IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01218-COA

MATTHEW BURNHAM **APPELLANT**

v.

DANA BURNHAM **APPELLEE**

DATE OF JUDGMENT:	06/26/2012
TRIAL JUDGE:	HON. DAVID SHOEMAKE
COURT FROM WHICH APPEALED:	COVINGTON COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	THOMAS T. BUCHANAN JOHN D. SMALLWOOD
ATTORNEY FOR APPELLEE:	DAVID ALAN PUMFORD
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DIVORCE GRANTED; CHILD SUPPORT AWARDED; MARITAL ASSETS DIVIDED; AND APPEAL BOND DISMISSED
DISPOSITION:	AFFIRMED IN PART, REVERSED AND REMANDED IN PART - 04/08/2014
MOTION FOR REHEARING FILED:	04/17/2014 - GRANTED; AFFIRMED - 06/16/2015
MANDATE ISSUED:	

EN BANC.

FAIR, J., FOR THE COURT:

MODIFIED OPINION ON MOTION FOR REHEARING

¶1. The motion for rehearing is granted. The original opinion is withdrawn and this opinion substituted.

¶2. In this appeal from a judgment of divorce, Matthew Burnham argues that the chancery court ordered him to pay too much child support and that its division of the marital property

was inequitable. We find that substantial evidence supports the chancellor's finding that Matthew could earn, and had earned, more than he claimed to be making, and that the property division, though unequal, was within the chancellor's discretion because it was calculated to eliminate the need for alimony. We affirm the judgment.

STANDARD OF REVIEW

¶3. Matthew contends that the judgment should be subject to a "heightened" standard of review because the chancellor largely adopted the proposed findings of fact and conclusions of law submitted by Dana. We do not agree; in *Bluewater Logistics LLC v. Williford*, 55 So. 3d 148, 155-157 (¶¶24-33) (Miss. 2011), the Mississippi Supreme Court unambiguously held that the "heightened scrutiny" standard sometimes articulated in the past was illusory and that there is, in practice, no special standard of review for cases where the chancellor adopts the proposed findings of fact offered by one of the parties. Last year, the supreme court unanimously reaffirmed *Bluewater*, holding: "[T]his Court recently rejected the argument that factual findings should be reviewed under any sort of 'heightened scrutiny,' even if they are adopted verbatim from a party's proposed findings of fact." *Miss. Comm'n on Envtl. Quality v. Bell Utils. of Miss. LLC*, 135 So. 3d 868, 877 n.9 (Miss. 2014).

¶4. "When [an appellate court] reviews a chancellor's decision in a case involving divorce and all related issues, our scope of review is limited by the substantial evidence/manifest error rule." *Yelverton v. Yelverton*, 961 So. 2d 19, 24 (¶6) (Miss. 2007). Therefore, this Court will not disturb the chancellor's findings "unless the chancellor was manifestly wrong,

clearly erroneous or a clearly erroneous standard was applied." *Id.* (citation omitted).

DISCUSSION

¶5. Matthew and Dana were married in 1999. The marriage produced two daughters, born in 2006 and 2008. At the time of the separation, Dana was a stay-at-home mom, while Matthew was a biology instructor at Jones County Junior College and a part-time farmer. Ultimately, the parties agreed to an irreconcilable differences divorce with Dana having custody of the children. The issues of child support, property division, and alimony were submitted to the court and form the basis of Matthew's appeal.

1. Child Support

¶6. Matthew was ordered to pay $600 per month in support of his two children. On appeal, he argues that the chancellor erred by not following the child-support guidelines, which for two children specify 20% of the obligor parent's adjusted gross income. *See* Miss. Code Ann. § 43-19-101 (Supp. 2014). According to Matthew, the number the chancellor should have arrived at had he followed the guidelines is $523.61 per month.

¶7. Matthew's Rule 8.05[1] statement gave his monthly gross income as $4,189.58 "based on one check from 2012." But his 2011 W-2 from JCJC indicated gross monthly income of approximately $4,548, and the 2010 figure is even higher. If the chancellor had applied the guidelines to the $4,548 number and accepted Matthew's adjustments, he would have arrived at approximately $600 per month, which is what was ordered. Matthew also makes

[1] UCCR 8.05.

some dubious adjustments to his income, such as $667 per month for "mandatory insurance," but Dana has not cross-appealed asking for an increase in support.

¶8. Furthermore, Matthew's argument is premised around his claim that his income was – and only could be – the salary he was paid by Jones County Junior College. But the chancellor was quite clear that, even though he apparently accepted Matthew's claim of a gross monthly income from the college of $4,190, as well as Matthew's various downward adjustments, additional income was imputed because Matthew had the ability to earn more.

¶9. The record supports this overwhelmingly. Matthew had a Ph.D. and his job at the junior college required him to work, by his own admission, only six hours a day for nine months out of the year. According to his prior W-2s, Matthew had previously been earning up to ten thousand dollars a year more from the teaching position, and it is unclear why he earned less at the time of the divorce. Matthew also previously had a side business trading in cattle, and though he claimed it did not make money, the chancellor found that Matthew had not been forthcoming about his finances. Matthew was also awarded marital assets, including real property, intended to be used to generate additional income.

¶10. All of these facts support the chancellor's conclusion that Matthew could earn more money than he claimed to be making at the time of trial. The chancellor may impute additional income to an obligor parent who has voluntarily chosen to make less than he has the capacity to earn. *Selman v. Selman*, 722 So. 2d 547, 555 (¶36) (Miss. 1999).

¶11. The amount of income the chancellor would have to impute to Matthew was quite

small and is readily determinable – about $380 per month, or roughly $4,560 per year, if we accept that the chancellor employed the guidelines, as he said he did. Furthermore, the chancellor's failure to explicitly state how much income he imputed to Matthew is not reversible error. *Clark v. Clark*, 754 So. 2d 450 (Miss. 1999), is directly on point. There, the chancellor imputed an unspecified amount of income to the father and awarded $600 per month in support for three children. The supreme court held:

> [W]hen a chancellor chooses not to follow the guidelines, this Court has enforced the statutory requirement that the chancellor make an on-the-record determination that the guidelines do not apply. In this case, Richard reported a gross income of $30,500 in 1996 and was ordered to pay a total of $600 per month in child support. Even if Richard's reported gross income were not adjusted for taxes, etc., as provided for in the statute, the $600 award would exceed the statutory guidelines. That is, the amount awarded was approximately 23.61% of the gross income reported in Richard's 1996 tax return.
>
> However, "this Court is charged with reviewing the entire record." *Anderson v. Anderson*, 692 So. 2d 65, 71 (Miss. 1997). The chancellor found, based on expert testimony and Richard's own testimony, that Richard was hiding assets and income, in order to avoid financial responsibility to his children and his wife of 33 years. In fact, based solely on the testimony regarding the payment of Richard's employees, it was evident that Richard made more than he said he did (or he could not have paid his workers). Thus, applying the statutory guidelines to Richard's reported income would not be accurate in this case.
>
> Furthermore, a deeper study of the record indicates that the chancellor was not intentionally deviating from the statutory guidelines. Rather, the chancellor was attempting to follow the statutory schedule for child support payments.
>
> Moreover, the $600 monthly award would be correct, if Richard's adjusted gross income were $32,727.27. The record supports such an award. Also, at the motion for rehearing, the chancellor offered to re-evaluate the figures, if Richard would submit more complete financial data. Thus, any perceived inaccuracies in the calculation could have been corrected, if Richard had been

> more forthcoming about his actual income. For all these reasons, it appears that Richard's argument on this point is without merit.

Id. at 459 (¶¶53-56) (internal citations omitted).

¶12. We affirm the chancellor's award of child support since the imputation of additional income is supported by the record.

2. Equitable Division

¶13. Matthew's principal complaint is with the division of the marital property: he claims that it was unfair to award Dana most of the assets while saddling him with the marital debt. Not counting household goods, the couple's marital assets had a total value of $521,130.48 accompanied by a total debt of $225,472.79.

¶14. Dana was awarded an automobile valued at $27,000, a Roth IRA in her name valued at $1,226.87, and half of Matthew's deferred compensation and state retirement accounts, together valued at $53,911.47.

¶15. Matthew received half of his retirement and deferred compensation accounts, plus a Roth IRA in his name worth $730.67, two automobiles valued at $5,000 each, 9.62 acres of land valued at $10,000, and a mobile home and accompanying land valued at $15,000.

¶16. The two largest assets were the marital residence, valued at $250,000, and approximately 51 acres of land which had been used in Matthew's farming operation, valued at $94,350. The chancellor ordered these two properties to be held until the youngest child reaches the age of majority, at which point they would be sold. Matthew would receive 75% of the value of the 51 acres and 25% of the value of the home, with Dana getting the rest.

In the meantime, Dana would have possession of the home, Matthew the 51 acres, and Matthew would be responsible for the encumbrances, taxes, and insurance on both properties.

¶17. The debts were Matthew's student loans, at $8,479.95, the mortgage on the marital home, at $48,554.63, a home-equity line of credit secured by the house of approximately $100,000, and a $68,438.21 mortgage on the 51 acres.

¶18. To equitably divide property, the chancellor must: (1) classify the parties' assets as marital or separate, (2) value those assets, and (3) equitably divide the marital assets. *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss 1994). The value of the property and its status as marital or separate is not in dispute. In *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994), the Mississippi Supreme Court identified the factors that should be taken into consideration when determining the equitable division of marital property:

> 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.

¶19. The chancellor undertook a detailed analysis of these factors. During the twelve-year marriage, Matthew had obtained his Ph.D., while Dana, though she held a bachelor's degree, had stayed at home since the children were born. Dana had moved with the family several times for Matthew's educational and job opportunities. Matthew had a much higher earning capacity than Dana, who was making only eleven dollars per hour since she had rejoined the labor force.

¶20. As to dissipation, Matthew had liquidated much of the (marital) property that had been used in his cattle operation, contrary to a temporary order of the chancery court; and he had funded the cattle operation in part with money that was borrowed against the house.

Matthew claimed to lose money in the side business, but he could not provide an adequate accounting despite his education and apparent sophistication. He had also used marital funds to pay down a student loan after the separation, apparently because that debt was not dischargeable in bankruptcy. It was also noted that the house was located next to Dana's parents' home, on land they had sold the Burnhams, and that Dana and the children desired to stay in the house, near their family. "It is preferable that the party who is awarded [custody of the children] should also be awarded use of the marital home." *Chamblee v. Chamblee*, 637 So. 2d 850, 863 (Miss. 1994).

¶21. Perhaps the most important fact was that the chancellor had made the lopsided award with the intent of doing away with the need for alimony. "Alimony and equitable distribution are distinct concepts, but together they command the entire field of financial settlement of divorce. Therefore, where one expands, the other must recede." *Pierce v. Pierce*, 132 So. 3d 553, 564 (¶25) (Miss. 2014) (quoting *Ferguson*, 639 So. 2d at 929).

¶22. It has been said many times that "equitable distribution does not mean equal distribution." *Faerber v. Faerber*, 150 So. 3d 1000, 1005 (¶12) (Miss. Ct. App. 2014). Given the chancellor's thorough analysis of the *Ferguson* factors, supported as it is by record evidence, we can find no abuse of discretion in the equitable, if unequal, award.

¶23. Finally, Matthew claims that he is simply unable to make the monthly payments on the debts assigned to him. Again, he premises his argument around the assumption that his income-earning capacity is equal to what he earns from the teaching position at Jones County

Junior College. But as we explained in our analysis of the first issue, the chancellor determined that Matthew was able to earn more, and that finding is supported by the record. We note that, prior to the divorce, the Burnhams were able to pay these debts, and others, while only Matthew worked. Moreover, his argument comparing his monthly salary to the monthly debt service is specious; Matthew was awarded numerous saleable assets, and a significant part of the monthly cost he claims to be unable to pay is attributable to the original, fifteen-year note on the marital home, which would be paid in full approximately five years after the divorce judgment.

¶24. In conclusion, we find that Matthew has failed to show that the chancery court abused its discretion in its division of the marital property.

3. Supersedeas

¶25. Matthew filed an appeal bond to the Supreme Court of Mississippi with supersedeas. The chancery court, noting deficiencies in the supersedeas bond, entered a judgment discharging and dismissing the bond.

¶26. According to the Mississippi Rules of Appellate Procedure, "[t]he appellant shall be entitled to a stay of execution of a money judgment pending appeal if the appellant gives a supersedeas bond, payable to the opposite party, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state . . . ." M.R.A.P. 8(a).

¶27. The appeal bond filed by Matthew contained only his signature and one other for the

guarantee. In *City of Belzoni v. Johnson,* the supreme court held that "[t]he City cannot be considered a surety within this Court's interpretation of the rules governing supersedeas bonds, because the City was already principally liable for a portion of the judgment." *City of Belzoni v. Johnson*, 121 So. 3d 216, 221 (¶12) (Miss. 2013). We apply the same rule here. Matthew is already primarily responsible for the monetary judgment, so he cannot serve as a surety for the appeal bond. The chancery clerk lacked authority to accept the bond because the bond was invalid. The chancery court did not err in discharging and dismissing the supersedeas bond.

¶28. **THE JUDGMENT OF THE COVINGTON COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

LEE, C.J., GRIFFIS, P.J., BARNES, ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. JAMES, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED IN PART BY IRVING, P.J. CARLTON, J., NOT PARTICIPATING.

JAMES, J., CONCURRING IN PART AND DISSENTING IN PART:

¶29. I agree with the part of the majority opinion that denies the supersedeas bond. Matthew is primarily responsible for the monetary judgment, and therefore he cannot sign as a surety for the appeal bond. Matthew has not satisfied the requirements of Mississippi Rule of Appellate Procedure 8(a), and therefore, he is not entitled to a supersedeas bond. As to the calculation of child support and the equitable distribution of marital assets and debts, I respectfully dissent.

¶30. In the case at hand, the trial court essentially adopted the proposed findings of fact and

conclusions of law submitted by Dana. The Mississippi Supreme Court has previously held that "[w]here the chancellor adopts, verbatim, findings of fact and conclusions of law prepared by a party to the litigation, this Court analyzes such findings with greater care[.]" *Brooks v. Brooks*, 652 So. 2d 1113, 1118 (Miss. 1995) (citing *OmniBank of Mantee v. United S. Bank*, 607 So. 2d 76, 83 (Miss. 1992)).

¶31. Further, "the deference normally afforded a chancellor's findings of fact is lessened." *Id.* This does not mean that the appellate court is the fact-finder, nor does it change our standard of review. This means that the Court will take a closer look to make sure that our law is followed as interpreted by our courts. Chancellors are charged with the duty of being independent fact-finders, and the adoption of an opinion written by one of the attorneys is not the finding of the chancellor based on his independent reasoning, even though the chancellor may have a similar opinion.

¶32. In *Bluewater Logistics LLC v. Williford,* 55 So. 3d 148, 157 (¶32) (Miss. 2011), the supreme court announced that the standard of review has not changed. The court stated:

> If we are to adopt and apply a "heightened-scrutiny" standard, simple fairness and justice require[] us to publish that standard—in more than name—to the bench and bar. And because that has not been done—and because we decline to do it today—we shall continue to apply the familiar abuse-of-discretion standard to a trial judge's factual findings, even where the judge adopts verbatim a party's proposed findings of fact.

Id. The court also stated: "when a chancellor adopts verbatim, or nearly verbatim, a party's proposed findings of fact, our precedent provides that we should apply 'heightened scrutiny' to the chancellor's finding of fact. This rule is fairly well-settled and accepted. Yet our

precedent provides little guidance as to how we are to comply with our duty to 'heighten' our scrutiny[.]" *Id.* at 156 (¶26). Also, it is important to note that the judge and the attorney have different duties. It appears that fairness would be best promoted if these duties remained separate.

¶33. However, in *Bluewater,* the court did not overturn the previous precedent of allowing heightened scrutiny. Therefore, the caselaw supporting heightened scrutiny is still good law. Further, it should be noted that in *Bluewater,* the court did not have the two documents to compare, but the supreme court saw fit to engage in an in-depth discussion of the standard of review. Therefore, there is nothing in this separate opinion that suggests that the standard of review has changed.

¶34. Here, the record contained copies of the Appellee's proposed findings of fact and the chancellor's findings of fact that were adopted verbatim from the Appellee's findings of fact, and I have had an opportunity to examine them thoroughly. My opinion is based on the law not being specifically followed as interpreted by our supreme court, and the standard of review is not dispositive in this case. My view aligns with the separate opinion in *Bluewater,* which concurs in part and in result, and states that "[h]eightened scrutiny refers to appellate review with a heightened sensitivity to the possibility of error. . . . In other words, the Court still defers to the chancellor's findings but with a closer examination of the record." *Id.* at 167 (¶80) (Waller, C.J., concurring in part and in result).

¶35. The record indicates that Matthew's adjusted gross income from Jones County Junior

College is $2,618.04 per month. The trial court found that Matthew receives additional income from farming operations. However, there is no documentation that provides for the amount per month he receives from farming. It is also unclear whether Matthew still receives this supplemental income from farming.

¶36. Matthew argues that the appropriate amount for his child-support obligation for the two minor children is $523.61, which is twenty percent of his net income. The trial court ordered Matthew to pay $600 per month. The trial court based the child-support award on the net income Matthew receives from Jones County Junior College and cash received from the farming operation. However, there is nothing in the record to establish the amount of income received from the farming operation. The trial court imputed an undetermined amount of income to Matthew.

¶37. Matthew argues that a deviation from the child-support guidelines requires a written finding on the record explaining the need for such deviation. Miss. Code Ann. § 43-19-101 (Supp. 2014). The criteria for finding an appropriate deviation are as follows:

> (a) Extraordinary medical, psychological, educational or dental expenses.
>
> (b) Independent income of the child.
>
> (c) The payment of both child support and spousal support to the obligee.
>
> (d) Seasonal variations in one or both parents' incomes or expenses.
>
> (e) The age of the child, taking into account the greater needs of older children.
>
> (f) Special needs that have traditionally been met within the family budget even though the fulfilling of those needs will cause the support to exceed the

proposed guidelines.

(g) The particular shared parental arrangement, such as where the noncustodial parent spends a great deal of time with the children thereby reducing the financial expenditures incurred by the custodial parent, or the refusal of the noncustodial parent to become involved in the activities of the child, or giving due consideration to the custodial parent's homemaking services.

(h) Total available assets of the obligee, obligor and the child.

(i) Payment by the obligee of child care expenses in order that the obligee may seek or retain employment, or because of the disability of the obligee.

(j) Any other adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt.

Miss. Code. Ann. § 43-19-103 (Supp. 2014).

¶38. "The child support award guidelines are 'a rebuttable presumption in all judicial or administrative proceedings regarding the awarding or modifying of child support awards in this state.'" *Grove v. Agnew*, 14 So. 3d 790, 793 (¶7) (Miss. Ct. App. 2009) (quoting Miss. Code Ann. § 43-19-103). Thus, "[i]n the absence of specific findings of fact to support a deviation from the child support guidelines, the chancellor's award is not entitled to the presumption of correctness under the statute." *Osborn v. Osborn*, 724 So. 2d 1121, 1125 (¶20) (Miss. Ct. App. 1998).

¶39. I find no specific finding of fact to support deviation. Instead, there is merely an order for Matthew to pay a seemingly arbitrary amount of $600. The ordered amount of support is almost twenty-three percent of his net income. There is no mention of any extraordinary circumstances that would warrant a departure from the child-support guidelines. Although

the children attend private school, the maternal grandparents agreed to pay the tuition. Accordingly, I find that the trial court abused its discretion in deviating from the child-support guidelines without specific on-the-record findings. The majority opinion supports the chancellor's award of child support without a finding on the record of deviating from the statutory guidelines for child support. The majority opinion bases its findings on the record as a whole. However, the record as a whole does not support the specific monetary award of $600 per month.

¶40. Matthew next asserts that the trial court erred in its division of marital assets and debts by awarding Dana the bulk of the marital assets and assigning Matthew all the marital debt. In the final judgment of divorce, the trial court prohibited either party from selling any of their real property until the youngest child turned twenty-one years of age. In the meantime, Matthew must continue to pay the mortgage, maintenance costs, and taxes on all three parcels of property, including the marital home. Matthew argues that this prohibition on selling the real property is inequitable, because the court did not take into consideration the amount of interest that Matthew would be paying over the course of the prohibition, which diminishes his portion of the award.

¶41. The following steps must be taken in the distribution of marital property: "(1) classify the parties' assets as marital or separate; (2) value those assets; and (3) equitably divide the marital assets pursuant to the *Ferguson* factors." *Faerber v. Faerber*, 13 So. 3d 853, 858 (¶18) (Miss. Ct. App. 2009) (citing *Ferguson v Ferguson,* 639 So. 2d 921, 928 (Miss. 1994)).

In *Ferguson,* the Mississippi Supreme Court identified multiple factors that should be taken into consideration when determining the equitable division of marital property.

¶42. Here the trial court awarded Dana $283,226.87[2] of the marital property. Matthew was awarded marital property totaling $237,903.61. The trial court then awarded Dana half of Matthew's Public Employees' Retirement System account and deferred-compensation account, which was an additional $53,911.47, bringing the total award for Dana to $337,138.34 and Matthew's total award to $183,992.14.

¶43. Further, the trial court ordered that all the real property be sold when the youngest child turns twenty-one years of age. At that time, Dana would receive seventy-five percent of the proceeds from the sale of the house, and Matthew would receive twenty-five percent of the proceeds. Likewise, when the real property awarded to Matthew is sold, Matthew would receive seventy-five percent of the proceeds from the sale and Dana would receive twenty-five percent. The taxes, insurance, and maintenance for all the real property would be Matthew's responsibility. In terms of marital debt, Matthew was ordered to pay the Regions bank loan of $148,554.63, the Regions Bank farm loan of $68,438.21, and the AES loan of $8,479.95. The total amount of debt Matthew is ordered to pay is $225,472.79, not including any interest on any of the loans. This leaves Matthew with a deficit of $41,480.65.

¶44. The trial court reasoned that Matthew is in a better position to pay the debt than Dana,

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[2] The value of the property, both real and personal, is the value at the time of the final judgment.

due to his level of education, current work schedule, and farm equipment. Matthew has a Ph.D. in biology and three other degrees, which greatly increases his earning capacity. In determining the ability of Dana to pay any of the marital debt, the trial court failed to consider that Dana has a college degree and is currently working, earning $11 an hour. Dana is capable of obtaining employment that pays more money and is equal to her level of education. Also, Dana spent part of the marriage as a wage-earning spouse and had only been out of the workforce since the birth of their youngest child in 2008.

¶45. Upon considering the *Ferguson* factors, "the chancellor should determine whether the equitable division of the marital property, considered in light of the non-marital assets, adequately provides for both parties." *Jenkins v. Jenkins*, 67 So. 3d 5, 9 (¶11) (Miss. Ct. App. 2011). Matthew is not adequately provided for in the property division as set forth in the final judgment of the trial court. The amount of payments the trial court required Matthew to pay each month exceeds his $2,618.04 salary each month. Our supreme court has stated that when determining property division,"[f]airness is the prevailing guideline[.]" *Lowrey v. Lowrey*, 25 So. 3d 274, 285 (¶26) (Miss. 2009).

¶46. After the equitable division of property is determined, the trial court must then determine whether or not alimony is appropriate. In *Ferguson,* the Court stated that "[a]ll property division, lump sum or periodic alimony payment, and mutual obligations for child support should be considered together." *Ferguson,* 639 So. 2d at 929.

¶47. The trial court conducted a *Ferguson* analysis as well as an *Armstrong*[3] analysis. The ultimate conclusion was that alimony was not needed because the trial court divided the marital assets and liabilities as previously discussed. The trial court, however, arrived at an inequitable result concerning the property division.

¶48. The trial court opined that Matthew may have acted in bad faith in terms of his financial situation and his dissipation of marital assets. Although the farming equipment was sold, Matthew reduced the marital debt by paying student-loan debt down aggressively. Matthew also testified that he acted under the advice of his former counsel. The trial court concluded that by selling farming equipment and securing a home-equity line of credit, Matthew increased the liabilities of the marriage, and that Matthew's actions constituted a dissipation of assets.

¶49. The trial court found, however, that the line of credit and sale of farm equipment were used to pay for vehicles, decrease debts, and further Matthew's farming operation. In the past, this Court has found that "[w]ith respect to the dissipation of marital assets, . . . ordinary and reasonable living expenses used during separation generally do not constitute a dissipation of marital assets." *Faerber,* 13 So. 3d at 862 (¶34). I am of the opinion that obtaining the home-equity line of credit and selling of farming equipment do not constitute dissipation of assets.

¶50. I would find that the trial court abused its discretion in determining the division of

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[3] *Armstrong v. Armstrong,* 618 So. 2d 1278, 1280 (Miss. 1993).

marital assets and debts. The majority opinion supports the chancellor's division of marital assets to avoid payment of alimony. However, this is not a justification when inequitable results are produced.

¶51. It is important to note in the present case that the trial court considered that Dana was entitled to alimony. Here, the parties were married for twelve years, prior to the divorce, and two children were born to the marital union. In the case of *Buckley v. Buckley,* 815 So. 2d 1260, 1266 (¶34) (Miss. Ct. App. 2002), the Court found that the trial court erred in denying alimony even though the wife was awarded more property in equitable division than the husband. The court, citing *Armstrong,* stated, "when alimony is not awarded at all or is considered inadequate, normally we will affirm unless 'the decision is seen as so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion'" *Id.* at 1262 (¶9). The Court in quoting *Armstrong* further stated, "alimony is not a completely independent financial issue in a domestic case, in which consideration is hermetically sealed from other financial matters. Alimony together with equitable distribution of property work together, to provide for the parties after a divorce. Therefore where one expands, the other must recede." *Id.* at (¶10).

¶52. The division of property in this case has an oppressive result for Matthew, and it evidences an abuse of discretion. An award of alimony can be modified upon a showing of a material change in circumstances. *Russell v. Russell,* 148 So. 3d 1052, 1054 (¶7) (Miss. Ct. App. 2014). Alimony can also be terminated upon the death of the obligor or the

remarriage of the obligee. *Id.* However, absent fraud or a contractual provision stating otherwise, neither a property settlement agreement or judgment nor lump-sum alimony can be modified. *Smith v. Little,* 834 So. 2d 54, 60 (¶23) (Miss. Ct. App. 2002) (citing *Norton v. Norton,* 742 So. 2d 129 (Miss. 1999)). Unless the judgment awarding child support and equitable distribution in this case is reversed and remanded, it will create prolonged oppressive results for Matthew. However, child support can be modified upon a showing of a substantial and material change of circumstances. *Evans v. Evans,* 994 So. 2d 765, 770 (¶16) (Miss. 2008) (citing *Gillespie v. Gillespie,* 594 So. 2d 620, 623 (Miss. 1992)).

¶53. The trial court abused its discretion and reached an inequitable result in terms of establishing child support and dividing marital property. Matthew was ordered to pay almost twenty-three percent of his income without an explanation from the trial court as to why a deviation from the child-support guidelines was necessary. The trial court deviated from the child-support guidelines without a proper on-the-record finding. Matthew was ordered to pay all of the marital debt, while Dana was awarded all of her assets free and clear from debt.

¶54. I would therefore affirm the trial court's judgment on the denial of the supersedeas bond and reverse and remand as to the issue of child support and equitable distribution of marital assets.

IRVING, P.J., JOINS THIS OPINION IN PART.