes may lose its separate identity and be converted into marital property, absent an agreement to the contrary, as a result of the family use doctrine. *Pittman v. Pittman*, 791 So. 2d 857, 866 (Miss. Ct. App. 2001). Typically, however, the family use doctrine applies to convert a spouse's separate personal or real property into marital assets, and the commingling doctrine applies to cash or cash equivalents. *McKissack*, 45 So.3d at 721.

Mississippi appellate courts have, on multiple occasions, addressed a more nuanced application of the commingling doctrine, dealing with commingling of funds withdrawn or transferred from one spouse's separate asset to be used for marital purposes as well as the commingling of the separate asset from which commingled funds originated. In one case, a husband used approximately \$350,000 of \$900,000 of monies that were held in certificates of deposit, which certificates of deposit were the husband's separate property, to pay family expenses. *McKissack*, 45 So.3d at 721. The Court of Appeals affirmed the trial court's finding that such \$350,000 had been converted into marital property, but it reversed the trial court's classification of the balance of the certificates of deposit as marital property. *Id.* at 721-22. The Court of Appeals reasoned that the remainder of the funds held in the certificates of deposit were kept separate, were not commingled with any other marital assets, and were not converted into marital property by application of the family use doctrine, which was improperly applied to cash or cash equivalent assets. *Id.*

In another case, the Mississippi Supreme Court affirmed a Trial Court's finding that a husband's separate interests in a corporation and the properties it owned had been commingled such that these separate assets had become marital assets subject to equitable distribution. *Grantham*, 747 So.2d at 839. During the marriage, the parties used corporate funds to pay personal expenses and to build a new home for themselves. *Id.* Indeed, the trial court in that case found that the corporation was simply an alter ego of the husband. *Id.* This did not necessarily commingle the corporation or its assets such that the principal, as opposed to the income used, was converted into a marital asset. *Id.* However, the evidence suggested the net equity of corporate assets may have increased due to the husband's efforts, and there was no evidence presented by the husband to clearly demarcate the value of the corporation at the beginning of the marriage and at the time of the parties' separation to show how those values came to change. *Id.* Consequently, the husband failed to satisfy his burden under *Hemsley* to demonstrate the non-marital character of the asset. *Id.* As a result, both the cash and cash equivalent assets held by the corporation together with its real property interests were properly considered by the trial court in arriving at an equitable distribution. *Id.* at 838-39.

Application of the commingling doctrine has been examined in the context of characterizing a spouse's interest in a trust that would otherwise be that spouse's separate property, finding that where one spouse has commingled marital funds with the corpus of such a trust, that spouse's interest in the trust, and not just the monies that had been paid out of it for marital expenses, can be converted into a marital asset. *Pittman*, 791 So. 2d at 867. In *Pittman*, a husband appealed the trial court's classification of a trust that had been established for his wife as a graduation present as the wife's separate property. *Id.* The wife in *Pittman* was the income beneficiary of the trust, and the wife used the income from the trust as additional financial support for the family. *Id.* When the parties bought an interest in a vacation home, they

borrowed from the trust. *Id.* However, when the parties separated, the vacation home interest was sold, and the trust was reimbursed. *Id.* Moreover, there was no evidence that the wife could draw upon the trust corpus other than potentially for a loan. *Id.* Consequently, the Court of Appeals affirmed the trial court's designation of such trust as the wife's separate property. *Id.*

Here, the evidence is clear that, to the extent of Husband's one-third interest in the BSRT, the corpus of the BSRT had been inextricably commingled with marital assets, and, moreover, Husband failed to satisfy his burden under *Hemsley* to demonstrate the non-marital character of his one-third interest in the corpus of the BSRT. Unlike *McKissack*, where there was no evidence that marital assets had been commingled with the husband's separate certificates of deposit, Wife clearly showed that Husband, as well as the two partnerships, Forrest Plantation and St. Charles Plantation, in which Husband owned a marital interest and in which partnerships the BSRT held no ownership interest, had directly deposited marital funds into accounts held by the BSRT. Furthermore, those deposits of marital funds had become further commingled with BSRT assets as a result of the multiple transfers in, out, and between Husband, the partnerships, and the BSRT. (R. at Exhibits vol. 2, 604-05, 609-50, 659-60.)

Indeed, unlike the trust in *Pittman*, the BSRT was Husband's alter ego, or, as described by Wife's expert, Husband's "personal piggy bank." (R. at vol. 19, 702:20-24.) Husband continually took money out of the BSRT without making any accounting, even to Keith Byrd, his co-trustee and co-beneficiary (R. at vol. 20, 775:14-776:4), to pay for personal expenses, and Husband regularly shifted money around between the BSRT and the partnerships. (R. at vol. 19, 702:26-28.) Husband had written nearly all of the checks out of the BSRT accounts (R. at vol. 19, 702:6-19), and Husband had distributed to himself as a beneficiary of the BSRT \$878,880.00 between January 2008 and January 2011, which sums he used to pay personal and/or family

expenses, while his co-beneficiaries, Keith Byrd and Barry Byrd, were distributed only \$295,204.00 and \$243,000.00, respectively (R. at Exhibits vol. 2, 602-03).

On December 8, 2009, Husband paid \$50,000 out of his personal bank account into the BSRT. (R. at vol. 19, 677:26-678:18.) Husband, personally, was the owner and annuitant of three life insurance annuities, but when he cashed in the annuities, Husband transferred both the interest and principal to the BSRT. (R. at vol. 19, 700:11-24.) Though Husband claimed that the annuities were actually owned by the BSRT, the tax returns for the BSRT never reflected the annuities as assets, and the proceeds received when Husband cashed in the annuities were taxed to Husband. (R. at vol. 19, 700:19-26.) Husband, moreover, when he purchased properties in Alabama in his name individually and Keith Byrd's name individually, took out a loan through the BSRT and used BSRT assets to secure such loan. (R. at vol. 19:599:4-600:21; Exhibits vol. 1, 330-36; Exhibits vol. 2, 390-92.) The Trial Court found that Husband's interest in such Alabama properties was a marital asset, and neither party has appealed such finding.

Husband regularly used funds from Forrest Plantation and St. Charles Plantation to pay loans owed by the BSRT. (R. at vol. 19, 699:20-25.) The BSRT was the debtor on a loan to Metropolitan Life, but multiple payments were made on such loan by both Forrest Plantation and St. Charles Plantation. (R. at vol. 19, 679:14-680:7; Exhibits vol. 2, 606-07.)

Though Husband claimed some of the funds transferred between the BSRT and the partnerships were loans, there were no such loans reflected on the tax returns of the partnerships (R. at vol. 19, 702:29-703:17), the amount of the transfers from the BSRT to the partnerships were in no way comparable to the amount of the transfers by the partnerships back into the BSRT (R. at Exhibits vol. 2, 609-39), and there were no journals, minutes, or other documents maintained by any of the entities that would show which funds belonged to which entity (R. at vol. 20, 760:15-761:20, 775:20-776:4).

The facts of the case at bar are, moreover, highly analogous to those in *Grantham*. Husband himself testified that the BSRT had done well, paid down debts, and purchased and sold land (R. at vol. 22, 1063:15-23); clearly the BSRT had appreciated in value throughout the parties' marriage since the inception of the BSRT in 1999. Moreover, a portion of the indebtedness of the BSRT had decreased as a result of payments made on BSRT loans by the partnerships in which Husband held a marital interest. (R. at vol. 19, 679:14-680:7; vol. 20, 937:13-17.) Husband further testified that he "ran the show" for the BSRT (R. at vol. 22, 1063:9-23), and Billy Andrews, the accountant for the BSRT, testified that Husband was the "backbone" of the BSRT (R. at vol. 17, 343:25-26). Based on testimony by Husband and his witnesses, the performance of the BSRT could be attributed, at least in part, to Husband's efforts during the marriage and, indirectly, to Wife's efforts maintaining the home and rearing the parties' children.

Moreover, similar to the husband's inability in *Grantham* to satisfy his burden under *Hemsley*, Husband and his counsel failed to demarcate appreciation in the value of the BSRT during the marriage from the value of the BSRT at the time of its inception. Husband introduced a warranty deed transferring several properties from Husband's father's estate to the BSRT, without any documentation of the value of those properties at that time.³ (R. at Exhibits vol. 2, 669-99.)

Consequently, under the analysis of the Mississippi Supreme Court in *Grantham*, such lack of evidence demarcating the value of the BSRT at its inception from the appreciation of the value of Husband's interest in the BSRT and, more particularly, the appreciation in the value of

³ The Trial Court, moreover, reviewed in camera the estate tax return for the testamentary estate that created the BSRT, but appraisals that were referenced in the document were not attached to it. (R. at vol. 19, 714:15-24.) Husband's counsel never introduced this return into evidence. The estate tax return, moreover, is another example of a document that Husband and his counsel secreted during this litigation. Though Wife's counsel had repeatedly requested a copy of the return, neither Husband nor his counsel ever produced such return until the Chancellor ordered Husband's counsel to retrieve the return from his office for an in camera inspection. (R. at vol. 19, 712:28-714:10.)

the assets held by the BSRT, including cash, cash equivalent, and real property assets, Husband's interest in the BSRT and in the assets held by the BSRT was inextricably commingled with marital assets and is, therefore, subject to equitable distribution.

In sum, there was no way for the Trial Court to determine what funds paid out of the BSRT originated from marital assets and which originated from Husband's separate assets, resulting in Husband's one-third interest in the corpus of the BSRT becoming inextricably commingled with marital assets. (R. at vol. 19, 693:21-698:5, 700:27-701:11.) Moreover, there was no way for the Trial Court to determine the amount or timing of any appreciation in value of Husband's interest in the BSRT. Therefore, the Trial Court manifestly erred in classifying Husband's one-third interest in the BSRT as Husband's separate property.

D. THE TRIAL COURT MANIFESTLY ERRED IN ITS IDENTIFICATION, CHARACTERIZATION, AND VALUATION OF CERTAIN MARITAL PROPERTY.

The Trial Court manifestly erred in its identification, characterization, and/or valuation of (1) the residence occupied by Husband in Duncan, Mississippi, (2) Wife's 2001 Cadillac, (3) payments made by Husband toward credit card debts for which Husband refused to produce statements or bring forth evidence to show a reasonable purpose for the creation of such debts, and (4) additional dissipation by Husband.

1. Value of Duncan, Mississippi residence.

The value of \$195,004.85 assigned to the Duncan, Mississippi residence by the Trial Court actually represents the balance of the mortgage indebtedness on such residence. (R. at Exhibits vol. 1, 291-92.) At trial, an appraisal of such residence, dated January 5, 2011, was introduced into evidence, valuing the residence at \$425,000.00. (R. at Exhibits vol. 3, 802-35.) In conformity with his pattern of attempting to mislead the Trial Court regarding the nature, extent, and value of the marital and separate estates, Husband failed to produce such appraisal to Wife's counsel until February 11, 2011 (R. at vol. 20, 883:11-885:4), after the parties had

already been in trial for three days on February 2, February 3, and February 4, 2011, during which time Husband's counsel had cross-examined Wife's expert in an attempt to diminish Wife's valuing the residence at \$395,000 (R. at vol. 19, 731:10-734:5). Indeed, even after obtaining this appraisal, Husband failed to amend his Rule 8.05 Financial Disclosure of August 2010, which valued the residence at \$350,000 (R. at Exhibits vol. 2, 294-97), and submitted no amended Rule 8.05 Financial Disclosure until February 28, 2011 (R. at Exhibits vol. 3, 836-46). Even in his Rule 8.05 of February 28, 2011, Husband valued the residence at only \$395,000, which sum was \$30,000 less than the appraised value. (R. at Exhibits vol. 3, 840.) Therefore, based on the clear evidence presented at trial as well as based on the principles enunciated by the Mississippi Supreme Court in *Jones v. Jones* and *Trim v. Trim* as well as the principles of equity, as discussed in Section VIII(A) hereinabove, the Trial Court manifestly erred in valuing the Duncan, Mississippi residence at \$195,004.85, and the Trial Court should have valued the residence at \$425,000.00, with a net equity value of \$229,995.15.

2. Wife's 2001 Cadillac.

In assigning a value of \$15,000 to Wife's 2001 Cadillac, the Trial Court adopted the value Husband placed on this asset. (R. at Exhibits vol. 1, 45.) However, Husband never offered any document or other evidence in support of such value. In contrast, Wife introduced a Kelly Blue Book printout, which was received into evidence, in support of her valuing the vehicle at \$2,775.00. (R. at vol. 19, 640:22-641:3; Exhibits vol. 2, 506-07.) Moreover, Wife's expert testified that the vehicle was in such poor condition that it would need work just to pass inspection. (R. at vol. 19, 641:4-7.) Therefore, the Trial Court should have valued Wife's 2001 Cadillac at \$2,775.00 or less, based on the credible proof offered at trial and based on the fact that Husband's value of the car was included on a substantially false Rule 8.05 Financial Statement, which Financial Statement constituted a fraud on the court.

3. Payments made by Husband toward credit card debts for which Husband refused to produce statements or bring forth evidence to show a reasonable purpose for the creation of such debts.

One of the major issues during the discovery process and trial of this matter was that Husband failed and/or refused to produce his credit card statements though they had been requested repeatedly by Wife's counsel and though the Trial Court had ordered him to produce them. (R. at vol. 4, 502-04.) The statements that Husband did produce after being ordered to do so by the Trial Court, moreover, were incomplete, with numerous pages missing which pages would have included an itemization of Husband's claimed expenditures. (R. at vol. 18, 459:19-461:3; vol. 21, 918:22-920:26, 924:1-21.)

Wife introduced multiple exhibits at trial, showing that Husband had made \$18,705.50 in credit card payments from his personal checking account between January 8, 2008 through January 7, 2011; \$99,404.75 in credit card payments from the St. Charles Plantation checking account between January 31, 2008, and March 31, 2010; and \$135,385.14 in credit card payments from the Forrest Plantation checking account between January 31, 2008, and March 31, 2010. (R. at Exhibits vol. 3, 978-1028.) Husband further testified at trial that the credit cards being paid were his personal credit cards. (R. at vol. 21, 920:5-19.) Moreover, because Husband had been out of the farming business since December of 2008 and because the farming partnerships were defunct (R. at vol. 21, 922:8-923:3), the charges incurred on such credit cards could not be credibly shown to have been for farming purposes.

Under the principles enunciated by the Mississippi Supreme Court in *Jones v. Jones* and *Trim v. Trim* as well as the principles of equity, as discussed in Section VIII(A) hereinabove, the Trial Court's failure to presume that the full amount of the credit card payments totaling \$253,495.39 was a waste of marital funds that would have otherwise been available for division has allowed Husband to benefit from his misconduct and from his refusal to comply with an

order of the Trial Court. Once such inference of dissipation was raised and no documents were produced by Husband to refute such inference, the Trial Court should have considered those payments as dissipated marital assets and/or as income available to Husband for alimony and child support purposes.

4. Additional dissipation by Husband of marital monies.

Wife introduced at trial a Rule 1006 summary showing dissipation of marital monies by Husband in the amount of \$221,103.19,⁴ which sum did not include cash withdrawals and gambling activities found by the Trial Court to be dissipation. (R. at Exhibits vol. 3, 888-89.) Wife's counsel questioned Husband extensively at trial regarding the purpose of the checks reflected on the Rule 1006 summary, and Husband offered no reasonable or logical explanation of the nature and/or purpose of these payments to third parties. (R. at vol. 21, 901:7-905:15.)

Moreover, the Rule 1006 summary included a payment of \$55,315.75 that Husband made to Nabors GMC to purchase a vehicle for his paramour, Julie Clark, and a payment of \$2,000.00 to Susan Denman, one of Husband's prior paramours. (R. at Exhibits vol. 3, 888.) Husband's purchase of a vehicle for Julie Clark is also reflected in documents entered into evidence that were subpoenaed from Nabors GMC after Husband and his paramour lied, under oath, regarding the purchase of the vehicle. (R. at Exhibits vol. 2, 772-79.) The Trial Court, moreover, noted in its Opinion, "In addition, [Husband] has lied under oath about purchasing an automobile for his mistress and attempted to get her to lie about it as well." (R. at vol. 12, 1774.) Therefore, the Trial Court should have included the additional sum of \$221,103.19, or, at a minimum, the sum of \$57,315.75 representing marital funds dissipated by Husband on his paramours. Such

⁴ This sum reflects the total sum of \$229,034.19 on the Rule 1006 summary less \$7,931.00, which was paid to the Brett Robinson Golf Club. The Brett Robinson Golf Club membership was separately identified from dissipation and equitably divided by the Trial Court. (R. at vol. 12, 1767.)

dissipation by Husband should have been included as part of the marital assets to be equitably divided between the parties.

Therefore, the marital assets subject to equitable division should have been correctly itemized by the Trial Court as follows⁵:

2010 Ford F250	\$40,000
2008 GMC Yukon	\$25,000
1/3 interest in St. Charles and Forrest Plantations	\$132,251
†Personal Residence (Duncan)	\$199,995.15
Furniture & Fixtures (Duncan)	\$40,000
1/3 interest in Island 66	\$41,000
Clarksdale County Club Membership	\$1,000
Coahoma County Conservation League	\$60,000
Boat	\$80,683.22
Lot in Louisiana	\$6,000
2006 Ford Mustang	\$15,000
2007 Jeep	\$15,000
†2001 Cadillac	\$2,775
BYWT 22' boat with trailer	\$44,218.82
6 boats	Unknown
Fixtures – Noland Topper	\$20,000
Furniture & Fixtures (AL condo)	Unknown
Guns, Hunting, & Fishing Equipment	Unknown
Interest in Island Seas Investment	Unknown
Lake Charles Hunting Club	Unknown
Brett Robinson Golf Club	\$7,931
Pershing LLC Brokerage Account	\$9,060.35
Wells Fargo Account	\$8,932.50
New York Life Policy	\$14,026.70
Checking Account	\$3,000
Savings Account	\$27,000
Condominium	\$225,000
Baldwin County, AL Residence	\$341,950
Boat Slip	\$50,000
Cash Withdrawals	\$466,949.05
*Unexplained Credit Card Payments	\$253,495.39
*Dissipation	\$221,103.19
TOTAL	\$2,350,831.37

E. THE TRIAL COURT MANIFESTLY ERRED IN MAKING AN EQUITABLE DIVISION OF MARITAL PROPERTY PURSUANT TO THE *FERGUSON* FACTORS.

Though the Trial Court correctly applied many of the *Ferguson* factors in dividing the marital estate, the Trial Court manifestly erred in its consideration of what it perceived to be

⁵ † designates items that the Trial Court manifestly erred in valuing.

* designates items that the Trial Court manifestly erred in omitting.

Wife's present ability to be self-sufficient. Alimony and equitable distribution are distinct concepts, but together they command the entire field of financial settlement of divorce. Therefore, where one expands, the other must recede. *Seymour v. Seymour*, 960 So. 2d 513, 519 (Miss. Ct. App. 2006) (citations omitted). When attempting to effect an equitable division of marital property, courts should consider the guidelines set forth by the Mississippi Supreme Court in *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994). One such factor is "the extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments . . . between the parties." *Id.* at 928.

Here, the Trial Court erroneously found that Wife's receipt of one-half of the marital estate would sufficiently allow Wife to purchase a home, finish nurse practitioner school, and share equally in the payment of the children's private school and college tuition and health insurance premiums, particularly in light of the Trial Court's failure to award Wife sufficient alimony, as discussed in Paragraph IX(F). Wife was unemployed at the time of the divorce, having gone back to school to continue her education and improve her earning potential. (R. at vol. 12, 1769.) Wife testified that she would not graduate from nurse practitioner school until 2012 and would not be capable of earning income as a nurse practitioner until she could find a physician-sponsor; Wife anticipated that it would take her at least three years to complete her education and to become established. (R. at vol. 17, 392:28-393:2, 401:1-5; vol. 18, 499:26-27.)

Moreover, for Wife to purchase a new home would have required her to expend a substantial portion of the cash she received as part of her equitable division of property because, without earned income and without alimony upon her vacating the Noland Topper residence, she could not qualify for a mortgage, much less afford the monthly notes. Homes comparable to the one in which Wife had lived with the children throughout the marriage would cost between \$400,000

and \$450,000.⁶ (R. at vol. 21, 1033:1-4.) However, Wife had no credit history, no valuable assets in her name, and, for at least the next three years, no independent source of income (R. at vol. 17, 401:1-5; vol. 18, 521:14-522:13). Wife also owed approximately \$38,000.00 to her father, the payment for which was due in full upon her receipt of her property division (R. at vol. 18, 515:29-516:13; Exhibits vol. 2, 769-70), and it was anticipated that Wife would owe also a balance of \$14,461.49 in attorney fees at the conclusion of the trial (R. at Exhibits vol. 3, 1036). Consequently, whatever portion of Wife's division of property remained after these substantial payments would have to be used to support Wife until such undetermined time that Wife would be able to earn income as a nurse practitioner. Husband, in contrast, was living in a home worth \$425,000 (R. at Exhibits vol. 3, 802-35), and such home could have easily been made available to Wife and the children with Husband's paying the mortgage as additional child support.

Therefore, the equities of this case required that Wife be awarded a weighted distribution of marital property in order for her to effect the purchase of a home comparable to that in which she had lived with the children throughout the marriage and to continue to adequately support herself and the children until she was capable of earning income as a nurse practitioner. Therefore, the Trial Court manifestly erred in finding that Wife would be self-sufficient after the receipt of one-half of the marital estate, and the equities of the case demanded that Wife should receive a weighted division of the marital assets in order to be self-sufficient and to provide a home for herself and the parties' children.

Moreover, in light of the manifest error committed by the Trial Court in failing to characterize Husband's one-third interest in the BSRT as a marital asset, as discussed in Section VIII(C), and its improper identification, characterization, and/or valuation of certain marital

⁶ The home in which Wife and the parties' children were living, and in which they had lived throughout the parties' marriage, had 3,500 square feet with five bedrooms and three bathrooms. (R. at vol. 21, 1033:5-11.)

assets, as discussed in Paragraph IX(D), the Trial Court manifestly erred in failing to take into account these assets and their proper value in making an equitable distribution of the marital estate between the parties.

F. THE TRIAL COURT MANIFESTLY ERRED IN FAILING TO AWARD SUFFICIENT ALIMONY TO WIFE BY (1) FAILING TO PROPERLY APPLY THE *ARMSTRONG* FACTORS, (2) FAILING TO TAKE INTO ACCOUNT THE SUBSTANTIAL DISPARITY IN THE PARTIES' FINANCIAL POSTURES PRE- AND POST-DIVORCE AND, BECAUSE THERE WAS SUCH A SUBSTANTIAL DISPARITY, (3) FAILING TO TAKE INTO ACCOUNT HUSBAND'S INTEREST IN THE BSRT AS A SOURCE OF FUNDS FROM WHICH TO PAY ALIMONY.

To determine whether a spouse is entitled to alimony, the court must consider the *Armstrong* factors. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993). Such factors include the length of the marriage, the presence of minor children in the home, the age of the parties, the standard of living of the parties during the marriage and at the time of the support determination, fault or misconduct, dissipation of assets, and any other factor deemed by the court to be "just and equitable." *Id.* The court must also determine if the marital assets, after equitable division and in light of the parties' non-marital assets, will adequately provide for both parties. If an equitable division of marital property, considered with each party's non-marital assets, leaves a deficit for one party, then alimony should be considered. *Johnson v. Johnson*, 877 So. 2d 485, 495 (Miss. Ct. App. 2003) (citing *Kilpatrick v. Kilpatrick*, 732 So. 2d 876 (¶ 16) (Miss. 1999)).

If a division of marital property, considered with each party's non-marital assets, leaves a deficit for one party, then alimony based on the value of non-marital assets should be considered. *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994). Once a disparity is shown, the *Armstrong* factor regarding the length of the marriage becomes significant. Deborah H. Bell, *Bell on Mississippi Family Law* 270 (2005). Permanent alimony has typically been awarded to remedy a disparity in marriages over 20 years, and the appellate courts have reversed multiple cases for failure to award permanent alimony in marriages exceeding 20 years. *Id.*

In *Johnson v. Johnson*, the Court of Appeals considered whether the amount of a periodic alimony award was appropriate where a significant deficit existed between the husband and the wife and considered whether the trial court had erred in failing to award lump sum alimony. 877 So. 2d at 495-501. The Court of Appeals reviewed the trial court's consideration of the *Armstrong* factors, finding in part that the wife was unemployed and received temporary alimony of \$3,000 per month and that the husband paid many of the wife's other expenses. *Id.* at 496. The parties had been married for over 12 years, the wife received physical custody of children of ages (13 and 11) where they would continue to require attention and supervision by the wife, and the husband was found to be guilty of adultery and at fault in the destruction of the marriage. *Id.* at 497-98. Moreover, the husband had been granted sole and complete ownership of businesses that had produced the income the parties used during their marriage, and the husband was granted exclusive use of the former marital home. *Id.* at 498. The wife received \$250,000 as a payment for her half of the marital home, half of the value of the retirement accounts, and her car. *Id.* "From this, the chancellor expected [the wife] to purchase a new home for herself and the children, make investments in order to supplement her cash flow, and pay her attorney's fees," disapprovingly noted the Court of Appeals in reversing the amount of the permanent periodic alimony award of \$750 per month and directing the trial court to consider the *Armstrong* factors in determining a proper amount of alimony for the wife on remand. *Id.* at 498-99.

The Court of Appeals in *Johnson* found that the trial court had also erred in failing to award the wife lump sum alimony. *Id.* at 499. The parties' income and wealth had come from the husband's earnings during the marriage, and the wife had maintained the home and taken care of the children while the husband spent most of his time and resources at work. *Id.* More importantly, however, at the time of the divorce, the wife had no separate income and no immediate expectation of employment, received assets from the judgment that were meager in

comparison to those received by the husband, and was without financial security without the husband. *Id.*

In *Sanderson v. Sanderson*, which involved the dissolution of a 22-year marriage, the husband had substantial income from stock holdings in a corporation, valued at \$4,000,000, which holdings were found to be the husband's separate property. 824 So. 2d 623, 624-25 (Miss. 2002). The wife was awarded lump sum alimony in the amount of \$200,000 and rehabilitative alimony in the amount of \$1,500 per month for 36 months. *Id.* at 625. In reversing such award, the Supreme Court affirmed the Court of Appeals' finding that the wife had been denied the anticipated cushion of the husband's holdings as a source of financial security and that, even if the wife were to return to work after the divorce, her income would be substantially less than that enjoyed by the husband. *Id.* at 626. Therefore, it would not be equitable "upon the dissolution of a marriage that exceeded twenty years in length, during which [the wife] forsook a professional career in favor of working in the home and in the day-to-day matters of child rearing, to leave [the husband] with a multi-million dollar stock portfolio . . . while [the wife] was left without any meaningful support beyond her own labor once the relatively brief period of rehabilitative alimony was exhausted." *Id.* The case was remanded with instructions that the chancellor should take into account the husband's stock holdings when considering the equities of the lump sum and rehabilitative alimony awards. *Id.* at 627.

The facts in the case at bar satisfy many of the same *Armstrong* factors as were satisfied in *Johnson*, in which case the Court of Appeals found that the trial court had erred in not awarding the wife a sufficient amount of permanent periodic alimony and in not awarding Wife lump sum alimony as well. Here, as in *Johnson*, Wife was unemployed for the majority of the marriage and was unemployed at the time of the divorce, the parties had a long-term marriage (20 years), Wife received physical custody of the parties' four children who were of ages that

required Wife's continued attention and supervision (ages 20, 16, 14, and 12), and Wife was granted a divorce on the ground of Husband's uncondoned adultery. (R. at vol. 19, 1753-54.) The Trial Court wholly failed to examine the application of such factors, finding only that after the division of marital property, Wife should be self-sufficient as a nurse practitioner. (R. at vol. 12, 1772.)

Moreover, the facts presented at trial showed that, based on the *Armstrong* factors, Wife was entitled to receive permanent periodic alimony. The Trial Court itself recognized regarding Husband's counsel's attempts to question Wife about what expenses she would be willing to pay, "If she had a current income, it might be a little more relevant. But she doesn't have one. She's trying to complete her education so that she could then have a better income than she had before." (R. at vol. 21, 1021:18-22.) In the absence of any proof that Wife was at that time presently capable of earning income as a nurse practitioner or that she had any immediate expectation that she would be able to find employment as a nurse practitioner, the Trial Court should have awarded Wife permanent periodic alimony.

Here, as in *Johnson* and *Sanderson*, there was a significant disparity in income and assets between Husband and Wife. Like the wives in both *Johnson* and *Sanderson*, Wife was unemployed at the time of the divorce. At that time, Wife was still in nurse practitioner school, would not graduate until 2012, and would not be capable of earning income as a nurse practitioner until she could find a physician-sponsor; Wife expected that it would take her three years to complete her education and to become established. (R. at vol. 17, 392:28-393:2, 401:1-5; vol. 18, 499:26-27.) Though the Trial Court found that Wife would be able to earn substantially more income as a nurse practitioner than as a registered nurse (R. at vol. 12, 1769), there was no proof that, even after Wife became established as a nurse practitioner, that there would not still be a significant disparity between her income and that of Husband. Had the Trial

Court awarded Wife sufficient alimony (periodic), the disparity between Husband and Wife could have been narrowed.

Moreover, here, like the trial court in *Johnson*, the Trial Court erroneously expected Wife to expend a substantial portion of her property division on her own support while Wife had no immediate expectation of employment. Wife was permitted to remain in the residence she had continuously occupied throughout the 20-year marriage only until October 1, 2012, after which time she was expected to purchase a new home. Such purchase would have required her to expend a substantial portion of the cash she received as part of her equitable division of property, due to her having no credit history, no valuable assets in her name, and, for at least three years, no independent source of income (R. at vol. 17, 401:1-5; vol. 18, 521:14-522:13). Whatever portion of Wife's division of property remained would have to be used by Wife to support herself, pay one-half of the children's private school and college tuition, and one-half of the children's health insurance premiums until such undetermined time that Wife would be able to earn income as a nurse practitioner.

Furthermore, the Trial Court here, like the trial court in *Johnson*, failed to properly account for Wife's expenses, reflected on her unchallenged Rule 8.05 Financial Disclosure, in making its final decision regarding alimony. Similar to the wife in *Johnson*, Wife had been awarded \$3,000.00 per month in temporary rehabilitative alimony and \$4,000.00 per month in temporary child support. (R. at vol. 9, 1297.) From such sums, Wife, in the case at bar, was expected to be temporarily responsible for the payment of monthly bills associated with the Noland Topper residence, which was owned by the BSRT, and the upkeep and maintenance of the vehicles driven by Wife and the parties' daughter, Ashlea Byrd. (R. at vol. 9, 1297.) However, in its amended Final Judgment of Divorce, the Trial Court ordered Husband to pay to Wife \$1,500.00 per month until October 1, 2012, to assist her in maintaining the same residence

in addition to \$3,000.00 per month in child support. The final alimony award by the Trial Court drastically reduced the amount of support Wife would receive, without providing that Husband would become responsible for expenses that Wife had previously paid out of a significantly greater amount of temporary support. There was no proof that Wife's needs and ability to earn income had changed between the time she was awarded \$3,000.00 per month in temporary alimony and the time of the Trial Court's final award of \$1,500.00 per month for the maintenance of the Noland Topper residence, owned by the BSRT, until October 1, 2012.

In contrast, Husband was living in the marital residence, which residence was appraised at \$425,000, was earning substantial income through the BSRT and was, indeed, as discussed herein, using the BSRT as his own "personal piggy bank." Through his use of BSRT funds as if they were his own personal funds, Husband enjoyed an extravagant lifestyle, owning memberships in country clubs, hunting clubs, and golf clubs, a furnished condominium, boat slip, and residence in Alabama, multiple boats, valuable hunting and fishing equipment, and other luxury items (R. at vol. 12, 1757-59), as well as paying personal credit card expenditures out of BSRT funds (R. at Exhibits vol. 3, 1011-27). The Trial Court also found that Husband has had access to and possession of a large amount of cash between 2008 and 2010; Husband had cashed \$381,300 in checks at casinos between January 8, 2008, and December 15, 2010, withdrawn at various times \$85,649.05 in cash from his personal bank account between January 8, 2008, and April 10, 2010, and could offer no credible evidence or explanation as to what happened to this sum of cash. (R. at vol. 12, 1754.) It should be noted that, had Wife not subpoenaed such bank account records, none of this proof would have been presented to the Trial Court.

The Trial Court manifestly erred in failing to award sufficient alimony to Wife by (1) failing to properly apply the *Armstrong* factors, (2) failing to take into account the substantial

disparity in the parties' financial postures pre- and post-divorce, and, because there was such a substantial disparity, (3) failing to take into account Husband's interest in the BSRT as a source of funds from which to pay alimony. Indeed, under the Trial Court's ruling, Wife, after she is forced to purchase a house when she is no longer able to live in the home in which she has resided throughout the marriage, will likely be left with no meaningful support, beyond her own labor, to provide for her support and to assist in the support of the children as ordered by the Trial Court.

G. THE TRIAL COURT MANIFESTLY ERRED IN ORDERING WIFE TO VACATE THE NOLAND TOPPER RESIDENCE ON OR BEFORE OCTOBER 1, 2012 AND/OR IN FAILING TO ORDER HUSBAND TO PROVIDE A HOME FOR WIFE AND THE CHILDREN AS LUMP SUM ALIMONY.

In ordering Wife to vacate the Noland Topper residence on or before October 1, 2012, without ordering Husband to provide a new home for Wife and the children, the Trial Court reasoned that Wife would be able to finish her nurse practitioner program and find employment as a nurse practitioner by October 1, 2012. (R. at vol. 14, 2052.) However, the Trial Court manifestly erred in failing to take into account that, for Wife to purchase a new home, she will be required to expend a substantial portion of the cash she received as part of her equitable division of property, as discussed in Section VIII(E) hereinabove. Consequently, whatever portion of Wife's division of property remains after such purchase as well as the payment of her remaining outstanding attorney fees and promissory note to her father would have been used to support Wife and to assist in the support of the parties' children until such undetermined and speculative time in the future that Wife would be able to earn income as a nurse practitioner.

To avoid Wife's being forced to expend a substantial portion of her equitable distribution of the marital estate for the purchase a new home comparable to the Noland Topper residence or comparable to the residence in which Husband was living, the Trial Court should have permitted Wife to remain in the Noland Topper residence for a period of time after she had found

employment as a nurse practitioner. This would allow her time during which she could build her credit and place herself in a position financially to qualify for a loan on reasonable terms. Alternatively, the Trial Court should have awarded Wife the marital residence in which Husband was residing,⁷ or a comparable residence, and ordered Husband to pay the mortgage thereon as lump sum alimony until the last child reached the age of majority. Therefore, the Trial Court manifestly erred in ordering Wife to vacate the Noland Topper residence on or before October 1, 2012 and/or in not ordering Husband to provide a home for Wife and the children.

H. THE TRIAL COURT MANIFESTLY ERRED IN ITS APPLICATION OF THE MISSISSIPPI CHILD SUPPORT GUIDELINES AND CALCULATION OF CHILD SUPPORT OBLIGATIONS OF THE PARTIES.

According to Miss. Code Ann. § 43-19-101 (2012), a parent's child support obligation is based on the individual's adjusted gross income. Adjusted gross income is calculated by determining gross income from all potential sources that may be reasonably expected to be available to the absent parent and subtracting certain legally mandated deductions—federal, state, and local taxes, Social Security contributions, and involuntary retirement and disability contributions—; the amount of an existing court order for support of any other children; and, if the absent parent has another child residing with him, then the amount the court deems appropriate to account for the needs of said child. Miss. Code Ann. § 43-19-101(3). The court may then award a percentage of the adjusted gross income as support based on the number of children to be supported; the applicable percentage where there are three minor children⁸ is 22%.

According to Miss. Code Ann. § 43-19-103, the chancellor is allowed to deviate from the statutory guidelines when certain criteria are met, including extraordinary medical,

⁷ Husband's counsel went so far as to question Wife regarding her willingness to receive the house in which Husband was living (the Duncan, Mississippi residence), which residence Wife described as having a pool and having more room for the children. (R. at vol. 21, 1025:1-10.)

⁸ The parties' oldest daughter, Ashlea Byrd, turned 21 between the time the trial ended and the time the Trial Court entered the Final Judgment of Divorce.

psychological, educational, or dental expenses; the age of the child, taking into account the greater needs of older children; special needs that have traditionally been met within the family budget even though the fulfilling of those needs will cause the support to exceed the proposed guidelines; and total available assets of the obligor and obligee.

In *Tatum v. Tatum*, the Mississippi Court of Appeals affirmed a trial court's ordering a father to pay monthly child support, provide health and hospitalization insurance for the children, pay three-quarters of the costs of the children's uncovered medical costs, maintain a life insurance policy with each child named as the beneficiary, timely pay the children's private school tuition, and pay for the extracurricular activities in which he enrolled the children. 54 So. 3d 855, 864-65 (Miss. Ct. App. 2010). In making such award, the trial court justified its deviation from the Mississippi Child Support Guidelines, reasoning that in addition to his income from his employment in a family business, the husband had a personal and financial interest in a number of business entities. *Id.*

Moreover, where the chancellor is not convinced of the honesty and openness of the parent, this may be a determining factor for proper consideration of the amount of child support to award. *Suber v. Suber*, 936 So. 2d 945, 948 (Miss. Ct. App. 2006). In *Suber v. Suber*, where a father failed to produce the needed financial records to determine his adjusted gross income, the Court of Appeals affirmed a trial court's awarding child support to the mother that exceeded the statutory guidelines, according to the father's calculation of his adjusted gross income. *Id.* at 948-49. The Court of Appeals further commented, "It is wrong for the parents to hide income or to evade a complete assessment of income when child support is being considered." *Id.* at 948.

In light of the foregoing statutes and case law, the Trial Court further manifestly erred with regard to its application of the Mississippi Child Support Guidelines and calculation of Husband's child support obligation in the following ways:

- 1. The Trial Court manifestly erred in ordering Wife, beginning on July 1, 2012, to share, equally with Husband, in the payment of all tuition and educational expenses for the benefit of the children, including private school and college, and to share, equally with Husband, in the payment of all health and hospitalization insurance premiums for the benefit of the children.**

Here, as in *Tatum*, the Trial Court properly found that Husband's substantial assets and ability to acquire large amounts of cash and spend it as he chooses, taken together with Husband's income,⁹ justified an upward deviation from the Mississippi Child Support Guidelines (R. at vol. 12, 1772). Moreover, to allow Husband to benefit from his misconduct in attempting to conceal the extent of his income as well as the nature and extent of assets that were proven at trial to be easily accessible to Husband to pay his personal and marital expenses would violate the principles articulated in *Suber*. Based on the foregoing, for child support purposes, Husband had significant financial resources from which he could pay not only monthly child support but also the medical, educational, and extracurricular expenses that he had paid for the benefit of the children throughout the parties' marriage.

In contrast, Wife was unlikely to become established as a nurse practitioner until she had graduated from school, passed her boards, and found a physician-sponsor, which Wife estimated would take three years from the time of the trial. (R. at vol. 17, 392:28-393:2, 401:1-5; vol. 18, 499:26-27.) Until such time, Wife could not work in the interest of maintaining her good grades (R. at vol. 17, 393:9-13), and Wife would, as a result, have no source of income in the interim to support herself or to share in the support of the children, as ordered by the Trial Court. The Trial Court further noted, regarding Husband's counsel's attempts to question Wife about which of the children's expenses she would be willing to pay, "If she had a current income, it might be a little

⁹ The Trial Court manifestly erred when it found that Husband's income from the BSRT was \$135,000, as discussed in Section VIII(A). Consequently, the Trial Court manifestly erred in its calculation of Husband's child support obligation. Based on the various adjusted gross incomes Husband had actually earned or anticipated he would earn, \$282,936, \$207,249, and \$175,000, without also taking into account Father's full access to substantial cash funds or any other deviation from the Guidelines, Father's basic child support obligation should have been calculated as \$5,187.16, \$3,799.65, or \$3,208.33, respectively.

more relevant. But she doesn't have one. She's trying to complete her education so that she could then have a better income than she had before." (R. at vol. 21, 1021:18-22.) Moreover, Wife had not had any income since August 2010 (R. at vol. 17, 392:19-27, 393:6-11), and she had been forced to borrow substantial monies from her father to support the parties' children after Husband stopped paying the family's expenses and to pay attorney fees (R. at vol. 17, 394:19-26), many of which attorney fees were incurred as a direct result of Husband's attempts to conceal his assets, the values of his assets, and his true income, as discussed herein.

Moreover, the assets available to Wife were meager compared to those available to Husband, especially in light of the fact that Wife would be required to deplete a large portion of her equitable distribution of assets in order to purchase a home comparable to the one she had occupied with the children throughout the marriage and in order to pay her outstanding attorney fees and the debt she owed to her father. Even though the Trial Court found that Wife was capable of earning substantially more as a nurse practitioner than as a nurse, the evidence was speculative at best as to how much income Wife would be able to earn as a nurse practitioner (R. at vol. 17, 393:18-20, 401:12-15), and there was no indication that there would not still be a significant disparity between her potential income and the income Husband earned from the BSRT as well as the free access Husband had to large sums of cash from the BSRT, which he alone managed, as discussed in Section VIII(C).

To require Wife, beginning on July 1, 2012, to share equally with Husband in the payment of all private school and college tuition and educational expenses as well as in the payment of all health and hospitalization insurance premiums for the benefit of the three children was patently inequitable in light of the parties' pre- and post-divorce financial postures.

- 2. The Trial Court manifestly erred in failing to order Husband to maintain life insurance and/or other security for the payment of Husband's child support obligations in the event of Husband's death prior to the youngest child's attaining her age of majority.**

The specific need or support required is to be determined by a chancellor “at a time real, on a scene certain, and with knowledge special to the actual circumstances and to the individual child or children.” *Smith v. Smith*, 614 So. 2d 394, 397 (Miss. 1994) (citations omitted). Here, Husband has historically been the sole financial support of the children until he stopped providing for them after his paramour gave birth to his child. (R. at vol. 12, 1754; vol. 17, 403:29-404:6.) The three youngest children attend private schools, and it is anticipated that they will attend college, as the parties’ oldest daughter has done and was doing at the time of the trial. Moreover, as discussed thoroughly herein, there is a substantial disparity between the parties’ known actual incomes as well as their assets. Unless Husband is required to secure his child support obligation with sufficient life insurance or other security, Wife will not be able to assume the payment of the expenses that Husband has historically paid on behalf of the children. Therefore, the Trial Court manifestly erred in failing to order Husband to maintain life insurance and/or other security for the payment of his child support obligation in the event of his death prior to the youngest child’s attaining her age of majority.

3. The Trial Court manifestly erred in failing to address the issue of payment of uninsured medical expenses to be paid for the benefit of the minor children.

The Mississippi Child Support Guidelines require that all orders involving the support of minor children shall include reasonable medical support. Miss. Code Ann. § 43-19-101(6). Here, there was substantial evidence presented of the children’s extraordinary medical and psychological expenses. (R. at vol. 18, 511:9-514:9.) For example, the two oldest daughters were in need of counseling and medication (R. at vol. 18, 513:1-13) as a result of the trauma they had suffered when they witnessed Husband physically assault Wife (R. at vol. 17, 404:25-405:8; vol. 18, 503:20-505:27). Because such treatment involved considerable out-of-pocket costs for the parties, the order providing for the support of the children should have included the

uncovered medical expenses as part of their “reasonable” medical support. Therefore, the Trial Court manifestly erred in failing to make provision for the payment of these expenses, particularly given the disparity between the income and assets between Husband and Wife.

4. The Trial Court manifestly erred in considering Husband’s two sons, born outside the parties’ marriage and neither of which is the subject of a child support order, in making determinations relative to Husband’s obligations for the support of the children of this marriage.

The Mississippi Child Support Guidelines permit a deduction for the amount of an existing order of child support for any other children and, if the absent parent has another child residing with him, for the amount the court deems appropriate to account for the needs of said child. Miss. Code Ann. § 43-19-101(3). However, neither of these deductions apply to any support paid by Husband for the benefit of Jesse Byrd or of Jackson Byrd. Jesse Byrd lives in Arkansas, has attained the age of majority under Arkansas law, and is not the subject of a support order (R. at vol. 22, 1074:19-27; Exhibits vol. 3, 836). Jackson Byrd, who was born to Husband and his paramour while Husband was still married to Wife, had lived primarily with his mother throughout the divorce litigation (R. at vol. 16, 225:15-16) and is not the subject of a support order (R. at vol. 22, 1075:11-13). Therefore, the Trial Court manifestly erred in considering Husband’s sons Jesse Byrd and Jackson Byrd in making determinations relative to Husband’s obligation for the support of the children of this marriage.

I. THE TRIAL COURT MANIFESTLY ERRED IN FAILING TO AWARD WIFE ALL ATTORNEY FEES, EXPERT FEES, AND LITIGATION EXPENSES WHICH SHE HAD INCURRED THROUGHOUT THE DIVORCE LITIGATION.

In determining an appropriate amount of attorney fees in a divorce action, a sum sufficient to secure one competent attorney is the criterion by which courts are directed. *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). The fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of

responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case. *Id.* However, the Mississippi Supreme Court has stated, “Where a party’s intentional misconduct causes the opposing party to expend time and money needlessly, then attorney fees and expenses should be awarded to the wronged party.” *Mabus v. Mabus*, 910 So. 2d 486, 489 (Miss. 2005). Indeed, in contempt actions, attorney fees are awarded to make the plaintiff whole, and no showing as to the *McKee* factors is required. *Williamson v. Williamson*, No. 2010-CA-00400-COA, 2012 WL 48025, at *12 (Miss. Ct. App. Jan. 10, 2012) (citing *Patterson v. Patterson*, 20 So. 3d 65, 73 (Miss. Ct. App. 2009)).

The reasonableness of attorney fees may be demonstrated where an attorney submits an affidavit, which includes her time records, and makes herself available for cross-examination by the other party’s attorney and to questioning by the court, and the other party’s attorney fails to provide sufficient evidence showing attorney fees were unreasonable. *Williamson*, 2012 WL 48025, at *12.

Here, the record is replete with evidence of intentional misconduct by Husband and his counsel, which misconduct caused Wife to expend substantial time and money which would not have otherwise been incurred had Husband and his counsel complied with discovery requests and orders of the Trial Court. Indeed, the Trial Court specifically found as follows:

It is uncontroverted that [Husband’s] continuous violations of discovery and failure to abide by the orders of this Court were willful and intentional. This Court finds that sanctions are more than appropriate at that [Husband] should therefore be disciplined accordingly. [Wife] had no other choice than seek [sic] extra help and incur additional expenses, including the services of a forensic accountant, to determine the amount and location of [Husband’s] assets. Because of [Husband’s] failure to comply truthfully with discovery requests, many contempt issues had to be litigated. [Husband] was successful in testing the court’s patience with his continued violations because the numerous contempt issues took up a substantial amount of this Court’s time. [Husband] filed numerous 8.05 financial statements and continuously had to supplement them because of his constant failure to provide accurate information. Further [Wife] was obligated to file numerous motions to compel [Husband] to provide truthful responses and accurate

information. Even after his conduct stated above, there are still assets that he has failed to value.

In addition, [Husband] has lied under oath about purchasing an automobile for his mistress and attempted to get her to lie about it as well. His cavalier attitude about lying to the court can not tolerated [sic]

As previously stated, [Husband's] behavior resulted in the accumulation of substantial attorney's fees considering the multitude of work that was required in determining those assets of [Husband's] that he failed to disclose and those which he failed to value

(R. at vol. 12, 1774-75.)

At trial, Wife introduced an Affidavit of Attorney Fees and Expenses Incurred in the amount of \$157,601.28 on behalf of Wife, together with the underlying itemized, detailed charges. (R. at Exhibits vol. 3, 1035-1107.) Upon the introduction of such exhibit, Wife's counsel offered to testify and subject herself to cross-examination regarding the cause of such fees and the reasonableness and necessity of such fees, but Husband's counsel declined to call or to cross-examine Wife's counsel. (R. at vol. 21, 928:3-929:15.) Wife's counsel, however, was able to make a statement to the Trial Court regarding the reasonableness and necessity of Wife's attorney fees and expert fees, which statement outlined extensively the effort required in trying to identify, characterize, and value the marital estate accurately as a result of the obstructive and dishonest conduct by Husband and his counsel. (R. at vol. 22, 1088:29-1094:9.) To pay all such attorney fees and expenses as well as the fees charged by her forensic accountant, whose retention the Trial Court found necessary as a result of Husband's conduct, Wife had to deplete her savings and borrow monies from her family. (R. at vol. 18, 531:18-27; Exhibits vol. 1, 115-18.) Therefore, the Trial Court manifestly erred in failing to award Wife all attorney fees, expert fees, and expenses she has incurred in this divorce litigation, the "multitude" of which were incurred as a result of Husband's attempts to conceal his financial information.

J. THE TRIAL COURT MANIFESTLY ERRED IN FAILING TO SANCTION HUSBAND'S COUNSEL FOR HIS MISCONDUCT DURING THE PENDENCY OF THIS CASE.

The Mississippi Supreme Court in recent times has been overwhelmed with cases involving allegations of abuses of discovery. *Miss. Bar v. Land*, 653 So. 2d 899, 909 (Miss. 1994). However, where an attorney knowingly conceals potentially significant facts and evidence in his possession, such conduct goes far beyond what could be considered a discovery dispute to deceit of such magnitude that demonstrates a clear and convincing violation of the rules of professional conduct. *Id.* at 910. The common goal of the adversary process should be to learn “the truth, the whole truth and nothing but the truth.” *Id.* Accordingly, the Supreme Court has unequivocally stated that deceit on the part of an attorney is unethical and warrants sanction. *Miss. Bar v. Mathis*, 620 So. 2d 1213, 1219 (Miss. 1993).

It is vital to the effective administration of justice in the domestic relations arena that chancellors undertake the task of making an equitable distribution of assets while in possession of accurate financial information. *Trim v. Trim*, 33 So. 3d 471, 478 (Miss. 2010). Therefore, a party’s intentional filing of a substantially false Rule 8.05 Financial Disclosure constitutes a fraud on the court. *Id.*

Here, it was revealed during the trial of this matter that Husband’s counsel, who proudly proclaimed that he had represented the Byrd family for 30 years (R. at vol. 22, 1083:26-27), was directly involved in Husband’s attempts to thwart the discovery process and that Husband’s counsel had aided in concealing assets and the true values of assets and had secreted documents in his possession which were relevant proof of the legally-accepted true fair market value Husband’s assets. Specifically, Husband lied in his Answers to Interrogatories and Responses to Requests for Production of Documents, as well in his deposition testimony, when he stated that there was no written lease for the Coahoma and Bolivar County properties owned by the BSRT, which property had been leased in March 2008. However, it was revealed during the trial during Keith Byrd’s testimony that there was, in fact, a written lease agreement and that such lease was

prepared by Husband's divorce counsel and executed in his office. (R. at vol. 20, 778:21-779:5, 780:9-19.) After being ordered immediately to produce a copy of such lease on February 4, 2011, Husband's counsel reached into his briefcase, which was in the courtroom, and produced a copy of a March 2008 lease. (R. at vol. 20, 781:13-782:1.) Husband's counsel had clearly suborned perjury by permitting Husband to testify under oath that there was no written lease for this property. (R. at vol. 20, 780:9-782:1.) But for the cross-examination of Keith Byrd, this lease would never have been disclosed.

Husband again lied in his Answers to Interrogatories and Responses to Requests for Production of Documents when he stated there were no appraisals for any of the properties owned by him or the BSRT and that he had not entered into any contracts from which he stood to gain a pecuniary advantage (R. at vol. 19, 607:7-20). Wife's counsel discovered, with the help of her expert, that there had been a contract to sell the Lafayette County property for \$2 million, which contract also reflected that Husband, as co-trustee of the BSRT, was represented in the sale by the same counsel representing him in the divorce (R. at Exhibits vol. 2, 443). It was also discovered by counsel for Wife that there was, in fact, an August 2009 fair market value appraisal of the BSRT property located in Lafayette County, Mississippi, which valued such property at \$1,840,000.00. (R. at vol. 19, 607:1-3; Exhibits vol. 2, 353-89.) Once this was discovered by counsel for Wife and revealed at trial, the Trial Court adjourned the trial for Husband's counsel to go to his office and retrieve a copy of the secreted appraisal, which Wife's counsel subsequently introduced into evidence. (R. at vol. 20, 885:12-25.) Husband's counsel was clearly aware of this appraisal at the time it was performed in 2009 and throughout the pendency of this matter, as evidenced by a letter dated November 4, 2009 (Wife filed her Complaint for Absolute Divorce on August 3, 2009), signed by Husband's counsel, in which Husband's counsel referenced such appraisal. (R. at Exhibits vol. 2, 453.) Notwithstanding such

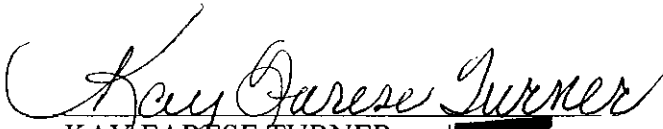
fact, Husband's counsel continued to prepare Rule 8.05 Financial Disclosures that misrepresented to the Trial Court that property's true value. (R. at Exhibits vol. 3, 845.) It should be noted that Husband's counsel signed all Responses to Requests for Production of Documents asserting as to their correctness, pursuant to Miss. R. Civ. P. 11. (R. at Exhibits vol. 2, 458-77.)

As a result of Husband's counsel's conduct in suborning Husband's perjury and in repeatedly violating the Trial Court's orders compelling discovery by withholding material evidence, Wife was caused to incur otherwise unnecessary attorney fees, expert fees, and expenses in uncovering and revealing to the Trial Court assets and values of assets. Therefore, under the principles announced by the Mississippi Supreme Court, the Rules of Professional Conduct, and the Uniform Chancery Court Rules, the Trial Court manifestly erred in failing to sanction Husband's counsel monetarily or otherwise for his conduct in attempting to conceal assets and obfuscate the value of assets during the pendency of this litigation. Such sanction is especially warranted when this misconduct occurred in the presence of the Trial Court, during the trial of this matter.

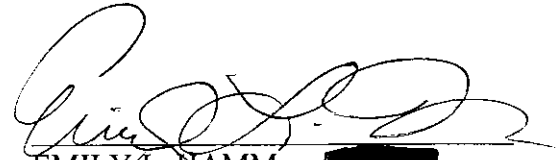
IX. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Wife respectfully requests that this Honorable Court reverse the subject decisions of the Trial Court and award her attorney fees and expenses incurred in pursuing this appeal.

RESPECTFULLY SUBMITTED:



KAY FARESE TURNER # [REDACTED]

KAY FARESE TURNER & ASSOCIATES
Attorneys of Record for Plaintiff/Appellant, Lea Ann Byrd
530 Oak Court Drive, Suite 255
Memphis, Tennessee 38117
(901) 529-4040


EMILY L. HAMM # [REDACTED]

CERTIFICATE OF SERVICE

I, Kay Farese Turner, do hereby certify that on the 2 day of April, 2012, I served a true and correct copy of the foregoing Brief of Appellant by United States Mail, postage prepaid on M. Lee Graves, Attorney for all named Defendants/Appellees, Post Office Box 1476, Clarksdale, Mississippi 38614.


KAY FARESE TURNER

AUTHORITIES