IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GARY C. MARTER — APPELLANT

VS. — NO.: 2010-CA-1450

2011-CA-391

CELESTE G. MARTER — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

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RESPECTFULLY SUBMITTED, this the 7 day of October, 2011.

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STATEMENT OF CASE

1. NATURE OF CASE

This matter is an appeal from the Decree of Divorce entered by the Chancery Court of Grenada County, Mississippi, on June 28, 2010 and Order on Motion for Reconsideration entered by the Chancery Court of Grenada County, Mississippi on July 30, 2010 (Record Excerpts items 2 and 3 respectively). This matter is also an appeal from that Amended Order on Motion for Reconsideration entered by the Chancery Court of Grenada County, Mississippi on January 4, 2011 and Order denying motion to set aside amended order entered on February 9, 2011 (Record Excerpts items 4 and 5 respectively).

2. COURSE PROCEEDING

The Plaintiff, Celeste Marter (hereinafter "Ms. Marter" or "the Appellee") filed a Complaint for Divorce on April 7, 2008 and subsequently filed an Amended Complaint for Divorce on April 1, 2009. Thereafter, Ms. Marter filed a second Amended Complaint for Divorce on February 19, 2010 alleging habitual cruel and inhuman treatment and in the alternative, adultery. The Defendant, Gary Marter, (hereinafter "Mr. Marter" or the "Appellant") filed a Counter-Complaint for Divorce on May 26, 2009 alleging adultery, habitual cruel and inhuman treatment and habitual drug use.

The trial of this matter began on March 1, 2010. At the end of the day, before the trial was concluded, the parties announced to the Court that they had agreed to a divorce on Irreconcilable Differences and had agreed on most issues. The Court ordered that the agreement be reduced to writing and that the parties submit by March 15, 2010 a proposed Findings of Fact and Conclusions of Law with respect to any issues that the parties were

unable to resolve. Subsequently, the parties were unable to resolve any issues except for agreeing to a divorce on Irreconcilable Differences. The trial of this matter was continued to May 6, 2010.

After the conclusion of the trial on May 6, 2010 the Court rendered a written opinion that was filed with the Court on June 7, 2010 and was later reduced to a written order that was filed with the Court on June 28, 2010. (Record Excerpts items 6 and 2 respectively). Mr. Marter timely filed a Motion for Reconsideration on June 24, 2010 as did Ms. Marter.

The Court overruled Mr. Marter's Motion for Reconsideration by Order Regarding Motions for Reconsideration entered on July 30, 2010 and Mr. Marter filed a timely Notice of Appeal on August 27, 2010 bringing this matter before the Appellate Court (Record Excerpts item 3).

Subsequently, Ms. Marter filed a Motion to Correct Decree of Divorce on October 4, 2010 and Mr. Marter filed a Response to Motion to Correct Decree of Divorce on October 11, 2010. (Record Excerpts items 7 and 8 respectively). The record had been transmitted to the Supreme Court on December 3, 2010. (Record Excerpts item 1 page 7). The Court entered an Amended Order on Motion for Reconsideration on January 4, 2011. (Record Excerpts item 4). Mr. Marter filed a Motion to Set Aside Amended Order on January 13, 2011. The Court entered an Order denying Mr. Marter's Motion to Set Aside on February 9, 2011. (Record Excerpts item 5). Mr. Marter filed a timely Notice of Appeal on March 10, 2011 bringing this matter before the Appellate Court. The two appeals have been consolidated by Order of the Supreme Court.

3. STATEMENT OF ALL FACTS

During the parties' thirty-one year marriage, Ms. Marter inherited a one-half interest in 120 acres of farmland from her grandfather (Transcript dated March 1, 2010 (hereinafter "R") 167). When Ms. Marter inherited the land with her sister it was all hill land and no trees had yet been planted (R 106). Subsequently, during their marriage, Mr. and Ms. Marter purchased the other one-half interest in the farmland from Ms. Marter's sister and another relative (R 26).

Mr. Marter paid the farm taxes with marital funds (R2 78). The title to all 120 acres is held in both Mr. and Mrs. Marter's name (R 26). Mr. Marter took care of all of the 120 acres of farmland and Ms. Marter had not been down to the farm in years (R 143). The parties hired someone to plant the trees on the farmland (R 143). Additionally Mr. Marter helped plant the trees as well as Ms. Marter's brother-in-law (Transcript dated May 6, 2010 (hereinafter R2) 88). All of the trees were planted during the marriage (R 106). The property is not divided based on acres Ms. Marter inherited and acres that the parties purchased together (R 167).

Ms. Marter agreed that the value of the farmland without timber was $55,000.00 (R 106). Ms. Marter later testified that she did not know what the actual value of the land was (R2 51-52). Ms. Marter says she let Mr. Marter value the farmland. (R2 54). Ms. Marter testified that she would not take $55,000 for the land (R2 53). Mr. Marter testified that forty-nine acres contain pine trees and there is thirty-two acres of hardwood (R2 68). Mr. Marter said he believed the value of the land to be $215,000 and the value of the value of the timber was pine trees at $61,904 and hardwood at $30,924.96 (R2 67-68).

The metal building was listed on Mr. Marter's Financial Declaration Form 8.05 with

a listed value of $16,050. Mr. Marter testified that the metal building/storage building was located on the farm where he had things locked up in there (R 28-29). There was no testimony that this building was attached to the land or could not be removed. There was absolutely no testimony or evidence indicating that the building was a fixture.

The parties agreed that the cash in the bank accounts was used to purchase Mr. Marter's Murano as opposed to Ms. Marter's Infiniti. (Record Excerpts items 7 and 8). The value of the Murano is $13,500 and the value of the Infiniti is $19,675 as listed on the parties' Financial Declaration Forms.

SUMMARY OF ARGUMENT

The Trial Judge erred in determining that only one-half of the parties' farmland was marital property. While the Trial Judge correctly noted that the Ms. Marter inherited one-half of the farm, the Court did not consider that the all of the farmland was used by both parties and maintained by Mr. Marter. Mr. and Mrs. Marter paid the taxes on the all of the farmland and planted trees on the farmland. The farmland was thus commingled which transformed the entire farm into a marital asset.

The Trial Judge also erred by assigning an untrustworthy value to the farm. The Trial Judge failed to consider that both parties admitted that they did not have an accurate value for the farm. The Trial Judge also failed to include the value of the timber in the value for the farm.

The Trial Judge erred by failing to account for the value of the metal building in the equitable distribution of the marital assets. Mr. Marter listed the metal building in his Financial Declaration Rule 8.05 form and has a value listed which the Court dismissed and

instead seemingly arbitrarily opined that the metal building was a fixture that passed with the farm without accounting for its value.

Finally, the Trial Judge erred by amending the Order Regarding Motions for Reconsideration without seeking leave of the appellate court. Moreover, the Amended Order provides that Ms. Marter receives more than 50% of the marital assets and orders Mr. Marter to pay Ms. Marter a sum of money which was not ordered in the first Order Regarding Motions for Reconsideration.

STATEMENT OF ISSUES

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

    c. The entire farm was converted to a marital asset pursuant to the family use doctrine.

    d. The entire farm was converted to a marital asset through commingling.

2. The Court erred in determining the value it assigned to the farm because both parties agree that the value of the land used by the Court was not accurate and the Court failed to include the value of the timber.

3. The Court erred in determining that the metal building was a fixture and the Court erred in failing to account for the value of the metal building.

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).

ARGUMENT

STANDARD OF PROOF

For the sake of brevity it is recognized that throughout this brief the scope of appellate review is limited by the substantial evidence/manifest error rule. Samples v. Davis, 904 So.2d 1061, 1063-65 (¶ 9)(Miss. 2004). The Appellate Court will not disturb the chancellor's opinion when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Holloman v. Holloman, 691 So.2d 897, 898 (Miss 1996).

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

The Trial Judge erred in determining that only one-half of the parties' farmland is marital property. The Trial Judge failed to consider that the all of the farmland was used by both parties and maintained by Mr. Marter (R 143). Mr. and Mrs. Marter paid the taxes on the all of the farmland with marital funds (R2 78). The parties planted trees on all of the farmland (R 143). The parties did not distinguish between the acres inherited by Ms. Marter and the acres purchased by the parties together (R 167).

a. The entire farm was converted to a marital asset pursuant to the family use doctrine.

A party's separate property becomes marital when used by the family. Brame v. Brame, No. 98-CA-00502-COA, 20000 Miss. App. LEXIS 412 (Miss. Ct.App.2000); see also King v. King, 760 So.2d 830, 836 (Miss. Ct. App. 2000); Smith v. Smith, 994 So.2d 882, 886

(Miss.CT.App.2008); Bowen v. Bowen, 982 So.2d 385, 395(Miss. 2008); Faeber v. Faeber, 13 So.3d 853 (Miss.Ct.App.2009); McDuffie v. McDuffie, 21 So.2d 3d 685, 691 (Miss.Ct.App.2009)

In McDuffie, the Court found that the marital home was brought into the marriage by the Husband but it was converted to a marital asset through familial use. Id. at 691. The Court found that both parties used the property for the benefit of the marriage and both parties made improvements to the property. Id. In this case, there is no question that both parties used the farm. Ms. Marter testified that Mr. Marter took care of the farm (R 143). Ms. Marter testified that she had not been down to the farm in years and Mr. Marter had the keys to the farm (R 143). Improvements were made by the parties to the farmland. The parties hired someone to plant the trees (R 143). Also, Mr. Marter helped plant the trees as well as Ms. Marter's brother-in-law (R2 88). Ms. Marter testified that there was no division of the property to show which part she inherited and which part they purchased from her sister (R 167). The fact that Ms. Marter received the money for Pine Tree Rental by direct deposit into her account (TR 70) does not override the substantial evidence indicating that the entire farm is a marital asset. All of the farmland was treated the same and all of it was used, maintained and improved by both parties.

b. The entire farm was converted to a marital asset through commingling.

Commingling occurs when there is a combination of marital and non-marital property which loses its status as non-marital as a result. Maslowski v. Maslowski, 655 So. 2d 18, 20 (Miss. 1995); see also Henderson v. Henderson, 703 So. 2d 262, 265 (Miss. 1997). Where parties pay taxes on a spouse's separate property from a joint account, the property

is converted to marital. Messer v. Messer, 850 So.2d 161, 168-69 (Miss. Ct. App. 2003). Where there is no evidence to distinguish between separate and marital funds, commingling occurs. Parker v. Parker, 929 So. 2d 940, 944 (Miss. Ct. App. 2005). Where there has been commingling and family use, the property will be classified as marital. Fogarty v. Fogarty, 922 So. 2d 836, 840 (Miss. Ct. App. 2006). Property owned prior to the marriage is converted to marital asset when the mortgage is paid with marital funds. Irby v. Estate of Irby, 7 So. 3d 223, 234 (Miss. 2009).

Mr. Marter testified that he paid the farm taxes with marital funds (R2 78). Mr. Marter maintained all of the 120 acres of farmland and he did not distinguish between the one-half he purchased and the one-half Ms. Marter inherited (R 143). Mr. Marter did testify on the first day of trial that he was only asking for one-half of the acres Mr. and Mrs. Marter purchased together; however, Mr. Marter later testified that he did not understand it all which is the reason he appeared to have changed positions when on the second day of trial he was asking for one-half of all of the 120 acres (R2 22). Also, title to the property was in both names as indicated by both parties (R2 54). Moreover, forty-nine acres contain pine trees and there is thirty-two acres of hardwood which the parties planted (R2 68). The parties did not distinguish between the land Ms. Marter inherited and the land they purchased together when they decided where to plant trees.

The Trial Judge found that the 120 acres of farm property was acquired during the marriage. (Record Excerpts , item 6, page 5, paragraph 7). The Trial Judge also found that the parties own the land jointly but found that it is unrefuted that the one-half interest was a product of inheritance to Ms. Marter and should be classified as her separate property and not marital in nature. (Record Excerpts, item 6, page 8). The Trial Judge is clearly

wrong in this instance as there is overwhelming evidence to support the finding that all of the farmland is a marital asset subject to equitable distribution.

2. **The Court erred in determining the value it assigned to the farm because both parties agree that value used was not accurate and the Court failed to include the value of the timber.**

Assets of divorcing parties are measured by fair market value or the price a willing buyer would pay a willing seller if both were adequately informed about the transaction. Redd v. Redd, 774 So.2d 492, 495 (Miss. Ct. App. 2000). The Trial court must assign a value to assets and a case will be reversed for failure to do so. Horn v. Horn, 909 So. 2d 1151, 1162-63 (Miss. Ct. App. 2005). If values are out of date or untrustworthy that is grounds for reversal. Bresnahan v. Bresnahan, 818 So. 2d 1113, 1119 (Miss. 2002). In the absence of expert testimony a lay witness may testify as to his opinion as to value. Watson v. Watson, 882 So. 2d 95, 106 (Miss. 2004).

In this case, the value of $110,000 for the farmland was not agreed to by either party. Mr. Marter testified that he took the value for the farmland from Ms. Marter (R 27). In the same way, Ms. Marter testified that she got the value from Mr. Marter (R 89.) Ms. Marter admitted that she had not done an appraisal on the farmland and did not know what the actual value was (R2 51-52). When asked if she would purchase one-half of the farmland, for $55,000, Ms. Marter replied no that she would not (R2 53). Although Mr. Marter agreed to that value on the first day of trial, he realized he made a mistake and testified that he believed that the value of the farm was $215,000.00 (R2 65-67).

Moreover, the trial court failed to include the value of the timber in the value of the

farmland. The farmland was not planted in trees when Ms. Marter inherited it (R 106). Ms. Marter answered yes when her attorney asked her to agree that her husband had the farmland valued at $55,000 without lumber and she agreed. (R 106). The only value for the timber in evidence was the testimony of Mr. Marter and the value he included for the timber on his 8.05 Financial Declaration. In this case, Mr. Marter was clearly familiar with the farm having taken care of it. He believed the appraisal he had to be accurate and he testified that the value of the timber was pine trees at $61,904 and hardwood at $30,924.96 (R2 67-68). There was no other testimony regarding value of the timber. The Trial judge erred by failing to include Mr. Marter's value for the timber in the value of the farm.

3. The Court erred in determining that the metal building was a fixture and the Court erred in failing to account for its value.

The Court may use the value listed on the 8.05 financial when no additional proof of valuation is presented at trial. Common v. Common, 42 So.3d 59, 63 (Miss. Ct. App. 2010). The metal building was listed on Mr. Marter's Financial Declaration Form 8.05 with a listed value of $16,050. There was no testimony to suggest that the metal building was attached to the land or a fixture. The Trial Judge erred by failing to include the value of the metal building in the equitable distribution of the marital assets and seemingly arbitrarily finding that the metal building was a fixture that passed with the farm in his Order Regarding Motions for Reconsideration. Since Ms. Marter received the metal building with the farm, Mr. Marter should thus receive one-half of the value of the building which is $8,025.00 back on his side of the distribution of assets.

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 relevant portion of Mississippi Rules of Civil Procedure Rule 60(a) reads as follows:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. *Thereafter, such mistakes may be so corrected only with leave of the appellate court* [emphasis added].

Rule 60(a) provides that clerical mistakes in judgments and the record may be taken up at any time "until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter such mistakes may only be corrected with leave of the appellate court". Knight v. Mississippi, 959 So.2d 598, 603 (Miss.App. 2007).

Here, the record was transmitted by the clerk of the trial court to the appellate court on December 3, 2010. (Record Excerpts, item 1, page 7). The Court entered the Amended Order Regarding Motions for Reconsideration on December 30, 2010. (Record Excerpts item 4). After December 3, 2010, pursuant to Mississippi Rule of Civil Procedure 60(a), the trial court had no authority to correct the judgment unless leave from the appellate court was given.

Moreover, a trial Judge may use Rule 60(a) to correct an order that failed to accurately reflect the Judge's decisions but the Judge may not use Rule 60(a) to change his mind. Jones v.

Mayo, 53 So.3d 832, 836 (Miss.App.2011). In Jones, the Court neglected to include in its decision how a transfer of retirement accounts would occur. Id. The Court amended its opinion via Rule 60(a) to include in its order that a QDRO be used. Id. The Court stated that it was not changing the previous order but rather clarifying the intent of the previous award, that the parties share equally without any tax consequences. Id.

The instant matter is distinguishable from Jones. Here, the trial judge changed his mind. The Court's Opinion states "It is undisputed that the Defendant had $10,000 in a checking account and at the time of separation withdrew $40,000 from another cash account of the parties. However although this totals $50,000 in cash assets, the evidence is undisputed that a portion of the $40,000 was used to purchase the Infiniti automobile which the Plaintiff currently drives which has an existing value of $19,675. Accordingly, the Court finds that the parties have cash marital assets of $30,325.00 in addition to those itemized hereinbefore." (Record Excerpts item 6, page 6, paragraph 7).

There was never an actual hearing on Ms. Marter's Motion to Correct Judgment. (Record Excerpts item 7). The Trial Judge did question counsel on the record concerning this matter but no testimony from the parties was taken. Mr. Marter agreed in his Response to Motion to Correct Judgment to the correction requested, that is that the parties stipulated that the cash in the bank account was used to purchase Mr. Marter's vehicle as opposed to Ms. Marter's vehicle. (Record Excerpts item 8). The Trial Judge then simply reviewed the Motion to Correct Judgment and Response to Motion to Correct Judgment and entered the Amended Order Regarding Motions for Reconsideration without testimony. The Amended Order Regarding Motions for Reconsideration reads as follows "Earlier in the Motion for Reconsideration, the Court neglected to address the equitable division of $19,675.00 which

the Court pursuant to evidence and testimony by both parties at trial was erroneously believed for the purchase of an Infiniti automobile driven by the Plaintiff wife. Both parties through counsel now concede that the said sum was for the purchase of a Murano automobile driven by the Defendant at this time and purchased after the separation of the parties. Accordingly, said sum should not have been chargeable to the wife and deducted from her ½ of the assets as the Court originally had decreed. Instead it should be and is now computed to be part of the marital estate as marital property and subject to equitable distribution. Therefore, in compliance with the Court's earlier opinion, this amount should be evenly divided between the parties with the Defendant retaining the use, possession and ownership of the vehicle and the Plaintiff being paid by him for one-half of the sums expended in the total amount of $9,837.50" (Record Excerpts item 4, page 2, paragraph 8).

Although the Trial Judge states that he is correcting the judgment in accordance with the Court's original opinion, the Trial Judge changed his mind because the Amended Order provides that Ms. Marter receives more than 50% of the marital assets and it orders Mr. Marter to pay a sum in cash to Ms. Marter which was not awarded in the first Order. Based on the Court's Amended Order, the Court finds that the following marital assets exist: $50,000 in cash, the $19,675 Infiniti and the $13,850 Murano. If the cash was used to purchase the Murano then the $13,850 must be taken off of the $50,000 since the total value of the cash and car cannot go above $50,000. In order to correct the Judgment in accordance with Rule 60(a) the Trial Judge needs to be consistent and Ms. Marter should be getting 50% of the marital assets and no more. At best, Ms. Marter should have received $472,179.17 and she received $469,966.67 and therefore the difference is $2,212.50 and not $9,837.50. Moreover, the first Order did not provide that Mr. Marter pay cash to Ms. Marter and thus at best Ms. Marter

should simply receive $2,212.50 more from one of the investment accounts.

The Trial Judge never addressed relief from judgment in accordance with M.R.C.P. 60(b) which reads as follows:

"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 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 judgment."

The grounds for a Rule 60(b) motion were not addressed in Ms. Marter's Motion and they were never heard by the Court nor were those grounds cited as the reason the Court was amending the Order. (Record Excerpts, item 7 and 4 respectively).

Not only did the Trial Judge fail to seek leave of the appellate court prior to amending the judgment when he was required to do so because the record had been transmitted to the appellate court, the Trial Judge did not properly correct the judgment in accordance with M.R.C.P. 60(a) but rather changed his mind and M.R.C.P. 60(b) was never discussed.

CONCLUSION

Based upon the arguments contained herein, Mr. Marter would respectfully request this Court reverse the June 7, 2010 Opinion of the Court and Divorce Decree entered on July 30, 2010 and either render a decision finding that the entire farm is marital property and that the value of the farm and timber is consistent with Mr. Marter's values and find that it be equally divided between the parties and find that the value of the metal building should be considered or in the alternative remand this matter back to the Trial Court for either additional findings as to the issues raised regarding value, or for a new trial. Mr. Marter would also respectfully request that this Court set aside the Amended Order Regarding Motions for Consideration as the Trial Judge did not properly correct the Judgment 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).

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GARY C. MARTER — APPELLANT

VS. — NO.: 2010-CA-1450

2011-CA-391

CELESTE G. MARTER — APPELLEE

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief and Record Excerpts to the following interested parties:

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