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Defining the Doctrine of Equitable Distribution in Mississippi: A Rebuttable Presumption that Homemaking Services Are as Valuable to the Acquisition of Marital Property as Breadwinning Services - Johnson v. Johnson

John R. Dowd

DEFINING THE DOCTRINE OF EQUITABLE DISTRIBUTION IN MISSISSIPPI: A REBUTTABLE PRESUMPTION THAT HOMEMAKING SERVICES ARE AS VALUABLE TO THE ACQUISITION OF MARITAL PROPERTY AS BREADWINNING SERVICES

Johnson v. Johnson
650 So. 2d 1281 (Miss. 1994)

John R. Dowd

I. INTRODUCTION

Until recently, Mississippi adhered to the title theory of marital property distribution.[1] This system simply awarded the marital assets to the title-holding spouse upon divorce. The title theory often resulted in unjust distributions, especially in the case of traditional families with most property titled in the name of the husband.[2] A housewife and mother often found herself left with nothing but a claim for alimony,[3] the receipt of which was many times suspect at best.[4]

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1. *See, e.g.*, Jones v. Jones, 532 So. 2d 574, 582 (Miss. 1988) (Prather, J., concurring); Hinton v. Hinton, 179 So. 2d 846, 847 (Miss. 1965); Windham v. Windham, 67 So. 2d 467, 472 (Miss. 1953); McCraney v. McCraney, 43 So. 2d 872, 873 (Miss. 1950).

2. *See* Ferguson v. Ferguson, 639 So. 2d 921, 926 (Miss. 1994). The same unfair results ensued when both spouses worked, but one spouse's salary was devoted to investments while the other spouse's salary was devoted to paying the family's expenses. *Id.*

3. This Note focuses on issues relating to the division of marital property between spouses incidental to a divorce in Mississippi. Several other important issues are involved in divorces, two of which are periodic and lump-sum alimony. Alimony is an expansive area of domestic relations law in its own right and is for the most part beyond the scope of this Casenote. However, a brief description of the two types of alimony is in order.

Periodic alimony is the most common type of alimony awarded in the courts of Mississippi. *See* Brendel v. Brendel, 566 So. 2d 1269, 1272 (Miss. 1990). It generally terminates automatically upon the death or remarriage of the obligee. Holleman v. Holleman, 527 So. 2d 90, 92 (Miss. 1988). In addition, periodic alimony awards are subject to modification in the event of a material change of circumstances subsequent to the original decree. Shearer v. Shearer, 540 So. 2d 9, 12 (Miss. 1989).

Periodic alimony arises out of the "duty of a husband to support his wife." East v. East, 493 So. 2d 927, 931 n.2 (Miss. 1986) (citing Gresham v. Gresham, 21 So. 2d 414 (1945)). The Supreme Court of Mississippi has also recognized that alimony may be awarded to the husband. Pratt v. Pratt, 623 So. 2d 258, 261 (Miss. 1993). It is generally used by the chancellor to balance the effect of divorce on each spouse's accustomed standard of living. *See* Wood v. Wood, 495 So. 2d 503, 506 (Miss. 1986). The chancellor is required to consider the reasonable needs of the obligee, and the right of the obligor to maintain a decent standard of living. Massey v. Massey, 475 So. 2d 802, 803 (Miss. 1985). The factors to be considered by a chancellor in granting periodic alimony were first set out in Brabham v. Brabham, 84 So. 2d 147, 153 (Miss. 1955). *See also* Armstrong v. Armstrong, 618 So. 2d 1278, 1280 (Miss. 1993).

Lump-sum alimony involves a single payment in satisfaction of all support claims against the paying spouse. Wray v. Wray, 394 So. 2d 1341, 1344 (Miss. 1981). It is a final settlement between spouses and is not subject to modification. Bowe v. Bowe, 557 So. 2d 793, 795 (Miss. 1990). Lump-sum alimony is often used as an adjustment to property distribution to prevent an unfair division. Reeves v. Reeves, 410 So. 2d 1300, 1303 (Miss. 1982). It has been described as a method of dividing marital property under the guise of alimony. *See* H. CLARK, DOMESTIC RELATIONS § 14.8 (2d ed. 1976). Lump-sum alimony, unlike periodic alimony, "is more in the nature of an award to the payee spouse of an interest rightfully owned by the payee, rather than a fulfillment of a spouse's duty to support the other spouse." Thomas W. Crockett & Walter P. Neely, *Mississippi's New Equitable Distribution Rules: The Ferguson Guidelines and Valuation*, 15 MISS. C. L. REV. 415, 416 (1995) [hereinafter Crockett & Neely].

Although alimony and property division are distinct concepts, "together they command the entire field of financial settlement of divorce." *Ferguson*, 639 So. 2d at 929. As a practical matter, the chancellor will often consider alimony and property division together because "where one expands, the other must recede." *Id.*

Chancellors are free to award lump-sum alimony, award periodic alimony, or both, in addition to making an equitable division of the property. *Id.* Limiting the scope of this Note to the distribution of marital property upon divorce is in no way intended to diminish the importance of alimony and the many other issues that arise incident to a divorce.

4. *Ferguson*, 639 So. 2d at 926. *See also infra* notes 246 and 248.

The Supreme Court of Mississippi recently abandoned the "title theory," and adopted the doctrine of equitable distribution.[5] The adoption of this doctrine forced chancellors to consider the sacrifices of a homemaker who has subordinated his or her earning potential for the best interests of the family.[6] *Hemsley v. Hemsley*[7] established a presumption that the value of "homemaking services" was equal to that of "bread-winning services."[8] *Johnson v. Johnson*[9] reaffirmed the *Hemsley* presumption, and explained that the presumption could be rebutted upon a proper showing.[10]

This Note analyzes the evolution of Mississippi law from the title theory to the doctrine of equitable distribution. In addition, it will explain how the Mississippi Supreme Court's decision in *Johnson* will help protect assets acquired by the parties prior to marriage, gifts, inheritances, and other types of property from being divided upon divorce. Finally, this Note illustrates the Mississippi Supreme Court's recent recognition of the value of domestic services, and concludes by discussing how all of these changes better reflect the realities of modern marriage.

II. FACTS

Wayne and Jane Johnson were married on June 29, 1962, when they were both about eighteen years old.[11] After the birth of their first child, Kendall, in 1968, they made a mutual decision that Jane cease working outside the home and devote her full time and energy to taking care of the home, Kendall, and any other children that the marriage might produce.[12] Two other children were subsequently born to the marriage.[13]

During the marriage, Jane inherited substantial assets from her parents.[14] She used $153,000 of these assets to "pay family expenses, to add to Wayne's savings account, and to purchase a . . . van titled to Wayne."[15] Wayne returned $66,000 of this amount to Jane's separate account.[16] In addition, the Johnsons had a debt of approximately $142,000.[17]

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5. *See* Draper v. Draper, 627 So. 2d 302 (Miss. 1993).
6. *Id.* at 306.
7. 639 So. 2d 909 (Miss. 1994).
8. *Id.* at 915.
9. 650 So. 2d 1281 (Miss. 1994).
10. *Id.* at 1286.
11. *Id.* at 1283.
12. *Id.* at 1284. They agreed that Wayne would be the "breadwinner" and Jane would be the "caretaker" of the home and family. *Id.*
13. *Id.* at 1283. The other two children were Kyle, who was born in 1974, and Kristin, who was born in 1980. *Id.*
14. *Id.* at 1284. These assets included $50,000 in cash, $3,200 in a checking account, a house valued at $40,000, timber land worth approximately $98,000, and marketable timber valued at $95,000. *Id.*
15. *Id.* The $153,000 came from four timber cuttings from Jane's inherited timber land over a 12-year period. *Id.*
16. *Id.* at 1285.
17. *Id.* at 1284. The debt resulted from treatment for their son, Kendall, who required lengthy and expensive hospitalizations for mental illness. *Id.* Unpaid medical bills for Kendall's treatment resulted in a $142,000 judgment against Wayne. *Id.* In addition, Wayne had "assisted Kendall by paying his car notes, medical insurance, medicine bills, and by giving him spending money." *Id.*

The Johnsons separated on June 4, 1990, and on February 27, 1991, Jane filed a complaint for divorce on the grounds of Wayne's adultery.[18] At the time of trial, Wayne was a division director for a Mississippi power company and was earning an annual salary of $88,450.[19] In addition to his salary, Wayne had a vested interest in an employee savings plan valued at $45,415 and an employee stock ownership plan valued at $6,523.[20] Jane, on the other hand, had served as a homemaker during the marriage instead of developing her own earning potential or building her own retirement fund.[21]

The chancellor granted Jane a divorce on the grounds of adultery.[22] He found that Wayne had "great earning potential" in his executive position, as opposed to Jane, "whose only anticipated income was the timber proceeds from logging and rental income of her inherited property."[23] Consequently, Jane was awarded sole use of the marital home.[24] The chancellor also ordered Wayne to pay the mortgage payments on the home with the option of discontinuing these payments upon the children's majority.[25] Jane also "received a fifty percent interest in Wayne's retirement plan, his employee stock ownership plan, and his employee savings plan."[26]

The Mississippi Supreme Court reaffirmed the presumption that the parties made equal contributions to the acquisition of all property acquired during the marriage,[27] but held that the presumption could be rebutted upon a proper showing.[28] In addition, the court held that property inherited by one spouse is sufficient to rebut the presumption, and is thus not subject to division with the non-inheriting spouse.[29] Finally, the court remanded the case to the chancery court so that the chancellor could explain his findings on the record in light of the recent developments in Mississippi's judicially-implemented version of equitable distribution.[30]

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18. *Id.*

19. *Id.* Wayne's gross monthly salary was $7,371. *Id.*

20. *Id.*

21. *Id.* Jane did not work after 1968, when she and Wayne agreed that she would stop working to take care of the children and the domestic services. *Id.* In addition, Jane had to borrow $56,000 against her nonmarital assets to support herself between the couple's separation and the divorce hearing in 1992. *Id.*

22. *Id.* at 1283.

23. *Id.* at 1285.

24. *Id.* at 1284. Jane was awarded custody of the minor children and $1,116 per month in child support as well. *Id.*

25. *Id.* Upon the children's majority, Wayne could grant Jane all of the equity in the property and discontinue making the mortgage payments if he so desired. *Id.*

26. *Id.* In addition, Wayne was ordered to transfer the title to the couple's 1984 van to Jane. *Id.* He was also required to maintain medical insurance for Jane for three years and for the children during their minority. *Id.* The chancellor concluded by ordering each parent to pay fifty percent of college expenses for the children's attendance at a state college. *Id.*

27. *Id.* at 1285-86. This presumption was set forth in Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994).

28. Johnson v. Johnson, 650 So. 2d 1281, 1286 (Miss. 1994).

29. *Id.* at 1286 n.2.

30. *Id.* at 1287.

III. BACKGROUND AND HISTORY OF THE LAW

A. "Equitable and Just"

The Mississippi Legislature has not spoken on the subject of marital property division upon divorce for over a century and a half.[31] The only statute that gives guidance in this area is section 93-5-23 of the Mississippi Code Annotated, which allows a chancery court discretion to divide a married couple's property in an "equitable and just" fashion upon divorce.[32] Instead of adopting a more detailed statutory scheme for marital property division issues, the Mississippi Legislature has left to the Mississippi Supreme Court the job of giving specific definition to this area of the law.

The Mississippi Supreme Court has interpreted section 93-5-23 as giving chancellors broad discretion in ordering an equitable division of property.[33] However, there has been considerable litigation over just what constitutes an "equitable division." It has long been held that "equitable" does not mean "equal," and that there is no automatic right to an equal division of property.[34] As long as the chancellor supports his decision with specific findings of fact supported by credible evidence, his or her findings will usually not be disturbed on appeal absent an abuse of discretion.[35] However, the meaning of "equitable and just" in the statute has recently undergone significant changes with the court's continuing recognition of the changing roles of women in society.[36]

B. The Title Theory

1. In General

Different states apply various methods to divide a couple's assets upon divorce.[37] Until 1993, Mississippi followed the title theory.[38] The title theory prohibited the chancery court from divesting "a spouse of title to real property

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31. Crockett & Neely, *supra* note 3, at 415.

32. MISS. CODE ANN. § 95-5-23 (1993). Section 93-5-23 reads in pertinent part as follows:

> When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him . . . .

Id.

33. *See* Draper v. Draper, 627 So. 2d 302, 305 (Miss. 1993); Brown v. Brown, 574 So. 2d 688, 690 (Miss. 1990).

34. *See, e.g.*, Johnson v. Johnson, 650 So. 2d 1281 (Miss. 1994); Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994); Draper v. Draper, 627 So. 2d 302 (Miss. 1993); Brown v. Brown, 574 So. 2d 688 (Miss. 1990); Dillon v. Dillon, 498 So. 2d 328, 330 (Miss. 1986).

35. Bell v. Parker, 563 So. 2d 594, 597 (Miss. 1990). *See also Ferguson*, 639 So. 2d at 924; Newsom v. Newsom, 557 So. 2d 511, 514 (Miss. 1990).

36. Crockett & Neely, *supra* note 3, at 415.

37. States generally follow either the equitable distribution system, the community property system, or the separate property system. Ferguson v. Ferguson, 639 So. 2d 921, 925-26 (Miss. 1994). The separate property system is often referred to as the "title theory." Jones v. Jones, 532 So. 2d 574, 583 (Miss. 1988) (Prather, J., concurring).

38. *Draper*, 627 So. 2d at 305.

and forcing that spouse to deed the property to the other by judicial decree."[39] This theory was based on a belief that stability in real estate titles must be maintained to protect lienholders' rights,[40] and on a failure of the courts to recognize the value of homemaker contributions to a marriage.[41] The title theory was often responsible for gross inequities in the division of marital property.[42]

One example of an inequitable result from the application of the title theory was the Mississippi Supreme Court's 1965 decision in *Hinton v. Hinton*.[43] In *Hinton*, the wife appealed the chancellor's judgement which failed to award her an interest in a farm titled in the name of her husband, even though she had contributed to its acquisition.[44] The chancellor's decree specifically stated that Mrs. Hinton had no right to an interest in Mr. Hinton's real property.[45] Mrs. Hinton contended that she was entitled to an equitable interest in the farm for her contributions, and that she should not be denied such interest simply because the farm was titled in the name of her husband.[46]

The Mississippi Supreme Court affirmed the chancellor's finding that Mrs. Hinton was entitled to no interest in the farm.[47] Allowing Mrs. Hinton an interest in the property titled in the name of her spouse, the court explained, "would be tantamount to adopting to a limited extent the community property system."[48] The court was unwilling to take the drastic step of abandoning the title theory,[49] and stated that it would be useless to relitigate this issue on remand.[50]

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39. *Jones*, 532 So. 2d at 581. In some cases the court would impose a constructive trust upon one person's property for the benefit of the other spouse who had made a significant contribution towards its purchase. *Id.* at 583. However, the power to confer a constructive trust is only "available in limited circumstances under standard trust principles." *Id.*

40. *Id.* at 583. Justice Prather explained that this argument has no validity because no "equitable distribution rule could ever alter, change or modify lienholders' priorities." *Id.*

41. *See* Cox v. Cox, 183 So. 2d 921, 923 (Miss. 1966) (stating that the "right of the husband to the services of the wife is a reciprocal marital obligation to that of the wife's right to the support from her husband," and denying the wife any interest in the property because she did not "put any money into the purchase of the homestead at the time of the purchase").

42. *See id.* at 923; Hinton v. Hinton, 179 So. 2d 846, 848 (Miss. 1965); Windham v. Windham, 67 So. 2d 467, 472 (Miss. 1953); McCraney v. McCraney, 43 So. 2d 872, 873 (Miss. 1950).

43. 179 So. 2d 846 (Miss. 1965).

44. *Id.* at 847. The Hintons were married when she was 23 and he was 46. *Id.* at 848. Shortly after their marriage, Mr. Hinton purchased a small farm near Hattiesburg, Mississippi. *Id.* The family moved into an old farm house and Mr. Hinton began farming the property. *Id.* Mrs. Hinton assisted her husband in doing various types of farm-related work, in addition to various domestic services. *Id.* Mr. Hinton subsequently built a new house on the farm which he paid for from money earned in his farming operation. *Id.*

After about ten years of this arrangement, Mrs. Hinton decided that she wanted to become a nurse. *Id.* She began working in this capacity in Hattiesburg and contributed some of her income to help pay family expenses. *Id.* The marriage eventually deteriorated and, after fifteen years of marriage, Mrs. Hinton filed for divorce on the ground of habitual cruel and inhuman treatment. *Id.* at 847. Mr. Hinton denied the allegations in her complaint and filed a counterclaim on the same ground. *Id.*

The chancellor entered a decree granting both parties an absolute divorce. *Id.* He awarded Mrs. Hinton $2,000 for alimony and attorney's fees, but failed to designate how much was alimony and how much was for attorney's fees. *Id.*

45. *Id.*

46. *Id.* at 848.

47. *Id.*

48. *Id.*

49. *Id.* The court was reluctant "to engraft on the laws of [Mississippi] features of [the community property] system." *Id.*

50. *Id.*

2. Exceptions to the Title Theory

The Supreme Court of Mississippi carved out so many exceptions that over time the title theory itself became "the exception, not the rule."[51] By 1988, all of the other forty-nine states had adopted laws permitting a court to distribute property upon divorce regardless of which spouse held the title.[52] Even many Mississippi Supreme Court opinions had expressed how useless it was to hang on to this antique theory of marital property division.[53] One of the most influential of these opinions came in *Jones v. Jones*,[54] a 1988 Mississippi Supreme Court decision.

In *Jones*, the husband, Fred, appealed the chancellor's judgement which divested him of title to property for the benefit of his wife, Becky.[55] The chancellor found that divestiture of title was justified because Becky had made substantial monetary and in-kind contributions toward the acquisition of the couple's property.[56] Fred contended that, under the title theory, the chancery court was without authority to decree an equitable division of property titled in his name exclusively.[57] However, the Supreme Court of Mississippi disagreed, and explained that the title theory had been "effectively eroded in cases where the wife contributed her money and labor toward the economic success of the marriage."[58] Justice

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51. *See* Jones v. Jones, 532 So. 2d 574, 581-82 (Miss. 1988) (Prather, J., concurring) (elucidating the many exceptions to the title theory); *see also* Watts v. Watts, 466 So. 2d 889 (Miss. 1985).

52. *Jones*, 532 So. 2d at 581-82. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are community property states. *Id.* n.2. In community property states, the property is presumed to be owned jointly by the husband and wife, and they are entitled to share equally in the "marital property," which generally includes all property substantially contributed to by both parties. *Id.* at 582. All of the other states follow the doctrine of equitable distribution. *Id.* n.3. Thirty-nine states have adopted equitable distribution by statute, and two states (Florida and South Carolina) by judicial decision. *Id.* (citing JOHN P. MCCAHEY, VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 3.01 (1988)). Although many states have followed the title theory in the past, by 1988, Mississippi remained its final adherent. *Id.* at 583.

53. *See Jones*, 532 So. 2d at 583-84 (Prather, J., concurring); *Watts*, 466 So. 2d at 890. In *Watts*, the Mississippi Supreme Court stated that "while [the title theory] is the general rule, it is not an absolute rule." *Id.* at 890. The court went on to elucidate several exceptions to the title theory. *Id.* The *Watts* Court concluded with a statement which has helped shape Mississippi divorce law: "It would offend equity to uproot one of the spouses from the homestead property which was jointly accumulated simply because that spouse's name did not appear on the deed thereto." *Id.* at 891. *See also* Chrismond v. Chrismond, 52 So. 2d 624 (Miss. 1951), *cert. denied*, 342 U.S. 878 (1951).

54. 532 So. 2d 574 (Miss. 1988).

55. Fred and Becky Jones were married in 1954. *Id.* at 575. Two daughters were born of the marriage. *Id.* During the first years of their marriage, Becky worked as a billing clerk at a transport company to support the couple while Fred attended high school and college. *Id.* Fred had just returned from service in Korea when the Joneses were married, and was able to pay for college with funds provided by the G.I. Bill. *Id.* Fred graduated from college in 1958 with a degree in Business Administration. *Id.*

Becky's job as a billing clerk enabled the couple to purchase their first residence. *Id.* However, in 1959 she was forced to stop working because of the approaching birth of their first child. *Id.* at 577. The chancellor found that the properties were "accumulated by the parties," and that Becky "contribute[d] to the acquisition and operation of the property." *Id.*

By 1969, Fred and Becky had accumulated approximately ten separate undeveloped tracts of land in addition to a large shopping center. *Id.* However, their marriage went downhill and, in 1983, after nearly thirty years of marriage, Becky filed for divorce on the ground of habitual cruel and inhuman treatment. *Id.*

56. *Id.* The court actually only awarded Becky two-fifths of the property, because she had conveyed three of the parcels of land to her daughter and brother just before she filed for divorce. *Id.* Fred appealed the chancellor's decision, arguing that the court erred when it divested him of title in the land for the benefit of the spouse. *Id.*

57. *Id.* at 578.

58. *Id.* at 579.

Robertson wrote the opinion of the court, which went on to elucidate several methods that chancellors were authorized to use in dividing the marital property upon divorce.[59]

The first method mentioned by the majority is used when a spouse has assisted his wife or her husband in the accumulation of wealth during the marriage, but has no property titled in his or her own name.[60] In this situation, Justice Robertson explained, the contributing spouse may be awarded lump-sum alimony reflecting an equitable portion of the increase in the net worth of the title-holding spouse.[61] In addition, he stated that the payment of the lump-sum award could be secured by placing an equitable lien upon the property of the debtor spouse.[62]

Another method for the chancellors to consider in dividing the marital property, the majority explained, was only possible when a spouse had made a "material contribution toward the acquisition of property which is titled in the name of the other [spouse]."[63] In this situation, the court explained, the chancellor could look beyond the state of title and award the deprived spouse an equitable interest in such property.[64]

The majority concluded by affirming the decision of the chancellor.[65] Justice Robertson explained that because of Becky's substantial contributions — both in cash and in her service working at the business — the law gave the chancellor the authority to order an equitable division of the marital property including the transfer of title to Becky.[66] However, the court still refused to abandon the title theory when dividing a couple's property upon divorce.

Justice Prather wrote an eloquent concurrence in *Jones* which called for the outright abolition of the title theory.[67] She explained that when the wife's primary contribution to the marriage has been as a homemaker, there was simply no reason to allow her lump-sum alimony but not an equitable interest in the marital

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59. *Id.* at 580.

60. *Id.*

61. *Id. See, e.g.*, Clark v. Clark, 293 So. 2d 447 (Miss. 1974). In *Clark*, the wife had worked eleven years in her husband's business with no compensation. *Id.* at 448. During this time, the couple had accumulated $164,000 in assets. *Id.* at 449. The Supreme Court of Mississippi held that under these circumstances the wife is entitled to a fair allowance. *Id.* This allowance can be accomplished by a lump-sum alimony award which "reflects not only the husband's duty to care for his former wife," but also her share in the marital assets. *Id. See also* Reeves v. Reeves, 410 So. 2d 1300 (Miss. 1982); Miller v. Miller, 298 So. 2d 704 (Miss. 1974).

62. Jones v. Jones, 532 So. 2d 574, 580 (Miss. 1988). *See also Clark*, 293 So. 2d at 450; Buckalew v. Stewart, 229 So. 2d 559, 562 (Miss. 1969).

63. *Jones*, 532 So. 2d at 580.

64. *Id. See also* Chrismond v. Chrismond, 52 So. 2d 624 (1951) (affirming the equitable division of an unmarried couple's real and personal property).

The court also explained that a property settlement agreement is specifically enforceable, even though it requires one spouse to divest himself or herself of title for the benefit of the other spouse. *Jones*, 532 So. 2d at 580 (citing Wray v. Langston, 380 So. 2d 1262, 1264 (Miss. 1980)). The *Wray* Court had explained that the divorce decree did not actually operate to divest the husband of title, but rather to enforce the agreement entered into between the parties. *Wray*, 380 So. 2d at 1263.

65. *Jones*, 532 So. 2d at 581.

66. *Id.*

67. *Id.* at 581 (Prather, J., concurring). "[A] candid assessment of the facts of this case suggest that we ought to confront directly the continued viability of one of our longstanding rules of law." *Id.*

property.[68] Justice Prather further explained that Mississippi was the only state which still held on to the title theory.[69]

Justice Prather, at least implicitly, suggested that Mississippi consider adopting the doctrine of equitable distribution, which most states had already adopted by statute or judicial decision.[70] She concluded by stating that the title theory had outlived any usefulness that it may have once had,[71] and urged the court to abolish this rule which could not be "justified as an original proposition" nor by any policy reason.[72] Nevertheless, the Mississippi Supreme Court did not directly confront the continued viability of the title theory until five years later in *Draper v. Draper*.[73]

3. Abolition of the Title Theory

In *Draper*, the husband, Doug, appealed the chancellor's divorce decree which ordered him to convey property titled in his name to his wife, Joan, upon the couple's divorce.[74] Joan had worked for the entire thirty-year marriage except for two intervals in which she ceased working to give birth to and raise the couple's two children.[75] Doug contended that the chancellor was without authority to divest him of title to property[76] because Mississippi adhered to the title theory of property distribution in divorce cases.[77] After considering all of the judicially-

68. *Id.* Justice Prather explained that, as a practical matter, often the only way the jusband can satisfy the lump-sum judgment is to sell the property anyway. *Id.* at 582.

69. *Id.*

70. *Id.* at 582-83.

71. *Id.* at 584.

72. *Id.*

73. 627 So. 2d 302 (Miss. 1993).

74. *Id.* at 303. Doug and Joan Draper were married in December of 1961. *Id.* Two children were born of the marriage. *Id.* At the time of the couple's marriage, Joan had just graduated from college with a B.S. degree in education and Doug was in his last quarter of undergraduate school. *Id.*

Doug asked Joan for a divorce in February of 1989, but Joan wanted to try and save the marriage. *Id.* at 304. After a failed attempt at saving the marriage, Doug moved out in July of 1989. *Id.* Joan filed for divorce in October of 1990 after learning of Doug's affair with another woman. *Id.* Doug counterclaimed on the ground of habitually cruel and inhuman treatment. *Id.* He testified that Joan smoked and refused to quit, worked too many crossword puzzles, watched too much television, was unaffectionate toward him, and refused to invite friends over to their home. *Id.* The chancellor denied Doug's counterclaim. *Id.*

The chancellor granted Joan a divorce on the grounds of adultery. *Id.* The chancellor then equitably divided all of the marital property, granting Joan the marital home and personal property therein, the lot adjoining the home, and $125,000 cash. *Id.* Furthermore, Doug was ordered to "maintain and pay the premium on a life insurance policy in the amount of $70,000." *Id.* Finally, Joan received thirty-five percent (35%) of the total value of Doug's retirement plan. *Id.*

75. *Id.* at 303. Joan began working soon after they were married, and in March of 1962 Doug began graduate school. *Id.* In November of 1962 Joan quit working due to her pregnancy with their first child. *Id.* However, she returned to the work force in 1963 and continued working until 1967 when she quit due to her pregnancy with the couple's second child. *Id.* In the spring of 1968, Doug completed his doctorate degree. *Id.*

Doug completed a post-doctoral fellowship and his internship, and in 1972 entered into private practice as a clinical psychologist. *Id.* Joan continued to work during most of the marriage except for one four-year interval to care for the young children and one seven-year interval to help the couple's son who was having trouble in school. *Id.* In 1988, Joan quit working because she was unhappy with the stress her job generated. *Id.* at 304. In addition, Doug was earning approximately $200,000 a year and Joan felt it was unnecessary for her to work. *Id.* Doug strongly disapproved of Joan's decision to quit her job. *Id.* Nevertheless, Joan decided to return to college and pursue a master's degree in counseling. *Id.*

76. *Id.* at 305. The home and adjoining lot were jointly owned by Doug and Joan, but the retirement plan was titled only in Doug's name. *Id.*

77. *Id.*

created exceptions to the title theory, the supreme court rejected Doug's contention by formally abolishing the title theory:

> Justice Prather stated in her concurrence in *Jones* that the old title theory in Mississippi was eroded, but not dead. Today we write its obituary. The chancellor in a divorce case now has the authority to divest title from one spouse, and vest it in the other spouse, when equitably dividing the marital assets.[78]

Doug also contended that Joan was not entitled to thirty-five percent of his retirement fund since she did not contribute to its accumulation.[79] The majority rejected this argument by stating that the chancellor was not limited to a consideration of the cash contributions of each party to the accumulation of the property.[80] The court noted that "[i]t is sufficient contribution if one party renders services generally regarded as domestic in nature."[81]

Draper finally abolished the prohibition against the chancery court's divestiture of title to property incident to a divorce.[82] In addition, the court sent a message to the lower courts to consider non-financial contributions by a spouse when equitably dividing marital assets upon divorce.[83] The Mississippi Supreme Court had finally abandoned the title theory method of property distribution and "evolved into an equitable distribution system."[84]

C. Defining the Doctrine of Equitable Distribution in Mississippi

Now that the Supreme Court of Mississippi had written the "obituary" to the title theory, it was time to shape the doctrine of equitable distribution.[85] In defining this doctrine the court was limited by the "inherent limitations in the shaping of [the] common law," which generally only allow the court to consider the factual situation before it.[86] However, the court often went beyond the factual situation before it to aid the chancellors in areas the court had not yet addressed. One example of this was the court's opinion in *Ferguson v. Ferguson*, decided in July of 1994.[87]

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78. *Id.*
79. *Id.* at 306.
80. *Id.*
81. *Id.*
82. *Id.* at 305.
83. *Id.* at 306.
84. Ferguson v. Ferguson, 639 So. 2d 921, 927 (Miss. 1994).
85. Though there is no precise definition for "equitable distribution," it basically refers to the authority of the courts to divest a spouse of title if necessary for an equitable division, and recognizes that a non-working spouse's efforts contribute to the acquisition of the marital estate. *Id.* (citing Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4th 481, 484 (1985)). Therefore, even though Mississippi had attempted to equitably divide marital property for a long time, it was not a true "equitable distribution" jurisdiction until the prohibition against divestment of title was lifted in Draper v. Draper, 627 So. 2d 302 (Miss. 1993).
86. Crockett & Neely, *supra* note 3, at 415.
87. 639 So. 2d 921 (Miss. 1994).

1. The *Ferguson* Guidelines

In *Ferguson*, the husband, Billy, appealed the chancellor's judgement awarding his wife, Linda, an equitable interest in property titled in his name.[88] Linda had served as a homemaker for most of the marriage, taking care of the domestic services as well as the couple's two children.[89] The Supreme Court of Mississippi sat *en banc* to hear the arguments in *Ferguson*. Justice Prather authored the majority opinion.[90] She first discussed the background of the different methods of marital property distribution, and formally announced that Mississippi would become an equitable distribution state.[91]

The majority next addressed the question of when rights to marital assets vest in a spouse.[92] Justice Prather explained that a spouse has no vested rights in any marital assets prior to the entry of a judgment or decree pursuant to divorce.[93] In determining exactly what assets are subject to division upon divorce, the court directed the chancery courts to consult its decision in *Hemsley v. Hemsley*,[94] decided on the same day as *Ferguson*.[95]

Given the recent developments in the area of marital property distribution, Justice Prather felt compelled to create guidelines for chancellors to follow when attempting to equitably distribute marital property.[96] She responded by pro-

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88. Linda and Billy Ferguson were married in April, 1967. *Id.* at 929. Linda gave birth to two children during the marriage. *Id.* During their marriage, Linda worked part of the time as a homemaker and caretaker of the children and part of the time as a cosmetologist/beautician. *Id.* At the time of the divorce, Billy worked as a cable repair technician for South Central Bell, earning approximately $1700 per month after taxes and other miscellaneous expenses. *Id.* at 936. In May of 1991, Linda filed for divorce on the ground of adultery. *Id.* at 929. Billy denied this allegation and counterclaimed for habitual cruel and inhuman treatment. *Id.*

The chancellor denied Billy's request for a divorce and awarded the divorce to Linda on the ground of adultery. *Id.* at 929-30. Linda also received: (1) the marital home and its contents with the four acres of land surrounding it, debt free (Billy was ordered to assume the mortgages on the house); (2) one-half interest in Billy's pension plan, stock ownership plan, and savings plan; and (3) lump-sum alimony in the sum of $30,000, payable at the rate of $10,000 per year for 3 years. *Id.* at 930. Billy was awarded: (1) 33 acres of jointly owned and accumulated real property, (2) all the farm equipment, (3) a leasehold interest on all farm property, (4) a cattle operation, and (5) his 100 shares in a mobile home park. *Id.* at 935.

89. *Id.* at 929.

90. *Id.* at 925.

91. *Id.* at 927. Justice Prather explained that "through an evolution of case law, this Court has abandoned the title theory method of distribution of marital assets and evolved into an equitable distribution system." *Id.*

92. *Id.* at 927-28.

93. *Id.* at 928. The vesting of rights "is committed to the discretion and conscience of the [chancery] court, having in mind all of the equities and other relevant facts and circumstances." *Id.* (quoting Brown v. Brown, 574 So. 2d 688, 691 (Miss. 1990)).

94. 639 So. 2d 909 (Miss. 1994). *See* discussion *infra* notes 138-64 and accompanying text.

95. Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994).

96. *Id.*

nouncing a non-exhaustive list of factors for chancellors to consider in dividing property upon divorce.[97]

The majority stated that the law of equitable distribution would be further defined as different factual situations appeared in future cases.[98] Justice Prather explained that homemaker contributions should not be measured "by a mechanical formula, but on the contribution to the economic and emotional well-being of the family unit."[99] In addition, she stated that one of the goals of equitable distribution is to conclude the parties' legal relationship, leaving each spouse in a self-sufficient state.[100]

The court further explained that the fair market value of the assets should be determined before any attempt at division was made.[101] In addition, the majority stated that the "chancellor may divide marital assets . . . as well as award periodic and/or lump sum alimony, as equity demands."[102] Furthermore, Justice Prather explained that fairness is the prevailing guideline, and directed the chancellors to include their findings of fact and conclusions of law to aid in appellate review.[103] The court then turned to the case before it to apply these new principles.[104]

Billy first contended that Linda's domestic services in no way contributed toward the acquisition of his pension plan, stock ownership plan, or company

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97. The *Ferguson* guidelines are as follows:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
   a. Direct or indirect economic contribution to the acquisition of the property;
   b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and
   c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets;
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise;
3. The market value and the emotional value of the assets subject to distribution;
4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;
5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
8. Any other factor which in equity should be considered.

Id. at 928. *See also* Crockett & Neely, *supra* note 3 for an excellent analysis of the origins of each of the guidelines and implications the guidelines will have on the law of Mississippi.

Whether or not the chancery courts are required to consider these guidelines is somewhat unclear from the opinion in *Ferguson*. The court first states that it "directs" the chancery courts to follow the guidelines, but then seems to cave in when it "suggests" that the chancery courts follow the guidelines "where applicable." *Id.* at 928.

98. *Id.* at 929.

99. *Id.* (citing LaRue v. LaRue, 304 S.E.2d 312, 322 (W. Va. 1983)).

100. *Id.*

101. *Id.* The court explained that expert witnesses may be crucial to establish valuation of assets, particularly when the list of assets is expansive. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

savings and security plan, but the court found no merit in this contention.[105] The majority reasoned that even though "contributions of domestic services are not made directly to a retirement fund, they are nonetheless valid material contributions which indirectly contribute to any number of marital assets, thereby making such assets jointly acquired."[106] The court concluded by explaining that because of Linda's contributions as a homemaker and a wage earner, she was entitled to some portion of the retirement funds titled in Billy's name.[107]

Billy next contended that the chancellor lacked authority to order him to convey to Linda his one-half interest in the marital home and surrounding four acres.[108] The majority found no merit in this contention, and stated that under current case law the chancellor was well within his authority in divesting Billy of his one-half interest in the property.[109]

The court remanded all issues relating to the marital property division for further consideration in light of the new guidelines pronounced by Justice Prather in the majority opinion.[110] On remand, the court required a determination of the value of the assets along with a thorough explanation for the basis of the chancellor's award.[111]

Three justices wrote separate opinions, each concurring in part and dissenting in part.[112] Chief Justice Hawkins agreed with "the excellent factors" set forth by the majority for chancellors to consider when dividing marital property.[113] However, he felt that the abolition of the title theory was unnecessary,[114] and that

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105. *Id.* at 933. The chancery court had awarded Linda a one-half interest in the pension plan (valued at $400.20), and a one-half interest in the stock ownership plan (valued at $17,060.45). *Id.* at 933, 938. In addition, the chancellor specifically ordered that all future increases by the employer to either of these plans would inure to Billy's benefit. *Id.* at 933. Linda was also awarded a one-half interest in Billy's savings and security plan. *Id.* However, Billy had withdrawn $30,000 from this plan immediately prior to the divorce, leaving only $677.89. *Id.* Billy claimed that he had spent this money; but a witness testified that he had actually hidden the money where nobody could find it. *Id.*

106. *Id.* at 934. The court stated that the spouse who contributes indirectly to the fund by way of domestic services could have instead been working and investing his/her wages in preparation for his/her own retirement. *Id.* Therefore, they concluded that "it is only equitable to allow both parties to reap the benefits of the one existing retirement plan, to which both parties have materially contributed in some fashion. *Id.*

107. *Id.*

108. *Id.* at 934.

109. *Id.* Finally, the court addressed Billy's contentions that it was inequitable to order him to assume the mortgage, and that the award of $30,000 in lump sum alimony was an abuse of discretion by the chancellor. *Id.* They stated that these contentions could not be addressed because the record contained insufficient evidence of the value of the cattle operation, the thirty-three acres of real estate, or Billy's leasehold interest in the property. *Id.* at 936. In addition, the court found that the chancellor failed to sufficiently explain the basis for the $30,000 lump sum alimony award. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 937.

113. *Id.* (Hawkins, J., concurring in part and dissenting in part).

114. *Id.* Hawkins evidently disagreed with the majority opinion here and the one in Draper v. Draper, 627 So. 2d 302 (Miss. 1993), because he stated that he felt that an equitable result could be achieved "by the tools a chancellor has presently under Jones v. Jones, 532 So. 2d 574 (Miss. 1988) . . . [r]ather than creating — like the Genie in Aladdin's lamp — some property right simply by being married." Ferguson v. Ferguson, 639 So. 2d 921, 937 (Miss. 1994) (Hawkins, J., concurring in part and dissenting in part).

it interfered with the constitutional right of a person to own and enjoy his or her property without any government interference.[115]

Justice Lee agreed only with the majority's decision to remand the case for a re-evaluation by the chancellor.[116] He disagreed with the guidelines set out by the majority because he felt that the majority had violated the doctrine of separation of powers as well as interfered with the right of contract.[117] Lee felt that the majority opinion may have misinterpreted section 95-5-23 of the Mississippi Code Annotated, and that this could interrupt Mississippi's statutory framework in many areas of the law.[118]

Justice Lee further criticized the majority for failing to define "marital property."[119] He noted that prior cases required a finding of a "material contribution" towards the acquisition of the property by the non-titled spouse before such property was considered "marital."[120] However, he was concerned with the fact that the majority relegated the determination of "marital property" to the will of the chancellor.[121] In addition, Lee stated that the majority failed to confront the consideration of how the "marital liabilities" should be shared, including debt-encumbered marital assets.[122]

Justice Lee believed that the majority opinion would "have a monumental impact upon all persons in this state, wealthy and poor."[123] He stated that with the respective "needs" of the parties being an integral component of the chancellor's consideration, a spouse who had never contributed to acquiring assets but had a substantial "need" upon divorce could receive a large amount of the marital property.[124]

In addition, Justice Lee argued vehemently that the majority opinion was "against public policy," and that it "discourages the marital relationship."[125] He stated that if the majority's guidelines were adopted, it could seriously threaten

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115. *Id.* Hawkins stated that "[t]he right of each individual to own and enjoy property in his or her own name, undisturbed and unfettered by any government, is a sacred right." *Id.* at 937-38 (citing Fitzhugh v. City of Jackson, 97 So. 190, 192 (Miss. 1923); MISS. CONST. art. IV, § 94).

116. *Id.* at 938 (Lee, J., concurring in part and dissenting in part).

117. *Id.* Lee felt that the majority opinion represented a "usurpation of legislative power because, instead of interpreting the law, it states what the law should be — a legislative function." *Id.* at 940.

118. *Id.* Justice Lee explained that "[s]tatutes which control or affect property ownership, contractual rights, notice requirements, trusts, wills, partnerships, taxation, and future interests . . . [will] be abrogated or afflicted to one degree or another." *Id.*

119. *Id.*

120. *Id.*

121. *Id.* Lee continued: "[T]he majority haphazardly relegates the prior threshold requirement of finding a 'material contribution' to a mere 'consideration' for the chancellor, leaving the property which might properly be subject to division unidentified and undefined." *Id.* The reason Justice Lee felt this way is likely because the requirement of finding a material contribution is now reduced to just one of eight factors a chancellor should consider.

122. *Id.* at 941.

123. *Id.*

124. *Id.*

125. *Id.* at 942. Justice Lee stated that persons who were contemplating marriage in Mississippi would surely consider the alternative of unmarried cohabitation to "avoid the interference with their lives and property which could be caused by today's judicial legislation." *Id.*

inheritance rights[126] as well as the enforceability of prenuptial agreements.[127] Justice Lee scorned the majority for "hastening to a decision which would cause chaos in the lives of the citizens of Mississippi."[128]

Justice McCrae shared Justice Lee's concerns about the many ramifications of the majority opinion.[129] He opined that the doctrine of equitable distribution announced by the majority begged the question of just who's interests were being protected.[130] He was especially concerned that the existence of a prenuptial agreement was not even recognized as a factor to be considered in the majority's guidelines.[131] Justice McCrae was worried that this would allow the chancellor to divide property which the parties intended to keep separate, if "equitable factors" so dictated.[132] He explained that many states had statutory provisions which effectively safeguarded the freedom to enter into prenuptial contracts.[133]

Justice McCrae was equally concerned with the effect the majority's opinion would have on inherited property and inter vivos gifts.[134] He was concerned that the definition of marital assets adopted by the majority, which encompassed "any and all property accumulated or acquired during the course of the marriage,"[135] could subject property inherited during the marriage to equitable distribution at the will of the chancellor.[136] Justice McCrae concluded by stating that "the majority ha[d] winked at the constitution, usurped the power of the legislature and devised a scheme which threatens the contract and property rights of every citizen in Mississippi."[137]

2. What is "Marital" Property?

The Supreme Court of Mississippi realized that before the *Ferguson* guidelines could be effectively applied by the chancery courts, it was important to define exactly what property would be classified as "marital" and thus subject to division at divorce. The court wasted no time. The court addressed this question on the same day as *Ferguson*, in *Hemsley v. Hemsley*.[138]

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126. *Id.* at 941. Justice Lee believed that "[i]f the majority's guidelines were adopted, a testator or donor might no longer be free to determine who would be the 'exclusive' beneficiary of their will or trust." *Id.*

127. *Id.* at 942. Justice Lee explained that "[e]ven the prenuptial agreements of spouses might be disregarded by a chancellor according to the majority." *Id.*

128. *Id.*

129. *Id.* (McCrae, J., concurring in part and dissenting in part). Justice McCrae agreed that the majority violated the doctrine of separation of powers and severely impinged on the constitutional right to contract. *Id.*

130. *Id.* at 944.

131. *Id.* Justice McCrae cited several cases in explaining that the Supreme Court of Mississippi had long recognized the validity of prenuptial agreements when fairly entered into. *Id.* (citing Stevenson v. Renardet, 35 So. 576 (Miss. 1904); Gorin v. Gorin, 38 Miss. 205 (1859)). McCrae disagreed with the majority's failure to provide safeguards for the validity of these agreements. *Id.*

132. *Id.*

133. *Id.* at 944-45 (citing WIS. STAT. ANN. § 767.255(11) (West 1980)).

134. *Id.* at 945.

135. This definition came from Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994). *Hemsley* was decided on the same day as *Ferguson* and is discussed *infra* in notes 138-164 and accompanying text.

136. Ferguson v. Ferguson, 639 So. 2d 921, 948 (Miss. 1994) (McCrae, J., concurring in part and dissenting in part). Justice McCrae also expressed concern over the effect of the majority's opinion on business interests. *Id.* at 945-46. He questioned how the majority opinion would affect preferences between secured creditors. *Id.* at 946.

137. *Id.* at 947.

138. 639 So. 2d 909 (Miss. 1994).

In *Hemsley*, the chancellor had awarded the wife, Bitsy, fifty-percent of the retirement benefits that her husband Mike had acquired during their marriage.[139] Mike agreed that the chancellor could have considered his retirement benefits in determining the amount of alimony to be awarded.[140] However, he contended that Bitsy had no property right in his retirement benefits which justified the chancellor in divesting him of fifty percent of his interest therein.[141]

The supreme court found no merit in Mike's contention.[142] Citing *Jones*, the majority held that the chancellor had the authority to order a division of the retirement benefits since they were accumulated through the joint contributions of the parties.[143] The court also explained that the Federal Uniformed Services Former Spouses' Protection Act[144] had vested state courts with the power to allocate military retirement pay upon divorce.[145]

The court then turned to the task of defining which assets were subject to division upon divorce.[146] It explained that "[a]ssets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown by proof that such assets are attributable to one of the parties' separate estates prior to the marriage or outside the marriage."[147] Furthermore, the court assumed that the contributions of marital partners were of equal value whether economic, domestic, or otherwise.[148] The majority concluded by reaffirming the

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139. *Id.* at 910. Bitsy and Mike Hemsley were married in June of 1966. *Id.* at 911. The marriage produced two children. *Id.* In the early years of their marriage, the couple lived in many different localities because of Mike's military service. *Id.* However, they settled in Mississippi in 1983. *Id.*

Mike received a bachelor's degree in engineering in 1966. *Id.* He worked as an engineer officer with the Army from 1966 until 1977. *Id.* While he was in the army Mike attended night classes and received a master's degree in harbor, coastal, and ocean engineering. *Id.* After working in a private engineering firm for three years, he returned to the federal government as a member of the civil service. *Id.*

Bitsy worked either full-time or part-time during the marriage to help support the family. *Id.* She had a high school education. *Id.* At the time of the couple's separation in April of 1991, Bitsy was earning approximately $22,000 per year as a secretary. *Id.* Mike was earning approximately $70,000 per year. *Id.* at 913. Soon after their separation, the couple received a divorce on the ground of irreconcilable differences. *Id.* at 911.

The chancellor awarded Bitsy periodic alimony, fifty percent (50%) of Mike's military retirement, and fifty percent (50%) of Mike's civil service retirement as of the date of the judgment. *Id.*

140. *Id.* at 912.

141. *Id.* at 913.

142. *Id.* at 914.

143. *Id.* (citing Jones v. Jones, 532 So. 2d 574, 580-81 (Miss. 1988); Watts v. Watts, 466 So. 2d 889, 891 (Miss. 1985)). *See also* Brendel v. Brendel, 566 So. 2d 1269, 1273 (Miss. 1990); Regan v. Regan, 507 So. 2d 54 (Miss. 1987); Clark v. Clark, 293 So. 2d 447 (Miss. 1974).

144. 10 U.S.C. § 1408(c)(1) (Supp. 1992). FUSFSPA does not vest rights in anyone, but merely allows the states to treat the military retirement pensions of their citizens as property subject to state property laws. Brown v. Brown, 574 So. 2d 688, 690-91 (Miss. 1990).

145. Hemsley v. Hemsley, 639 So. 2d 909, 914 (Miss. 1994).

146. *Id.*

147. *Id.* Prior to *Hemsley*, a spouse had to prove that he or she contributed to the acquisition of an asset titled in the name of the other spouse in order to receive an interest therein. *See* Draper v. Draper, 627 So. 2d 302 (1993); Jones v. Jones, 532 So. 2d 574 (Miss. 1988); *Watts*, 466 So. 2d at 889. However, this definition of marital property espoused in *Hemsley* seems to create a presumption of equal contribution which can only be rebutted by proof that the property is attributable to one of the parties' separate estates prior to marriage. *Hemsley*, 639 So. 2d at 914.

148. *Id.* at 915.

Ferguson guidelines[149] for chancellors to follow in arriving at an equitable distribution.[150]

The *Ferguson* dissenters[151] were also upset with the majority opinion in *Hemsley*.[152] Chief Justice Hawkins dissented as to the court's definition of "marital property."[153] He felt that lump-sum alimony was a sufficient tool to award a wife for her contributions to the marriage,[154] and he was disturbed by the majority's creation of a property right in each spouse solely because of the marriage.[155] He believed that the majority diminished a person's sacred right to own property.[156] He feared that this "judicially-created property right" upon divorce would expand to other areas of the law such as will contests and the distribution of estates.[157]

In his dissenting opinion, Justice McCrae sharply criticized the majority's definition of marital property.[158] He stated that the court went too far when it created a presumption that all property acquired during the marriage was subject to equitable distribution unless there was proof that the asset came from one spouse's separate estate.[159] He also disagreed with the majority's presumption that the partners contributed equally to the marriage, whether such contributions were domestic or economic.[160]

Justice McCrae further explained that the majority opinion left open too many questions.[161] He cited an Arkansas statute which set forth seven exceptions to the

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149. Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994).

150. *Hemsley*, 639 So. 2d at 915. The court also noted that the chancellor ordered Bitsy's alimony to be reduced by her share of Mike's retirement benefits once they start to receive those benefits. *Id.* Periodic alimony awards are always subject to modification when circumstances require. *See supra* note 3. Therefore, the chancellor was just trying to foster administrative convenience and save the parties from having to petition the court for a modification once Mike's benefits began being dispersed.

151. In *Ferguson*, Chief Justice Hawkins, Justice McCrae, and Justice Lee each dissented to most of the majority opinion. *Ferguson*, 639 So. 2d at 937.

152. *Hemsley*, 639 So. 2d at 916.

153. *Id.* (Hawkins, C.J., concurring in part and dissenting in part).

154. *Id.* Hawkins once again expressed his agreement with the *Ferguson* factors, but stated that the chancellor should consider them when making a lump-sum award. *Id.*

155. *Id.* Hawkins stated that parties should be free to put all of their assets acquired during the marriage in their joint names, but that "[t]hey also ought to be free not to." *Id.*

156. *Id.* Hawkins explained that everyone has a sacred right to own property in their individual names, whether married or not, and that the majority opinion disparages that right. *Id.* He also felt that the court lacked the constitutional authority to create such a right. *Id.*

157. *Id.* Justice Hawkins stated that "it will take but a slight turn of the screw to expand the assertion of this property right." *Id.* Therefore, he felt that such a far-reaching change in the right to own property is best left to the legislature. *Id.*

158. *Id.* at 918 (McCrae, J., dissenting). Justice McCrae explained that the majority's definition of marital property was "too all-encompassing and fail[ed] to consider the nature of the assets to be distributed." *Id.*

159. *Id.* Justice McCrae interpreted the majority's definition of marital property as including property acquired by gift or devise, regardless of title or proof that it was intended to be passed only to one spouse. *Id.*

160. *Id.* at 919. Justice McCrae interpreted the majority opinion as saying that "regardless of what the evidence might show, the chancellor is to assume there has been a fifty-fifty contribution to the assets of the marriage." *Id.* He interpreted this as an irrebuttable presumption. *Id.*

161. Some of the questions McCrae mentioned were:

1) How would parties substantiate that they acquired an asset before marriage?
2) Can an asset change in character from "separate" to marital?
3) What character would rental payments from property acquired before marriage take?
4) How does indebtedness fit into the definition of marital assets?

Id.

presumption that all property acquired during marriage was marital property.[162] He stated that this method better accounted for the "realities of modern marriage."[163] Justice McCrae concluded by criticizing the majority for leaving the "public, bench, and bar in a quandary over the definition of marital property and matters governing its disposition upon divorce."[164]

3. Questions Left Open

The Supreme Court of Mississippi had come a long way in a short time in its implementation of the doctrine of equitable distribution. The abandonment of the title theory[165] and the *Hemsley* presumption that homemaker services were of equal value to breadwinner services[166] were just a few examples of the positive changes the court had made. Several subsequent cases confirmed these changes,[167] and by October of 1994 all of the Justices on the court had either accepted or acquiesced in the *Ferguson* factors.[168] However, many questions were left open. The character of inherited property or inter vivos gifts between the spouses, and the enforceability of antenuptial agreements were some of the issues still to be faced.[169] The court addressed one of these issues, the enforceability of antenuptial contracts under the new doctrine of equitable distribution, just five months after *Ferguson* and *Hemsley*, in *Smith v. Smith*.[170]

Billy and Zena Smith were married in April of 1985[171] when they were each in their mid-fifties.[172] They each had previous marriages and children by their former spouses.[173] In contemplation of their marriage, they entered into an antenup-

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162. ARK. CODE ANN. § 9-12-315 (1993) provides as follows:

(b) For the purpose of this section, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(1) Property acquired prior to marriage, or by gift, or by bequest, or by devise, or by descent;

(2) Property acquired in exchange for property acquired by gift, bequest, devise, or descent;

(3) Property acquired by a spouse after a decree of divorce from bed and board;

(4) Property excluded by valid agreement of the parties;

(5) The increase in value of property acquired prior to marriage or by gift, bequest, devise, or descent, or in exchange therefor;

(6) Benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses; and

(7) Income from property owned prior to the marriage, or from property acquired by gift, bequest, devise, or descent, or in exchange therefor.

163. Hemsley v. Hemsley, 639 So. 2d 909, 918 (McCrae, J., dissenting). Some of the characteristics of modern marriage that Justice McCrae mentioned were that more couples are entering marriages with separate assets, more couples are marrying later in life, and it is more common to see both spouses work. *Id.*

164. *Id.* at 921. Justice Lee also wrote a short dissenting opinion which agreed with the dissenting opinions of Justice McCrae and Chief Justice Hawkins. *Id.* at 918 (Lee, J., dissenting).

165. Draper v. Draper, 627 So. 2d 302 (Miss. 1993).

166. *Hemsley*, 639 So. 2d 909 at 914.

167. *See* Pierce v. Pierce, 648 So. 2d 523 (Miss. 1994); Parker v. Parker, 641 So. 2d 1133 (Miss. 1994).

168. *See Pierce*, 648 So. 2d at 529-30.

169. *See Hemsley*, 639 So. 2d at 919-20 (McCrae, J., dissenting).

170. 656 So. 2d 1143 (Miss. 1995).

171. *Id.* at 1145. Zena had worked in a garment plant for 40 years, and continued to work there after her marriage to Billy. *Id.* In addition, during the marriage she often helped Billy in his truck farming business and sold vegetables for Billy from her vehicle at work. *Id.* Furthermore, Zena helped Billy with personal care of two of his elderly relatives, and added Billy to her health insurance plan at a cost of $100.00 per month. *Id.*

172. *Id.* at 1146.

173. *Id.* at 1145.

tial agreement in which each spouse relinquished any claims to the other's assets owned prior to the marriage.[174]

Billy had a savings account consisting of nonmarital funds with Zena authorized to make withdrawals from the account.[175] However, soon after the couple's separation in 1991, Zena withdrew $38,500 from the joint savings account to support herself.[176] Billy filed for a temporary restraining order [hereinafter TRO] which the chancery court granted, ordering Zena to return the money to his account.[177] Zena redeposited approximately $32,500 of the $38,500.[178] Billy then filed for divorce, and Zena counterclaimed for separate maintenance.[179]

The chancellor dismissed Billy's claim for divorce and Zena's claim for separate maintenance.[180] In addition, the chancellor reversed the effect of the TRO and ordered the $32,500 returned to Zena.[181] The chancellor did not order a division of property, but simply found that the TRO was unwarranted because Zena had acted within her authority in withdrawing funds from the account.[182]

The Supreme Court of Mississippi, under the pen of Justice Prather, began by discussing the history of antenuptial agreements, and explained that in earlier times these agreements were considered void as contrary to public policy.[183] However, the court explained that by 1984 the majority of courts had abandoned the view that such contracts were void *ab initio*.[184] Citing *Stevenson v. Renardet*,[185] the court noted that antenuptial agreements were fully enforceable in Mississippi.[186] However, the majority explained that Mississippi imposed a requirement of fairness, including a duty of disclosure, in the execution of these

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174. *Id.* The antenuptial agreement provided, in pertinent part, that both parties would have "full, complete and absolute control and management of all [his/her] property . . . [by] sale, *inter vivos* gift . . . so that all of [his/her] said property shall be disposed of as [she/he] alone desires." *Id.*

175. *Id.*

176. *Id.* at 1146.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* The chancellor's findings of fact were as follows:

> Zena was "entitled to withdraw the $32,500" from the joint savings account; the monies deposited in the account were . . . Billy's inheritance . . . ; Billy had not made a gift of these funds to Zena, but had "placed the funds in a joint account to enable Zena to write checks on the account."

Id.

183. *Id.* (citing Osborne v. Osborne, 428 N.E.2d 810, 814 (Mass. 1981)).

184. *Id.* (citing Frey v. Frey, 471 A.2d 705, 709 (Md. 1984); Posner v. Posner, 233 So. 2d 381 (Fla. 1970)).

185. 25 So. 576 (Miss. 1904).

186. Smith v. Smith, 656 So. 2d 1143, 1147 (Miss. 1995).

187. *Id.* (citing Hensley v. Hensley, 524 So. 2d 325, 327-28 (Miss. 1988)).

188. *Id.*

189. *Id.* (citing ANN OLDFATHER ET. AL., VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 4.05 at 4-42 (1994 ed.)).

190. *Id.* at 1147.

191. *Id.*

192. *Id.* at 1146.

193. *Id.* at 1147. Therefore, the court found that Zena was acting within her authority when she withdrew the $38,500. *Id.*

194. *Id.*

195. *Id.* at 1144.

196. *Id.* at 1148.

agreements.[187]

Justice Prather noted that, generally, antenuptial agreements are only enforceable upon death or divorce.[188] She pointed out that some legal observers have recognized that the breach of an antenuptial agreement can lead to appropriate remedies even before a divorce,[189] however, she declined to follow suit in the case at bar.[190] Furthermore, the majority explained that the primary consideration, as in any other contract, should be the parties' intent.[191]

Billy first contended that the chancellor erred in granting Zena an interest in the savings account consisting of his inheritance.[192] The majority explained that the chancellor had not granted Zena any interest in the joint account, but that he had simply found that Billy granted Zena the right to withdraw funds by establishing the joint account.[193] Since the chancellor denied the divorce, the court held he was without authority to order a division of the marital property.[194]

Billy's remaining contentions all dealt with the division of property pursuant to the antenuptial agreement.[195] The majority rejected these contentions by reiterating that the chancellor had not ordered a division of property, but had simply found that Zena had the authority to withdraw funds from the account.[196] The majority concluded by explaining that the chancellor could only address the antenuptial agreement upon divorce.[197]

Not to spoil what had become a tradition in marital property division cases since *Draper*, Justices McCrae and Lee dissented.[198] Both Justices agreed that the language in the antenuptial agreement clearly expressed the parties' intent for the agreement to take immediate effect.[199] They opined that the majority erred by holding that the antenuptial agreement could not be addressed until divorce.[200] The Supreme Court of Mississippi attempted to clarify *Hemsley*'s distinction

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197. *Id.* The Supreme Court of Mississippi stated that upon divorce the chancery court can consider the antenuptial agreement, any inter-spousal transfers of separate property during the marriage, any inherited property, the dissipation or appreciation of property, or "any other applicable factors to arrive at a fair division of marital assets." *Id.* at 1147. The court did not provide guidelines for the chancellor to follow in making these considerations, nor did they give examples of "any other applicable factors." *Id.*

198. *See* Pierce v. Pierce, 648 So. 2d 523 (Miss. 1994); Parker v. Parker, 641 So. 2d 1133 (Miss. 1994); Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994); Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994); and of course Draper v. Draper, 627 So. 2d 302 (Miss. 1993).

199. Smith v. Smith, 656 So. 2d 1143, 1149 (Miss. 1995).

200. *Id.* Justice McCrae stated that the chancellor had erred by reversing the effect of the temporary restraining order and awarding Zena $32,500. *Id.* at 1148-49. He explained that, in doing so, the chancellor had ignored the terms of the antenuptial agreement. *Id.*

Justice McCrae explained that the intent of the parties should be the controlling factor in antenuptial agreements, and that the Smiths clearly relinquished their right to each other's property acquired before the marriage. *Id.* Justice McCrae further stated that the money withdrawn by Zena was part of Billy's inheritance, and that the chancellor had no right to repudiate the contract and award Zena the money. *Id.*

Justice McCrae believed that the chancellor had no authority to award Zena a judgment of $32,500. *Id.* He disagreed with the majority's contention that the chancellor merely found that Zena was authorized to withdraw the money from the joint account. *Id.* Justice McCrae explained that the chancellor had clearly awarded Zena an interest in the joint account. *Id.* He included part of the chancellor's order which went as follows: "THE COURT DOES FIND, AND IT IS HEREBY ORDERED that the savings account at Security Savings Association is a joint account, and the defendant, Zena Faye Phillips Smith, is hereby granted thirty-two thousand, five hundred dollars ($32,500) of those sums in that account." *Id.* at 1148. He also stated that the language in the Smith's antenuptial agreement gave the agreement full force and effect during marriage, not just in the event of a divorce. *Id.* Justice McCrae concluded by stating that "the majority should . . . seek to protect the sanctity of such contracts . . . during marriage and in the event of divorce." *Id.* at 1149.

between marital and nonmarital property on the same day as *Smith*, in *Johnson v. Johnson*.[201]

IV. THE INSTANT CASE

With Justice Prather at the helm, *Johnson v. Johnson* provided much-needed guidance on what constituted "marital property," the title given by *Hemsley* to property subject to equitable distribution.[202] In a near-unanimous opinion,[203] the Supreme Court of Mississippi looked to other jurisdictions to help eliminate some of the legitimate concerns that had been expressed in recent dissenting opinions.[204]

After explaining the standard of review in domestic relations matters,[205] Justice Prather turned to the merits of the case.[206] Wayne first contended that the chancellor erred in awarding Jane a one-half interest of the present value in his retirement plan, his savings plan, and his employee stock ownership plan.[207] Citing *Hemsley*, the court stated that Jane's domestic contributions are assumed to be equally as valuable as the contributions made by Wayne toward his pension and savings plans.[208] Therefore, the court rejected Wayne's contention and held that his retirement and savings plan were presumptively part of the marital estate subject to equitable distribution.[209]

The majority next responded to Jane's contention that the assets she had inherited during the marriage constituted "nonmarital property," and were not subject to equitable distribution.[210] The court agreed that "property clearly obtained by one party through inheritance or acquired by one party by gift is nonmarital property not subject to equitable distribution."[211] Therefore, Jane initially rebutted the *Hemsley* presumption that these assets were marital property.[212] Since Wayne offered no proof to the contrary, the court explained, Jane's inherit-

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201. 650 So. 2d 1281 (Miss. 1994).

202. *Id.*

203. Justice Lee concurred in the results only.

204. *Id.* at 1286 n.2.

205. *Id.* at 1285. The court explained that the "scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." *Id.* (citing McEwen v. McEwen, 631 So. 2d 821, 823 (Miss. 1994)). *See supra* part III.A.

206. *Id.*

207. *Id.*

208. *Id.* at 1285-86.

209. *Id.* at 1285. *Hemsley* created a presumption that all property acquired during the marriage was jointly accumulated by the husband and wife. *Id.* at 1285-86. To rebut this presumption with regard to an asset, it must be shown "that such asset is attributable to one of the parties' separate estates prior to the marriage or outside the marriage." *Id.* at 1285 (citing Hemsley v. Hemsley, 639 So. 2d 909, 914, 915 (Miss. 1994)).

210. *Id.* at 1286.

211. *Id.* at 1286 n.2 (citing Hemsley v. Hemsley, 639 So. 2d 909, 914 (Miss. 1994)). The court stated that this comports with other equitable distribution states which distinguish these types of property from "marital property." *Id.* (citing Hussey v. Hussey, 312 S.E.2d 267, 270 (S.C. 1984) (holding that inherited property is not part of the marital estate which is subject to equitable distribution); and Wagner v. Wagner, 358 S.E.2d 407, 410 n.3 (Va. 1987) (holding that gift property is not part of the marital estate subject to equitable distribution)).

212. *Id.* at 1286. In order to rebut the *Hemsley* presumption (that all property obtained during marriage is jointly accumulated and subject to equitable distribution), Jane had to show that her inheritance was attributable to her separate estate prior to the marriage or outside the marriage. *Id.*

ed property was "nonmarital" and not subject to equitable distribution.[213]

When nonmarital property is commingled with marital property, Justice Prather explained, it may lose its nonmarital character.[214] Jane had allowed $153,000 of her nonmarital property[215] to be used for the benefit of the entire family.[216] In addition, Wayne had returned $66,000 of this amount to Jane's nonmarital estate.[217] The court held that when the $153,000 was commingled with the joint marital estate, it lost its nonmarital character and became subject to equitable distribution.[218] However, the majority explained that the $66,000 which Wayne returned to Jane "reacquired its nonmarital character by virtue of Wayne's actions."[219]

The court also addressed the issue of how indebtedness of a married couple fits into the division of property upon divorce.[220] Wayne had incurred a $142,000 debt as a result of medical expenses for the couple's oldest child.[221] The majority explained that since this debt affected Wayne's income, thus implicating a *Ferguson* factor,[222] it must be considered in equitably distributing the marital property.[223]

The court attempted to provide a framework for chancellors to follow when dividing marital property pursuant to *Hemsley* and *Ferguson*.[224] In addition, the framework was developed to help chancellors in determining the necessity for collateral awards of alimony in light of the newly adopted doctrine of equitable distribution.[225]

Justice Prather explained that the first step is to determine the character of the parties' assets, "marital" or "nonmarital," pursuant to *Hemsley*.[226] Next, she stated, the chancellor should equitably divide the "marital" property pursuant to the *Ferguson* guidelines.[227] If this division will, in combination with each party's nonmarital assets, adequately provide for both parties, the chancellor need not go further.[228] However, if one party is left with a deficit after the property is divid-

213. *Id.*
214. *Id.*
215. *Id.* This $153,000 came from the sale of timber which Jane had inherited. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* (citing Nelson v. Nelson, 611 So. 2d 1113, 1115 (Ala. 1992)). *Nelson*, an Alabama case, held that "commingled funds are marital assets subject to equitable distribution." *Id.*
219. Johnson v. Johnson, 650 So. 2d 1281, 1286 (Miss. 1994).
220. *Id.*
221. *Id.*
222. *Id.* *See Ferguson* guideline number 7, *supra* note 97.
223. *Id.* The court stated that indebtedness should be considered when dividing the property, but apparently left to the chancellor the task of determining how to factor indebtedness into the picture. *Id.*
224. *Id.* at 1287.
225. *Id.*
226. *Id.*
227. *Id.* The nonmarital property stays vested in its owner. *Id.*
228. *Id.*

ed, then alimony should be considered.[229] In addition, the court repeated, this process does not require the divestiture of gifts or inheritances.[230] In conclusion, Justice Prather urged chancellors to provide a record which clearly reflects the factors considered in reaching their decisions.[231]

V. ANALYSIS

The Mississippi Supreme Court has gone to great lengths in creating a fair system of dividing marital property upon divorce. Frequent dissenting opinions have illustrated the sensitivity and overwhelming importance of this area of the law.[232] The most significant of the recent changes is the supreme court's recognition that homemaker services are a sufficient contribution toward a marital estate to justify the divestiture of title from the title-holding spouse.[233]

A. Recognizing the Value of Homemaker Contributions to a Marriage

Mississippi did not become a true equitable distribution state until 1993, when *Draper* abandoned the title theory. This is because until then the Supreme Court of Mississippi failed to recognize "homemaker contributions" as a sufficient contribution to the acquisition of a family's assets to justify the divestiture of title from the wage-earning spouse.[234] The court failed to recognize this even though many times the homemaker spouse was encouraged by the wage-earning spouse to stay home and take care of the children. This approach definitely ignored the very essence of the doctrine of equitable distribution: that the distribution be

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229. *Id.* *Ferguson* specifically stated that the doctrine of equitable distribution did not alter the law regarding alimony. Ferguson v. Ferguson, 639 So. 2d 921, 929 (Miss. 1994). However, *Ferguson* also stated that one of the goals of equitable distribution is to finalize the division of assets, and conclude the parties' legal relationship. *Id.*

By considering all of the property division issues first, as the *Johnson* framework requires, courts will be better able to accomplish a termination of the parties' legal relationship. However, the court failed to state whether the alimony awards are still determined pursuant to Armstrong v. Armstrong, 618 So. 2d 1278, 1282 (Miss. 1993). *See supra* note 3.

230. Johnson v. Johnson, 650 So. 2d 1281, 1287 (Miss. 1994).

231. *Id.* The court also addressed Wayne's contention that the award of child support was excessive. *Id.* The court stated that chancellors should follow the child support guidelines found in MISS. CODE ANN. § 43-19-101(1) (1972). *Id.* The court further explained that a chancellor can only depart from these guidelines with written findings of why they are inappropriate. *Id.* at 1288 (citing McEahern v. McEahern, 605 So. 2d 809, 813-14 (Miss. 1992)). It was also explained that the chancellor erred by departing from the guidelines without a written justification. *Id.*

In addition, the court addressed the chancellor's decision to give Wayne an option, upon the children's reaching their majority, to discontinue making monthly payments on the home and deed his one-half interest to Jane. *Id.* In light of the fact that the chancellor could have made this divestiture mandatory, the court declined to state that the optional divestiture was error. *Id.* The court also found that the chancellor erred in awarding Jane $5,000 in attorney's fees, because there was no finding that Jane was unable to pay them. *Id.* The court concluded by remanding the entire case for a "redetermination not inconsistent with this opinion." *Id.* at 1289.

232. *See* Johnson v. Johnson, 650 So. 2d 1281 (Miss. 1994); Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994); Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994); Draper v. Draper, 627 So. 2d 302 (Miss. 1993).

233. *See Draper*, 627 So. 2d at 306.

234. In regard to the contributions required by a spouse in order to effectuate a divestment of title, *Draper* stated: "It is sufficient contribution if one party renders services generally regarded as domestic in nature." *Id.*

equitable.[235] In fact, Mississippi's adherence to the title theory for nearly ten years longer than any other state offended equity.

Mississippi courts often worked around the title theory by awarding the non-title holding spouse alimony in the form of a lump-sum settlement, reflecting that spouse's share in the jointly accumulated assets.[236] However, no justification remained for allowing a chancellor to "reach deeply into a man's pocketbook," but not allowing the chancellor to touch his property.[237] This is especially true because, as a practical matter, the title-holding spouse often had to sell the property to be able to afford the lump-sum alimony.[238] No reason existed for allowing one spouse to retain all of the future benefits of a family investment while the other spouse was relegated to being "bought off" with a cash award.[239]

Due to the changing position of women in society and the enlightenment of people in general, there was no justification left for the rule that homemaker contributions did not justify an equitable division of property.[240] Oliver Wendell Holmes said it best:

> It is revolting to have no better reason for a law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[241]

The title theory was such a rule. The State of Mississippi blindly imitated the past for many years longer than any other state in the union.[242]

Draper finally recognized that the domestic services of the wife could be adequate to justify her receipt of an equitable interest in property titled in the name of her husband.[243] This was likely sweet music to the ears of women in Mississippi – women who had spent years raising the children, cooking the food, cleaning the home, empathizing with their husbands' hard days at work, keeping track of the family's finances, etc., and in so doing, had foregone their own

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235. Though impossible to precisely define, equitable distribution basically refers to the authority of the courts to order a transfer of property from the title holder to his or her spouse. Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4th 481, 484 (1985). In addition, the doctrine recognizes a homemaker's contribution to the acquisition of the marital estate. *Id.* Therefore, any remnants of the title theory which remained before *Draper* kept Mississippi out of the arena of equitable distribution.

236. *See, e.g.*, Reeves v. Reeves, 410 So. 2d 1300 (Miss. 1982); Clark v. Clark, 293 So. 2d 447 (Miss. 1974). *See also* supra note 2.

237. Jones v. Jones, 532 So. 2d 574, 581 (Miss. 1988) (Prather, J., concurring).

238. *Id.* at 582. *See also Reeves*, 410 So. 2d at 1300.

239. For instance, if the husband owns a business which he built during the marriage, the wife should share in the future profits of the business instead of being awarded a lump-sum alimony award. *See infra* note 249 discussing how alimony awards frequently go unpaid.

240. *Jones*, 532 So. 2d at 583 (Prather, J., concurring). Justice Prather explained that there was no good reason for "why Mississippi clings to these last vestiges of the title rule." *Id.* She explained that the reasons given for maintaining the title theory were to maintain the stability in real estate titles and to protect lienholders' rights. *Id.* These reasons, she further explained, held no validity because "no equitable distribution rule could ever alter, change, or modify lienholders' priorities." *Id.*

241. *Id.* at 584 (quoting O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

242. *Id.* at 583. Mississippi was the final adherent to the title theory. *Id.* The final states to abandon the title theory prior to Mississippi were New York and Pennsylvania in 1980, South Carolina in 1982, and West Virginia in 1983. *See* JOHN MCCAHEY, VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 3.01 (1988). Mississippi finally abandoned the title theory in 1993. *See* Draper v. Draper, 627 So. 2d 302, 305 (Miss. 1993).

243. *Draper*, 627 So. 2d at 306.

opportunities for education and success in the work-place. Subsequent cases have agreed with *Draper*.[244] Allowing adequate compensation for the services rendered by these women signaled the court's realization that homemaker services have legitimate, compensable economic value,[245] which should be accounted for upon divorce. These women could now at least be confident that they would get something of value to help them survive instead of just an award of lump-sum alimony, of which a penny is too-often never seen.[246]

The reliance of courts on lump-sum alimony as the means of distributing the marital property upon divorce ignores the realities of the epidemic of non-payment.[247] Chancellors should take care of a spouse who served as a homemaker by awarding that spouse property, whenever possible, instead of alimony. Even an unsecured creditor, upon his debtor's bankruptcy, would not envy a woman sitting on the porch waiting for the mailman on the day her alimony is supposed to arrive.[248] By awarding the homemaker property that is before the court for division, a chancellor can effectively eliminate any problems caused by the non-payment of alimony.[249] This is the classic example of a bird in the hand (receipt of a portion of the property at present) being worth several in the bush (the uncertain receipt of alimony in the future).[250]

The Mississippi Supreme Court did not stop with the abandonment of the title theory. The court continued in providing protection for homemakers in *Hemsley*. *Hemsley*'s creation of a presumption of equal contribution to assets acquired during the marriage was a monumental step in Mississippi domestic relations law. It represented a valiant attempt by the court to prevent any possibility that a chancellor would use his or her discretion to undervalue a wife's domestic contributions to a marriage. No longer would a spouse who made significant homemaker

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244. *See* Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994); Ferguson v. Ferguson, 639 So. 2d 921, 934 (Miss. 1994); Johnson v. Johnson, 650 So. 2d 1281 (Miss. 1994).

245. There have been persistent attempts made to put a monetary value on homemaker contributions. *See* Nancy R. Hauserman, *Homemakers and Divorce: Problems of the Invisible Occupations*, 17 FAM. L.Q. 41 (1983). Estimates of the value of such contributions have been as high as $40,000 per year. *See Ferguson*, 639 So. 2d at 926 n.2. In addition, as Justice Prather explained in the context of a pension plan:

> When one spouse has contributed directly to the fund, by virtue of his/her labor, while the other has contributed indirectly, by virtue of domestic services and/or earned income which both parties have enjoyed rather than invested, the spouse without retirement funds in his/her own name could instead have been working outside the home and/or investing his/her wages in preparation for his/her own retirement. When separate plans for each spouse are not in existence, it is only equitable to allow both parties to reap the benefits of the one existing retirement plan, to which both parties have materially contributed in some fashion.

Id. at 934.

246. Court ordered alimony awards frequently go unpaid, leaving women in desperate circumstances. LaRue v. LaRue, 304 S.E.2d 312, 328 (W. Va. 1983) (Neely, J., concurring). Statistics have shown that 28.4 percent of women entitled to receive alimony do not receive the full amount, and 30.5 percent of these women receive nothing at all. *Id.*

247. *Id.* at 329.

248. Other statistics support the proposition that alimony is a less attractive alternative to women today: 10.3 percent of single male parents fall below the poverty line while 34.6 percent of single female parents fall below this line. *Id.* at 328. In addition, divorced women with children now constitute a new class of the poverty-stricken. *Id.*

249. Hopefully, this will prevent the use of lump-sum alimony awards as a substitute for an equitable division of the property. By awarding the wife a portion of the "marital" property the court has before it, the chancellor can best assure that she will be provided for in the future. It is better for society in general for the wife to have an interest in the family business and the small stream of income it produces than for her to receive her share in lump-sum alimony, the receipt of which is speculative in comparison.

250. *Id.* at 330.

contributions to a marriage be punished by receiving an inequitable amount of the family's assets upon divorce, solely because she rendered her contributions outside the marketplace.

B. How to Rebut the Hemsley *Presumption Under* Johnson v. Johnson

Another important step in Mississippi domestic relations law was *Johnson*'s holding that the *Hemsley* presumption was rebuttable.[251] Although *Johnson* did not explain exactly what will rebut the *Hemsley* presumption, it unequivocally stated that it could be done.[252] The court specifically stated that inherited and gift-acquired property would rebut the presumption upon a proper showing as long as that property had not been commingled with the family assets.[253] In addition, *Johnson* placed the burden of proof on the party claiming that the property was his or her "nonmarital"[254] property.[255] The cases suggest several other situations in which the *Hemsley* presumption may be rebutted.

One way a party can likely rebut the presumption is by showing his or her spouse did absolutely nothing to contribute to the marriage. In determining whether a spouse has made a "substantial" contribution to the accumulation of the family's assets, *Ferguson* guideline number one directs chancellors to consider such spouse's contribution to the economic and emotional well-being of the family unit.[256] However, *Hemsley* removed any requirement of an economic contribution, explicitly finding that domestic services were sufficient.[257] Therefore, a spouse who served as a homemaker and successfully raised two children in a twenty year marriage will likely be entitled to a good portion of the marital property upon divorce. On the other hand, a spouse who spends twenty years of a marriage sitting in front of the television while his or her partner maintains a job and pays the bills is leaning on a slender reed.[258]

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251. Johnson v. Johnson, 650 So. 2d 1281 (Miss. 1994).

252. *Id.* at 1286.

253. *Id.*

254. "Nonmarital" was the label given by *Johnson* to property that is the parties' separate property and is not subject to division with the other spouse upon divorce. *Id.*

255. *Id.* The court explained that Mrs. Johnson initially rebutted the presumption that her inheritance was "marital" property subject to equitable distribution. *Id.*

256. Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994).

257. Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994). The court stated: "We, today, recognize that marital partners can be equal contributors whether or not they both are at work in the market place." *Id.*

258. Community property jurisdictions generally require a fifty-fifty split of a couple's property upon divorce. Equitable distribution allows a chancellor to avoid the unjust results that the community property system often causes by examining the history of the marriage and the relative contributions of each spouse, and reaching a settlement which best reflects the parties' respective contributions. *See* Chamblee v. Chamblee, 637 So. 2d 850 (Miss. 1994). The court explained in *Chamblee* that:

> The contrast between community property and equitable division is clear: in the former one must conform to a strict intransigent rule which has little consideration for the realities of each individual case while in the latter one has the flexibility to do what equity and justice requires. It is the opinion of this court that the rule of equitable division is the better rule and the rule that Mississippi should continue to maintain.

Id. at 864.

Another way that the *Hemsley* presumption can be rebutted is by a valid prenuptial agreement.[259] This concept was reaffirmed in *Smith v. Smith*.[260] However, under *Smith*, just as in the inheritance context, for spouses to commingle assets covered by a prenuptial agreement is ill-advised.[261] In addition, the court will generally only enforce such agreements at death or divorce.[262] One lesson to be learned from the recent cases is that spouses should keep their nonmarital property separate and distinct from any jointly-owned property if they want such property to be exempt from distribution at the time of divorce.[263]

Another possible way for a spouse to rebut the *Hemsley* presumption is by proving that the property was an inter-spousal gift.[264] However, this issue has not yet been addressed by the court in light of the new doctrine of equitable distribution. It has been suggested that the character of an inter-spousal gift may depend on whether the gift is a highly-personalized one, such as a piece of jewelry, or whether it is a more impersonal type of gift, such as a living-room set.[265] Impersonal gifts, as *Ferguson* suggested, are more likely to be considered "marital" property subject to equitable distribution.[266]

By creating a presumption of equal contribution, *Hemsley* helped assure that chancellors would not wield their discretion in a gender-based fashion. However, as illustrated above, the presumption could result in an injustice in situations such as that in which one spouse receives an inheritance during the marriage. Therefore, by holding that the presumption is rebuttable, *Johnson* gave chancellors the flexibility to achieve the fairness that a strict presumption would likely have prohibited in some situations.

C. Issues Left Unresolved

Foremost of the questions left open is: What has to be shown to rebut the *Hemsley* presumption that the parties contributed equally to the acquisition of any property accumulated during the marriage?[267] This is especially important when one spouse claims that certain property is his or her nonmarital property and the other party contests that fact. The *Johnson* Court did not have the occasion to address the evidence necessary to rebut the *Hemsley* presumption because the husband there did not dispute the nonmarital character of the wife's assets.[268]

What should a married person do to prevent his or her spouse from successfully disputing the nonmarital character of his or her property? Since the initial burden of proof is on the party claiming that the particular asset is his or her nonmarital property,[269] it is likely a good idea for a party to build and maintain a

259. *See* Smith v. Smith, 656 So. 2d 1143 (Miss. 1995).
260. *Id.*
261. *Id.* In *Smith*, the court seemed to find that Mr. Smith's bank account, even though it consisted of his inheritance, became a marital asset once he put Mrs. Smith's name on the bank account. *Id.* at 1147.
262. *Id.*
263. *See* Johnson v. Johnson, 650 So. 2d 1281, 1286 (Miss. 1994).
264. *See* Ferguson v. Ferguson, 639 So. 2d 921, 929 (Miss. 1994).
265. *Id.* (citing LaRue v. LaRue, 304 S.E.2d 312, 335-36 (W. Va. 1983) (Neely, J., concurring)).
266. *Id.*
267. *See* Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994).
268. Johnson v. Johnson, 650 So. 2d 1281, 1286 (Miss. 1994).
269. *Id.*

"paper trail" which fully documents the source of such property. In some circumstances, even documentation of the source of the asset may be misleading. One such occasion would be when a parent leaves his or her child a piece of property in a will with the intent that the property be shared equally with the child's spouse. If the parent leaves the property in the name of his or her adult-child and fails to express his or her intent that the property be shared equally with the child's spouse, the child may be able to receive the property in its entirety upon divorce,[270] even though it is in direct contravention of the parent's intent. This sends a message to Mississippians to fully express their intent when leaving someone property in a will.

What actions are necessary to prevent one's nonmarital property from becoming commingled with the marital property and subject to division at divorce? Clearly, when one spouse uses money derived from his or her inheritance for the benefit of the family, such money loses its nonmarital character.[271] *Smith* indicates that even including the name of one's spouse on a bank account for convenience can change the character of the inherited money in the account from nonmarital to marital.[272] Therefore, a party who does not want his or her nonmarital property to be subject to division at divorce should go to great lengths to keep such property separate and distinct from his or her spouse.

Another issue that remains unresolved is when a prenuptial agreement should be given effect. The majority in *Smith* held that the prenuptial agreement at issue there could only be recognized at the dissolution of the marriage or the death of one of the parties.[273] However, the court there seemed to confuse prenuptial agreements, which the majority explained were "enforceable like any other contract," with property division, which a chancellor only has the authority to order upon divorce.[274] Therefore, until the court rules further on the enforceability of prenuptial agreements parties should expressly state that any such agreement shall take immediate effect, but even this may be insufficient. Until the Supreme Court of Mississippi gives immediate operative effect to prenuptial agreements, such agreements are of little use in protecting one's nonmarital property. Could the court's failure to give strength to such agreements discourage some of the many marriages that people would otherwise enter into later in life when they have already acquired substantial assets through their own individual efforts? The court's holding in *Smith*, insofar as it failed to give the prenuptial agreement there the same effect as any other contract, discourages the marital relationship and violates public policy.

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270. If the parents leave property to their child (and in that child's name) in a will, it would be difficult for that child's spouse to prove that the parents intended for the child to share the property equally with the spouse. Therefore, unless the inheriting child voluntarily disclosed that the parent intended the spouse to share in the property, the spouse would have a difficult time proving the parent's intent.

271. *Johnson*, 650 So. 2d at 1286.

272. Smith v. Smith, 656 So. 2d 1143, 1145-46 (Miss. 1995).

273. *Id.* at 1147-48.

274. When a court is interpreting a contract, its goal should be to give effect to the intent of the parties. Therefore, if the parties intended for their prenuptial agreement to take immediate effect, as the parties in *Smith* did, the court has no authority to enforce the contract only at death or divorce. Enforcing an antenuptial agreement is an entirely separate issue from property division, which the Mississippi Supreme Court has consistently held can only be effected upon divorce. *See, e.g.*, Gardner v. Gardner, 618 So. 2d 108, 115 (Miss. 1993); Thompson v. Thompson, 527 So. 2d 617, 623 (Miss. 1988).

Several other unanswered questions remain regarding the classification of property as marital or nonmarital: What is the character of property received in exchange for nonmarital property? What is the character of money acquired by the sale of nonmarital property? If the money is nonmarital, what type of money came from the sale of one's inheritance or other nonmarital property? Is the increase in value of one's nonmarital property during the marriage subject to division upon divorce? What is the character of benefits received from worker's compensation, personal injury, or social security claims? The Mississippi Supreme Court will likely address these and other questions in the near future as the doctrine of equitable distribution continues to take shape in Mississippi.

Although the general principles of the new doctrine of equitable distribution seem to be in place, the implementation and refinement of those principles is a different matter. In some cases, such as *Ferguson*, the court appears to have over-hastily addressed issues that were not before it.[275] However, most of this was likely done for the benefit of chancellors until the court has time to further define this doctrine through case law. It is important to note that the advisory portions of the opinions, such as the *Ferguson* guidelines, likely do not have the precedential value of the court's treatment of the factual pattern then before it. However, in due time, cases will fill in the gaps. Therefore, practitioners should be careful not to read too much into the opinions. In addition, lawyers should not be afraid to look to other jurisdictions to assist the court (and their clients) in this ongoing developmental process.[276]

VI. CONCLUSION

Due to the Mississippi Supreme Court's recent decisions regarding marital property division, Mississippi's homemakers can sleep better at night. The supreme court's abolition of the title theory set the stage for the development of the doctrine of equitable distribution, and the court proceeded at break-neck speed. In addition, the *Hemsley* Court finally recognized the value of the contributions of a homemaker, who may have sacrificed his or her own career potential for the sake of the other spouse.

Johnson served to eliminate some of the concerns that the *Hemsley* presumption brought about by explaining that the presumption was rebuttable. Though this rebuttable presumption will likely be the subject of much future litigation, it will help protect a person's inheritance, inter vivos gifts, and similar types of property from being subject to division upon divorce. The recent changes in this area better account for the realities of modern marriage and the changed position of women in today's society. The Supreme Court of Mississippi has worked diligently to create a fair system of marital property distribution, and should be commended for its efforts.

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275. The *Ferguson* guidelines are one example of the court addressing issues that were not before it, because many of the guidelines did not relate to the *Ferguson* case itself. Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994).

276. This is evidenced by the fact that in *Ferguson*, *Hemsley*, and *Johnson* the court looked to other jurisdictions to help them define the new doctrine of equitable distribution.