IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CONSOLIDATED CAUSE NOS.: 2010-CA-1450 AND 2011-CA-391

GARY C. MARTER, APPELLANT

VS.

CELESTE G. MARTER, APPELLEE

APPEAL FROM THE CHANCERY COURT OF GRENADA COUNTY

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee, Celeste G. Marter, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1) Gary Marter
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2) Celeste (Marter) Goodson
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3) Honorable Percy Lynchard
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RESPECTFULLY SUBMITTED, this the 28th day of December, 2011.

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STATEMENT OF ISSUES

The appellee, Celeste G. Marter, (now Celeste Goodson) (hereinafter referred to as Celeste) pursuant to M.R.A.P. Rule 28 (b) hereby omits providing a Statement of Issues.

STATEMENT OF THE CASE

Celeste pursuant to M.R.A.P. Rule 28 (b) hereby omits providing a Statement of the Case concerning it procedural history. A statement of facts that appellee believes to be relevant is however provided.

STATEMENT OF FACTS

Celeste and the appellant herein, Gary C. Marter, (hereinafter referred to as Gary) were married on June 1, 1978 (RE number 6, CP in 2010-CA-1450 p. 77) and were divorced pursuant to a "Decree of Divorce" entered on June 28, 2010 (RE number 2, CP in 2010-CA-1450 pp. 100-105).

The trial of this matter began on March 1, 2010, a time in which each party was pursuing claims of fault grounds for divorce against the other. (R pp. 2-181 in 2010-CA-1450) At the conclusion of the said hearing on March 1, 2010 the parties' attorneys announced to the Court that they had reached an agreement to obtain a divorce on irreconcilable differences grounds, and for the division of real and personal property between them. Said agreement would leave only the issues of alimony and attorney fees to be determined by the Court. (R p. 179 in 2010-CA-1450)

After the March 1, 2010, hearing the parties were able to finally agree only on obtaining

a divorce on the grounds of irreconcilable differences. They therefore requested the Court to hear additional testimony on the issues of division of all property, alimony and attorney fees. (R pp. 181- 184 in 2010-CA-1450)

The Court heard said additional testimony on May 6, 2010. (R pp. 181-272 in 2010-CA-1450). On June 2, 2010 Chancellor Lynchard issued his opinion (RE number 6) which was filed and recorded on June 7, 2010 (RE number 1, CP in 2010-CA-1450 pp. 6, 77-89). A "Decree of Divorce" which incorporated the provisions of Judge Lynchard's June 2, 2010 opinion, was filed and recorded on June 28. 2010. (RE number 2, CP in 2010-CA-1450 pp. 6, 100-105)

In Judge Lynchard's aforesaid opinion (RE number 6, CP in 2010-CA-1450 at pp. 85-86) Celeste was awarded the following property:

Property awarded	Value
Infinity automobile	19,675.00
Marital Residence	173,500.00
Household furnishings	5,000.00
Farm Acreage (less value of part declared her separate property)	55,000.00
Real estate lots adjoining marital home	14,444.00
Timeshare at Pigeon Forge	11,500.00
Lawnmower	1,000.00
Furniture at Farm	500.00
Pioneer Investment	22,809.03
Pioneer Investment (Celeste)	17,025.95

Joint Pioneer Investments	430.19
T. Rowe Price mutual fund	17,285.12
Morgan Keegan 401 K	52,170.98
Entergy savings plan 401k (portion)	78,926.40

The "Decree of Divorce" (RE number 2 CP in 2010-CA-1450 at p.104) however, erroneously fails to name the Morgan Keegan account and utilizes that account value in connection with the T. Rowe Price fund. The said errors were corrected by an "Order to Correct Judgment" entered on January 24, 2011 but not designated as a part of the record in this cause. The entry of said Order is however reflected in the Trial Court Docket (RE number 1, and CP in 2011-CA-391 at p.1).

The total value of the property awarded to Celeste pursuant to Judge Lynchard's written opinion and the subsequent decree of divorce is stated to be "$469,966.67". However the sum of the amounts awarded to Celeste actually total $469,266.67 or $700.00 less than the amount stated in said opinion and decree.

Gary was awarded all marital property not specifically listed as awarded to Celeste (RE numbers 2 and 6, CP in 2010-CA-1450 pp.81-85, 101-104). Said property is as follows:

Property to Gary	Value
216 Jones Rd. rental house	41,000.00
Entergy savings plan 401k less portion to Celeste	369,316.67
Cash marital assets	30,325.00
2006 and 1997 Ford F-150 pickups	9,250.00
2005 Nissan Murano	13,850.00

Computer	500.00
2 Ford Tractors	4,200.00
2 bush hogs, disk, section harrow two row planter, fertilizer distributor, lift pole, 16 foot trailer, and Honda 4-wheeler	1,825.00

The total value of the aforesaid property to Gary is $470,266.67.

An additional hearing was held on July 14, 2010 (R pp. 272-291) for the parties to argue issues they had requested the Court to reconsider in connection with the divorce decree. In an "Order Regarding Motions for Reconsideration" issued by Judge Lynchard on July 25, 2010 (RE number 3, CP in 2010-CA-1450 pp. 106-107) and filed and recorded on July 30, 2010 (RE number 1, CP in 2010-CA-1450 p. 6), the Court ordered a division of a PERS account in the sum of $11,000.00 held by Celeste and a subtraction of funds previously due from Gary to Celeste, thereby decreasing the amount to be transferred from Gary to Celeste by $5,500.00 but leaving Celeste with the PERS account. He also ordered an equal division of Gary's Entergy pension based on its value as of May 6, 2010.

Said Order further ordered the restoration of Celeste's maiden name, to "Goodman" when it should have been restored to "Goodson"; denied Gary's request that a metal building or workshop located on the farm property be declared not to be a fixture of the farm; and found all other issues argued to be without merit and denied further relief.

On December 30, 2010, Judge Lynchard entered an "Amended Order Regarding Motions for Reconsideration". (RE number 4, CP in 2011-CA-391 pp. 10-12) Said amended Order was filed and recorded on January 14, 2011.

The said amended Order essentially restated the findings contained in the initial "Order

Regarding Motions for Reconsideration" in paragraphs 1 through 7, thereof. Paragraph 8, however acknowledged that its earlier finding that Gary had used $19,675.00 out of $50,000.00 in cash marital assets in Gary's possession to purchase an Infiniti vehicle awarded to Celeste was incorrect and incorrectly charged to Celeste in the property division. The car actually purchased by Gary out of marital funds after the separation of the parties was the Nissan Murano which he was awarded. Gary was therefore Ordered to pay to Celeste $9,837.50, being one-half of the sum improperly charged to her.

The Court in the 9th paragraph of said Amended Order, corrected Celeste's name restoration from "Goodman" to "Goodson"

SUMMARY OF THE ARGUMENT

Gary raises four (4) issues in his appeal in this case. In his first issue he claims that the Court improperly determined that one half of the farm property was Celeste's separate property because of her inheritance of a one-half interest through her grandmother. He claims that the entire farm property should have been deemed to be marital property as a result of being converted to marital property through either the family use doctrine or commingling.

Neither the family use doctrine or commingling apply to the farm property in this case. The evidence introduced at trial clearly shows that Celeste inherited a one-half undivided interest in the entire farm property from her grandmother. Said interest was correctly classified by the Chancellor as her separate property.

Gary and Celeste acquired the remaining undivided one-half interest in the farm with marital assets, and the Chancellor correctly held that this portion was subject to equitable division.

Gary as his second issue objects to the valuation placed on the farm. No competent evidence was presented to the Court however, to support a value other than that ultimately utilized by the Court.

As his third issue Gary complains that the Court was wrong in determining that the metal shop building on the property was determined to be a fixture. His only argument on this issue is that he placed a separate value for the metal building in his financial declaration. There was no evidence produced during any hearing that the building was not a fixture attached to the real estate.

Gary's final issue is his objection to the "Amended Order Regarding Motions for Reconsideration" (RE number 4, CP in 2011-CA-391 pp. 10-12). Gary claims that said Order was entered contrary to and in violation of the provisions of M.R.C.P. 60 (a) and (b). However, Celeste's Motions for Reconsideration and the Subsequent Motion to Correct Judgment were both timely filed in accordance with M.R.C.P. 60 and the relief sought fell within the parameters of said rule. Moreover, Gary agreed at the hearing on Celeste's "Motion for Reconsideration" and in his response to her "Motion to Correct Judgment" that she was entitled to the relief requested, because of Gary's erroneous testimony over the vehicle actually purchased.

ARGUMENT

STANDARD OF PROOF

Celeste agrees that Gary's brief filed with this Court correctly states that the scope of appellate review in this case, as to each issue raised in Gary's appeal is governed by the substantial evidence/manifest error rule. In reviewing a chancery court's judgment, an appellate

Court "will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, applied an erroneous legal standard, was manifestly wrong, or was clearly erroneous." *Hamilton v. Hopkins*, 834 So.2d 695, 699 (¶12) (Miss. 2003). A chancellor's interpretation and application of the law, however, is reviewed de novo. *Bond v. Bond*, 69 So.3d 771, 772 (¶3) (Miss. Ct. App. 2011).

GARY'S ISSUE NO 1:

The Court erred in determining that only one-half of the farm is a marital asset.

Gary now claims that the entire farm property should have been treated as a marital asset. However, he certainly did not hold that view throughout the course of the proceedings in the hearings in this case. During his March 1, 2010, testimony Gary agreed that he was making no claim to the portion of the property that Celeste inherited and that his only claim was to a one-half interest in the remaining one-half of the property that they purchased. (R. pp. 24, 25 in 2010-CA-1450)

In *Hemsley v. Hemsley,* 639 So.2d 909, 914-915 (Miss. 1994) marital property was defined as "any and all property acquired or accumulated during the marriage." Assets attributable to one of the parties' separate estates outside the marriage are excluded from that definition. Property that is "clearly obtained by one spouse through gift or inheritance is nonmarital property not subject to equitable distribution." *Larue v. Larue,* 969 So.2d 99, 106(Miss.App. 2007)

Celeste inherited an undivided one half interest in the farm property from her grandmother and Gary and Celeste purchased the remaining interest (R pp. 24-25, 89, 170-171 in 2010-CA-1450). This created a situation where she and Gary were essentially co-tenants

of the farm property. As such, Gary would have had access to the entire property based on his one fourth (1/4th) undivided interest. A tenancy in common occurs when "two or more persons, in equal or unequal undivided shares, have an equal right to possess the property. Moreover, our case law has recognized that: It is not essential to the right of partition that the cotenants shall have estates that are equal. One may have a term, another an estate for life, and another an estate in fee. All that is necessary is that they shall be cotenants of what is proposed to be partitioned. *Betty Lockhart, v. Richard Collins, Peggy Collins, Bolin Hamilton and Orene Hamilton*, No. 2010-CA-01705-SCT, at ¶ 11, decided November 17, 2011.

Gary's claims that the entire farm property was a marital asset through either the "family use doctrine" or "commingling" are each based on essentially the same factual allegations. Those fact allegations on which Gary's claims are based are: taxes were paid on the property with marital funds; Gary used the property and assisted in planting trees on the property; the parties did not distinguish between acres inherited by Celeste and acres purchased together; and the property was titled in them jointly by virtue of a deed executed in 2007.

"One who purchases or obtains by conveyance the undivided share of a tenant in common becomes a cotenant with the remaining owner or owners." *Wilder v. Currie*, 231 Miss. 461, 473-474, 95 So.2d 563, 566, (1957) "Tenants in common hold by several and distinct titles, with unity of possession; and each tenant owns an undivided fraction, being entitled to an interest in every inch of the property. * * *' The tenants may claim their several titles and interests from the same or entirely different sources; the shares may be unequal and the modes of acquisition of titles may be unlike. Tenants in common are united only by their right to possession of the property. Each tenant has an undivided fraction and each is entitled to an interest in every inch of

the soil, each being entitled to occupy the whole in common with the others and to receive his share of the rents and profits." *Wilder v. Currie*, 231 Miss. 461, 95 So.2d 563, 566-567(Miss. 1957) citing *Anderson v. Boyd*, Miss., 91 So.2d 537, 542

Gary's Payment of Taxes for the Farm

The testimony of concerning Gary's payment of taxes on the property is that he paid the taxes on the farm "as far as he could remember". But he produced only three (3) cancelled checks for tax years 2006(paid in Jan. 2007), 2007(paid in Jan 2008), and 2008 (paid in January 2009) showing payments to the Grenada County Tax Assessor (Exhibit 7-A) (R pp. 257-259 in 2010-CA-1450) None of the checks designated the property for which the taxes were being paid, and Gary produced no receipts from the Tax Assessor showing payment of taxes for the farm.

If the farm taxes were actually paid with said checks, the payments began at about the same time Gary was having the joint deed to the farm property (Exhibit 5-A) prepared. Additionally, after having testified on direct that he had paid the taxes for as long as he could remember, on cross examination he admitted that prior to 2007, Celeste's CRP payments went to pay at least some of the taxes. (R. p. 263)

"A co-tenant in possession is under a duty to pay the taxes but failing in that has a duty to redeem from the tax sale for the benefit of all of the tenants, in common, and he cannot purchase any interest adverse to them, and a purchase of an outstanding tax title by a tenant in common inures to the benefit of all tenants the cost of the redemption being a common charge against the property held in common." *Wilder v. Currie*, 231 Miss. 461, 95 So.2d 563, 568 (Miss. 1957) citing *Howard v. Wactor*, 41 So.2d at page 261 (Miss. 1949)

Gary, as a co-tenant basically took possession of the entire property. He had all the keys and for all practical purposes had Celeste locked out. He additionally wouldn't allow any of Celeste's family members to enter or utilize the property. (R. pp. 145, 146, 232) By his actions, he utilized his position as a cotenant to become the tenant in possession of the farm property. As such, he had the obligation to pay the taxes on the property. Therefore, any tax payments he made are consistent with his position as a co-tenant. Such payments are not indicative of any conversion of Celeste's undivided interest in the farm from separate to marital.

Gary's use of and Planting Trees on Farm Property

As a co-tenant with Gary in the farm property Celeste would have no legal means, other than filing a partition suit, to keep Gary off the property or any part thereof during the existence of the co-tenancy.

While Gary substantially controlled the access to the entire farm, there is very little testimony concerning any of his actual efforts to improve the property. Most of the trees planted on the farm property were planted by hired help, and by Celeste's brother-in-law . Gary helped three Mexicans plant a part back behind the trailer. (R. pp. 145, 266-267)

Gary's evidence concerning his use of land in which he was a co-tenant and had a right to utilize every acre, is less evidence than that upon which the Mississippi Court of Appeals previously found insufficient to convert separate property to marital. In *Ory v. Ory*, 936 So.2d 405, 411 (Miss.App. 2006) a husband was claiming that seventy-five acres his wife inherited had become marital property because of his efforts to improve the land. The Court found that he had made some efforts to improve the land, but the testimony was unclear as to what extent his efforts improved the seventy-five-acre tract versus the five-acre parcel upon which the marital

home was built. Nevertheless, the record did show that the husband cleared a portion of the land, hauled dirt onto the property, and had a large number of seedlings planted on the property. The husband failed, however, to put forth sufficient evidence to prove that his activity was so pervasive as to convert the entire seventy-five-acre parcel into a marital asset, or show how the land increased in value during his marriage. The Court could not under those facts found that the chancellor was manifestly wrong in characterizing the parcel as a non-marital asset.

Gary's use of the land was consistent with his rights as a cotenant, and were insufficient to constitute a conversion of Celeste's inherited portion of the farm from separate to marital. His evidence of his use is not sufficient to support a finding that the Chancellor was manifestly wrong in his determination.

The Parties did not Distinguish Between Acres Inherited by Celeste and Acres Purchased by the Parties Together

Because of the co-tenancy created by Celeste and Gary's purchase of the one half of the farm not inherited by Celeste, a distinction between inherited acres and purchased acres was impossible without a partition. Both Celeste and Gary, had an absolute right to access and use the entire property, even though Gary's fractional part of the property was substantially less than that of Celeste.

The fact that Gary made some use of the property, did not change the character of Celeste's inherited one half interest and did not constitute a commingling by Celeste.

2007 Deed Creating a Joint Tenancy

Gary additionally argues, without any supporting authority that title was in both names as support for his claim that the entire farm property was marital property. *Pearson v. Pearson,* 761

So.2d 157, 163, (Miss. 2000) abolished the joint title presumption and required that all factors be considered in determining which assets are marital property.

In viewing the evidence in this case the Chancellor certainly had an ample reason to question the voluntariness of the deed executed within about a year before the parties separation which created a joint tenancy between Celeste and Gary in the farm property. (Exhibit 5-A) Celeste testified that Gary essentially hounded her until she executed the deed. (R p. 233 in 2010-CA-1450).

Gary conversely testified that it was Celeste who was complaining to him on a daily basis that the house was in his name, the lots were in his name and she was "bugging" him on a daily basis to have her name added to those properties. (R pp. 266 in 2010-CA-1450) However the deed he had prepared only included the farm and the two vacant lots. It did not include the marital home. (Exhibit 5-A)

The Chancellor had sufficient reason to question Gary's veracity with regard to why and how the deed was prepared. His testimony that his primary goal in having the deed prepared was to stop Celeste's alleged complaints concerning her name not being on the title to the marital home is inconsistent with the reality that he had a deed prepared which included the farm property but did not include the marital home which was solely in his name.

The evidence supports a conclusion that the Chancellor as a matter of equity, decided that the deed creating a joint tenancy, should not change the character of Celeste's inheritance from separate to marital.

GARY'S ISSUE NO 2:

The Court erred in determining the value assigned to the farm because both parties agree

that the value used was not accurate and the Court failed to include the value of the timber.

"[T]he chancellor's discretion in the area of equitable distribution is exceedingly broad[,] and he 'has the flexibility to do what equity and justice requires.'" *Powell v. Powell*, 2010-CA-01041-COA (MSCA) at ¶ 19, decided November 8, 2011 citing *In re Dissolution of Marriage of Wood*, 35 So.3d at 516 (¶20) (quoting *Hensarling v. Hensarling*, 824 So.2d 583, 590 (¶21) (Miss. 2002)).

The claim of Gary in this case concerning the Chancellor's valuation of the farm property is very similar to the claims made in *Powell v. Powell*, 2010-CA-01041-COA (MSCA), at paragraphs 20 and 21. In ¶ 20 of *Powell v. Powell*, the Court said:

> ¶20. Sherida first attacks the value that the chancery court assigned to the marital home, which James testified was worth $80, 000 before he renovated it prior to his marriage to Sherida. Sherida complains that numerous documents could have been provided to prove the value of the home. While such documents could have been provided, they were not–not by James, and not by Sherida. Sherida was entitled to provide whatever documentation she could obtain regarding the value of the home; in the absence of such, we decline to find error with the chancery court's valuation of the home.

In ¶ 21 of the *Powell* opinion the Court said the following:

> ¶21. Sherida next complains that the chancellor erred in "failing to calculate the value" of the future payments on the promissory note from ASAP's sale. We note that Sherida made no effort to provide a calculation of the future value of the payments. In the absence of any valuation of the ASAP promissory note payments, we decline to hold the chancery court in error in its valuation of the payments.

While Gary complains about the farm property valuations, all of the valuations were provided by him. He is simply upset that the Court failed to utilize his second opinion as to the value of the farm. At the second hearing in this matter (May 6, 2010) Gary simply wanted to testify to hearsay as to the value of an appraisal on the farm he had purportedly hired to be

conducted by an individual named Allan Traugott. Mr. Traugott, the appraiser also happened to be the owner of a dirt race truck that was sponsored by Gary's advertising. He failed to provide the appraisal in discovery, however, and the Chancellor appropriately denied the admission of the appraisal and Gary's testimony concerning the same. (R pp. 195, 245- 247, 2010-CA-1450)

The Chancellor did allow Gary to testify concerning his belief as to the value of the farm property at said hearing. (R pp. 245- 247, in 2010-CA-1450) Ultimately, the Chancellor chose to value the farm property in line with the initial value given it by Gary. From his deposition testimony until the March 1, 2010 hearing Gary had valued the entire 110 acres at $55,000.00. At the March 1, 2010 hearing he valued it $55,000.00, excluding an unnamed value for 28 acres of pine planted on it. (Exhibit 2) Certainly the Chancellors value of $110,000.00 for the property would provide for both the property value and timber value thereon in accordance with Gary's opinion.

By the May 6, 2010, Gary had simply changed his mind. What was once "scrap hill land" to him had now become a farm worth $215,000.00 without the timber. Twenty-eight acres of pine with an unknown value had increased to 49 acres, plus an additional 32 acres of hardwood with a combined value of over $92,000.00. (Exhibit 3-A)

It appears from reading over Gary's testimony, that by May 6, 2010, he had simply decided he wanted the farm property awarded to Celeste. (R pp. 253-254 in 2010-CA-1450). Since he no longer wanted the property awarded to him, and Celeste had already testified that she wanted it because it was her family property (R. pp 207, 232 in 2010-CA-1450), the Court could have reasonably concluded that Gary's farm values were tremendously inflated in his May 6, 2010 testimony and financial declarations for the purpose of him obtaining a larger share of the

marital estate.

The Chancellor did not abuse his discretion in placing the total value of the farm property at $110,000.00.

GARY'S ISSUE NO 3:

The Court erred in determining that the metal building was a fixture and the Court erred in failing to account for its value. assigned to the farm because both parties agree that the value used was not accurate and the Court failed to include the value of the timber.

Gary offered no evidence during the trial which could support a finding by the Chancellor hat the building was not a fixture. The only testimony about any structure being capable of removal from the farm was the testimony of Celeste concerning a mobile home on the property (R pp.89- 90 in 2010-CA-1450).

Even during a hearing on the parties respective Motions for Reconsideration held on July 14, 2010 (R pp.272-291 in 2010-CA-1450) Gary failed to offer any evidence that the shop was not affixed to the farm. His attorney (at page 281) simply argued that there was a mobile home on the farm which Gary wanted no relief on and the shop which he had placed a separate value for his 8.05 and that Gary did not want it to be classified as a fixture of the farm.

Based on the record in this cause, the Chancellor would have been manifestly wrong only had he made a determination that the shop was not a fixture.

GARY'S ISSUE NO 4:

The Court erred in amending the Order Regarding Motions for Reconsideration because the Court did not properly correct the Order in accordance with M.R.C.P. 60 (a) and there were no grounds to provide relief from judgment in accordance with M.R.C.P. 60 (b).

The "Decree of Divorce" in this matter was signed by the Chancellor on June 23, 2010 and filed with the Court on June 28, 2010. (RE number 2). On June 25, 2010, Celeste filed her "Motion for Reconsideration and Other Relief". (CP pp. 96-99 in 2010-CA-1450) In paragraph "7." of said motion Celeste requested the following relief:

> 7. That the Plaintiff would further request that this Court reconsider its ruling on the personal property. That according to the Opinion entered herein, the Court stated that the Defendant purchased the Plaintiff's Infiniti with cash he currently had on hand. That Plaintiff would state that according to the proof the Infinity (sic) vehicle was purchase (sic) in April, 2007, almost one year prior to the parties' separation. That the Plaintiff's car was paid in full prior to the time of the parties' separation. That the Plaintiff would ask this Court return the sum of $19,675.00 to the cash marital assets and refigure the division of said asset.

On July 14, 2010, the Chancellor held a hearing on the parties' respective motions for reconsideration. (R. pp. 272-291 in 2010-CA-1450) During said hearing Celeste's attorney requested that the Court correct the asset distribution related to the Court's erroneous belief that Gary utilized cash marital assets to purchase an Infiniti for Celeste in 2008, when in fact the cash had be used to purchase a Nissan Murano for Gary. (R. pp. 275-276). Gary's attorney responded to said argument by saying: "As to the mistake on the car, it was the - - as she has described it, it was the Murano that he purchased then." (R. p. 278)

The Chancellor ruled on the parties' motions for reconsideration on July 30, 2010, but he failed to address the issue concerning the mistake with the vehicle. (CP.pp 106-107 in 2010-CA-1450, RE number 3)

On October 4, 2010 Celeste filed her "Motion to Correct Judgment" (RE number 7), requesting among other things, that the Court correct its error with regard to the mistake concerning the vehicle purchased. Gary filed a "Response to Motion to Correct Judgment" on

October 11, 2010 (RE number 8) in which he admitted that Celeste was entitled to the relief requested in her motion.

Gary filed his "Notice of Appeal on August 27, 2010 (CP.pp 108-109 in 2010-CA-1450); a "Designation of the Record" on September 14, 2010 (CP.pp 110-111 in 2010-CA-1450) ; and a "Certificate of Compliance with Rule 11 (b) (1) on September 20, 2010. (CP.pp 113-114 in 2010-CA-1450)

On December 2, 2010, the Court held a hearing on Celeste's said " Motion to Correct Judgment" and a "Petition for Contempt" ((not included in appeal record, but shown as filed on clerk's docket pages (CP p. 1 in 2011-CA-391)) also filed by Celeste against Gary on October 4, 2010. While all of the testimony during said hearing related to the contempt matter. The attorneys for the parties made arguments concerning and discussed with the Court the issue of correcting the Judgment because of the mistake concerning the vehicles. (R pp. 2, 47 in 2011-CA-391) At the conclusion of the hearing on December 2, 2011, the Court ruled from the bench on all issues raised during the hearing, including the mistake concerning the vehicles. (R. pp. 48-54 in 2011-CA-391)

The record in 2010-CA-1450 was transmitted to the Supreme Court on December 3, 2010. (CP p. 122 in 2010-CA-1450) On January 4, 2011 the "Amended Order Regarding Motions for Reconsideration", setting forth the Court's decision on December 2, 2010 was filed. (RE number 4)

Although an order was entered setting a supersedeas bond for Gary no bond was ever posted.

M.R.C.P. Rule 60 (b) provides as follows:

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc.
On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
(1) fraud, misrepresentation, or other misconduct of an adverse party;
(2) accident or mistake;
(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

In *Griffin v. Armana,* 679 So.2d 1049, 1050-1051 (Miss. 1996) the Supreme Court found a Chancellor erred by failing to rule on a 60 (b) motion to vacate a judgment, where the motion had been made within the six month period for making the motion and prior to the transmittal to the Supreme Court. The matter was remanded for the purpose of the Chancellor ruling on said motion.

Celeste's "Motion to Correct Judgment" was filed within the time period provided by M.R.C.P. 60 (b) and well before the record was transmitted. The Chancellor actually ruled on the motion from the prior to transmittal to the Supreme Court. Further, the relief granted by the Chancellor to Celeste, concerning the car purchased and the possession thereof in his "Amended

Order Concerning Motions for Reconsideration", was clearly for the purpose of correcting a mistake based on Gary's erroneous testimony during the trial. The relief was therefore, clearly within the provisions of Rule 60 (b) (2) .

Gary in his brief actually agrees that Celeste is entitled to some relief, because of the mistake as to the car actually purchased and who had possession of it. His only real dispute is with the amount awarded. On that issue Celeste agrees with Gary.

The value of the Murano was $13,850.00 rather than $19,675.00. So when the property division occurred. The cash marital funds awarded to Gary should not have been valued at $30,325.00 but rather at $36,150.00. The $19,675.00 value attributed to the Infiniti was deducted from $50,000.00 Gary had in marital cash leaving the sum used in Judge Lynchard's award of $30,325.00. The Murano's value of $13,850.00 should have been deducted from the $50,000.00 making the cash asset value $36,150.00.

Gary therefore, actually had the difference between $36,150.00 and $30,325.00 or $5,825.00 in additional cash marital assets which should have been divided between the parties. Gary should therefore be required to pay to Celeste the additional sum of $2,912.50 instead of the $9,837.50 Ordered by the Chancellor in the "Amended Order Regarding Motions for Reconsideration".

CONCLUSION

The evidence in this case supports the Chancellor's decisions that the half of the farm property inherited by Celeste was her separate property; that the value he placed on the farm property was in accordance with the credible evidence presented by the parties concerning said value; and that Gary failed to at any time offer any evidence which would support a finding that

the metal shop building was not a fixture of the farm. On all of those issues the Decree of Divorce entered in this cause should be affirmed.

The Chancellor's bench opinion on December 2, 2010 and his subsequently entered "Amended Order Concerning Motions for Reconsideration" was entered for the purpose of correcting a mistake as to an evidentiary fact in the "Decree of Divorce" and it was legally entered pursuant to the provisions of M.R.C.P. 60 (b). However, Celeste agrees that the Chancellor incorrectly ordered Gary to pay unto her the additional sum of $9,837.50 in his "Amended Order Concerning Motions for Reconsideration", when the actual sum should have been $2,912.50, and that on that issue alone this cause should be remanded to the Chancellor for entry of an order providing for the corrected amount.

Respectfully submitted, this the 28th day of December, 2011.

CELESTE GOODSON
APPELLEE

BY: _____

JAMES H. POWELL, III
ATTORNEY FOR APPELLEE
MISS. BAR NO. [redacted]

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, the undersigned co-counsel for Celeste Goodson (formerly Celeste Marter) appellee herein, hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the following interested persons:

1) Honorable Percy Lynchard
Chancery Court Judge
P.O. Box 340
Hernando, MS 38632

2) Helen Bagwell Kelly, Esquire
Co-Counsel for Appellant
Kelly Law Firm
P.O. Box 1631
Batesville, MS 38606

3) Lori M. Solinger, Esquire
Co-Counsel for Appellant
Kelly Law Firm
P.O. Box 1631
Batesville, MS 38606

This the 28th day of December, 2011.

JAMES H. POWELL, III
ATTORNEY FOR APPELLANT
MISS. BAR NO. [redacted]

CORRECTED CERTIFICATE OF SERVICE

I, the undersigned co-counsel for Celeste Goodson (formerly Celeste Marter) appellee herein, hereby certify that I on the 28th day of December, 2011 mailed, by United States Mail, postage prepaid, a true and correct copy of the Brief of Appellee in consolidated cause numbers 2010-CA-1450 and 2011-CA-0391 to the following interested persons:

1) Honorable Percy Lynchard
Chancery Court Judge
P.O. Box 340
Hernando, MS 38632

2) Helen Bagwell Kelly, Esquire
Co-Counsel for Appellant
Kelly Law Firm
P.O. Box 1631
Batesville, MS 38606

3) Lori M. Solinger, Esquire
Co-Counsel for Appellant
Kelly Law Firm
P.O. Box 1631
Batesville, MS 38606

I further certify that I have this day mailed, to the aforesaid persons, a true and correct copy of this "Corrected Certificate of Service" in said consolidated cases.

This the 5th day of January, 2012.

JAMES H. POWELL, III
ATTORNEY FOR APPELLEE
MISS. BAR NO. [redacted]