

CERTIFICATE OF INTERESTED PERSONS

**JAMES PARKER,
Defendant-Appellant,**

v.

NUMBER 2006-CA-01925

**NANCY CAROLYN PARKER,
Plaintiff-Appellee**

Brief

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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4. Michael Malski
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5. Luanne Thompson
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6. James Parker
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Tupelo/Fulton, Mississippi

7. Nancy Parker
Plaintiff-Appellee
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A handwritten signature in cursive script, appearing to read "Luanne Stark Thompson", written over a horizontal line.

Luanne Stark Thompson

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SUMMARY

Issue No. 1:

Whether the Court erred in ordering a judicial sale of all property classified by the Court as marital assets.

James argues that the Chancellor should not have ordered a judicial sale of the marital assets; however, his argument fails for two reasons. First, James failed to offer any evidence of the property valuations during the two-day trial except to testify that he was not sure of the value of the four businesses. Secondly, the Chancellor was provided no evidentiary support of values to order an equitable division of the property and, therefore, it was incumbent upon him to order the judicial sale unless he was inclined to suffer a reversal on his decision.

Issue No. 2:

Whether the Court erred in classifying three acres gifted to James Parker during the marriage as marital assets.

In spite of James' argument that the three acres was a gift to him, he offered no testimony with regard to his assertion that the property was a gift. In fact, the only testimony provided pertaining to the property was Nancy's and her testimony was uncontroverted that it was the result of a bartered exchange. James failed to meet his burden of establishing that the three acres were part of his separate estate and, therefore, the acreage was properly classified as a marital asset.

Issue No. 3:

Whether the Court erred in classifying James' one-half interest in approximately 85 acres contiguous to the homestead, and brought into the marriage by James Parker as marital property.

Again, James failed to meet his burden of establishing his separate estate with regard to the property contiguous to the homestead. James offered no testimony or exhibits with regard to the property while Nancy testified about the businesses, the purchase of the interest belonging to the ex-wife of James in the marital property, and the property acquired during the marriage.

Issue No. 4:

Whether the Court erred in failing to credit James Parker for equity in real estate brought into the marriage by James Parker but classified by the Court to be marital property.

The argument of James that he should be credited for his ownership in Lube# 1 prior to marriage fails for two reasons. First, James fails to cite law for the proposition which renders the issue moot. Additionally, Lube# 1 was foreclosed upon after the marriage and repurchased by James which transformed the property into a marital asset.

Issue No. 5:

Whether the Court erred in deducting one-half of the appraised value of Quick Lube No. 3 and one-half the appraised value of 3.01 acres sold by James in contravention of the temporary order in this cause, and in deducting one-half of the difference between the appraised value of Quick Lube No. 2 and its price brought at judicial sale, from James; share of the equitable division of proceeds from the sale of marital property.

There was no error on the part of Judge Littlejohn in his calculation of the division of the proceeds from the judicial sale. In fact, Judge Littlejohn divided the proceeds in half and, additionally, recognized Nancy's equitable interest in marital assets that James disposed of which was in violation of a court order prohibiting the parties to dispose of marital assets. His decision to do so was obviously not penalizing in nature due to the fact that he only gave Nancy a one-half interest even though it was well within his discretion to give her a greater interest. There was no abuse of discretion on the part of Judge Littlejohn with his ruling.

Issue No. 6:

Whether the Court erred in failing to credit James with payment of taxes and other debts owed against the marital property between the time of the court's temporary order and its final Judgment.

James failed to cite any law requiring chancellors to recognize and credit payment of debts and taxes during the pendency of a divorce. For that reason, his argument fails.

Issue No. 7:

Whether the Court erred in awarding attorneys fees to Nancy's counsel and in deducting same out of the proceeds of James' share of the liquidated marital assets.

Judge Littlejohn used his discretion in awarding attorney's fees to Nancy. As stated by the Court of Appeals, there is no requirement that one must show an inability to pay attorney's fees before an award can be granted. In affirming the award of fees, the Court further noted that her ex failed to inquire as to her ability to pay the fees. Furthermore,

the Supreme Court has upheld an award of attorney's fees even though the Chancellor did not apply the *McKee* factors on the record. Nancy was forced out of the marital home at the time of the separation because her husband would not provided financial support. She lost her job at the lube centers and only had her retirement of \$731 a month during the pendency of this case. Her vehicle was repossessed and, additionally, her husband had her indicted for forgery, upon which she was non-adjudicated, based upon three checks she had written signing his name as she had done for years during the marriage. James continued to work in the businesses and, additionally, had involvements with other women for whom he provided jobs. The Chancellor was well acquainted with the complexities of this divorce as well as the numerous court appearances and hearings required before it was finally over. The Chancellor further called upon Nancy's trial counsel, Michael Malski, to prepare and draft all orders in the case. Finally, James failed to demonstrate an abuse of discretion on the part of Judge Littlejohn in his award of attorney's fees and, therefore, that award should be upheld.

Issue No. 8:

Whether the Court erred in failing to properly list and make findings of fact as to each of the applicable Ferguson factors and in failing to illustrate, analyze or provide a conclusion of law to explain how each of the applicable Ferguson factors and findings of fact affected the court's consideration of an equitable division and distribution of the marital property.

There was substantial evidence in the record upon which Judge Littlejohn based his application of the *Ferguson* factors. Additionally, the Judge carefully analyzed those

factors applicable to the instant case which was all he was required to do. In his well reasoned and lengthy bench opinions, Judge Littlejohn addressed two issues he found troublesome—the sexual affair between James and Nancy’s daughter and the disposal of assets by James after the court had ordered that no assets be disposed of. The Chancellor specifically found that the conversation between James and his niece, Susie Grissom, which she admitted occurred, was particularly troubling because it established his intent to transfer assets out of his name. The Judge did not abuse his discretion in applying the *Ferguson* factors.

ARGUMENT

Issue No. 1:

Whether the Court erred in ordering a judicial sale of all property classified by the Court as marital assets.

The appropriate framework to be followed in this state concerning property division in divorce cases is as directed by the Mississippi Supreme Court in the cases of *Hemsley v. Hemsley*, 639 So.2d 909 (Miss.1994) and *Ferguson v. Ferguson*, 639 So.2d 921 (Miss.1994). Property division is to be based upon a determination of fair market value of the assets, and these valuations should be the initial step before determining division. *McKnight v. McKnight*, 951 So.2d 594, 596 (¶6)(Miss.Ct.App.2007) (citing *Ferguson*, 639 So.2d at 929). Where chancellors fail to make findings on the fair market value, the Court has not hesitated in reversing and remanding for determination of fair market value. *Horn v. Horn*, 909 So.2d 1151 (¶49)(Miss.Ct.App.2005); *Scott v. Scott*, 835 So.2d 82, 87 (¶13)(Miss.Ct.App.2003); *Pucylowski v. Pucylowski*, 741 So.2d 998, 1002 (¶17)(Miss.Ct.App.1999).

James argues that the property should not have been sold; however, the only appraisals entered into the record were entered by Nancy and only then for the limited purpose of her reliance upon the same for preparation of a financial statement for their bank in 1998. (Tr.p.154-155.) Interestingly enough, James objected to the admission of the appraisals even though he never sought to introduce appraisals of his own on the properties. James admitted that he tried to sell Lube# 1 for \$225,000 and further

admitted that it was Lube# 1 which was advertised for sale at \$275,000 and then reduced to \$259,900. (Tr.pp. 250-252.) The sketchy testimony James provided as to valuation of the properties ultimately resulted in his admission that he was not sure of the value of the four businesses. (Tr.pp. 253-254.) As the Court noted in the *Scott* case which was reversed and remanded due to failure on the part of the Chancellor to properly determine the value of the marital estate, “it is impossible for this Court to perform its oversight responsibility in the absence of such a valuation . . .” *Scott*, 835 So.2d at 87 (¶13).

The Mississippi Court of Appeals previously addressed dissatisfaction of the valuation of marital assets in the cases of *Dunaway v. Dunaway*, 749 So.2d 1112 (Miss.Ct.App.1999) and *Ward v. Ward*, 825 So.2d 713, 719 (¶21)(Miss.Ct.App.2002). In *Dunaway*, the husband complained of the values utilized by the Chancellor for property distribution; however, the Court, in failing to find error, emphasized that while the wife did not provide adequate proof of values, the values provided by the husband were “equally unsatisfying.” *Dunaway*, 749 So.2d at 1118 (¶14). “It is incumbent upon the parties, and not the chancellor, to prepare evidence touching on matters pertinent to the issues to be tried.” *Id.* In *Ward*, it is the husband again who complains of values assigned to certain marital assets and for which the Court of Appeals found no abuse of discretion due to the Chancellor having “fully explored” the evidence before him. *Ward*, 825 So.2d at 719 (¶21). In citing to the *Dunaway* case, the Court of Appeals reiterated the proposition that failure to have proper evidentiary support of values in the record is

the fault of the parties and not the Chancellor. *Id.*

Unfortunately, the Chancellor had little or no evidentiary proof upon which to rely in the case at bar to establish fair market value of the marital property. Chancellor Littlejohn could well have divided the marital assets without appropriate values—a decision which undoubtedly would have been reversed by this Court. Therefore, the inescapable conclusion for which he was left in an effort to avoid reversal was to order the immediate sale of all marital property.

Issue No. 2:

Whether the Court erred in classifying three acres gifted to James Parker during the marriage as marital assets.

The only evidence offered during the trial as to the three acres was offered by Nancy through her testimony and through introduction of the deed into evidence. (Tr.pp. 48, 132-133; Ex. 11.) The extent of her testimony was that in August, 1993, Charles Digby deeded three acres north of the dwelling in exchange for dozier work. (Tr.p. 48.) When questioned about the three acres on cross, Nancy provided further details by testifying that her husband had provided dozer work for the elderly couple and “for doing the work, he deeded three acres to him that joined our property. . .”¹ (Tr.p. 132.)

¹Among other evidence introduced by Nancy concerning the marital assets, several exhibits pertain to heavy equipment purchased during the marriage. (Ex. 16-19.) These items included a Caterpillar tracker, dump trucks, a backhoe, and a bulldozer. (Tr.pp. 58-63.)

There being no testimony offered by James classifying the three acres as a gift or even disputing the direct and cross examination of Nancy providing a description of a bartered transaction, the Chancellor cannot be said to have erred in classifying the property as marital property. All property acquired during marriage is considered marital property, and subject to equitable distribution, unless it is clearly shown to be a separate estate apart from the marriage. *Cork v. Cork*, 811 So.2d 427, 430 (¶13) (Miss.Ct.App.2001) (citing *Hemsley*, 639 So.2d 909, 914). The party seeking to exclude an item from the marital estate bears the burden of establishing its separate character. *A & L, Inc. v. Grantham*, 747 So.2d 832, 839 (¶23) (Miss.1999).

“With respect to issues of fact where a chancellor made no specific finding, this Court proceeds on the assumption that the chancellor resolved all such fact issues in favor of the appellee, or at least in a manner consistent with the decree.” *Langdon v. Langdon*, 854 So.2d 485, 494 (¶31)(Miss.Ct.App.2003) (citing *Smith v. Smith*, 545 So.2d 725, 727 (Miss.1989)). This Court may reverse a chancellor's findings of fact only when there is no substantial credible evidence in the record to justify his findings. The scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard. *Jundoosing v. Jundoosing*, 826 So.2d 85, 88 (¶10)(Miss. 2002) (citations omitted).

Issue No. 3:

Whether the Court erred in classifying James' one-half interest in approximately 85 acres contiguous to the homestead, and brought into the marriage by James Parker as marital property.

The only evidence offered during the trial as to the real property surrounding the marital home was offered by Nancy through her testimony and through introduction of deeds during her case in chief. (Tr.p. 45- 57; Ex. 9-15.) Nancy testified that at the time of her marriage to James in 1992, the property on which she would live with James during the marriage was titled in the names of James, his ex-wife Donna Parker, and his former brother-in-law Robert Hood. (Tr.p. 45.) Nancy further testified that Hood signed a quitclaim deed signing over his interest but that they had to purchase the one-half interest of the ex-wife Donna Parker for \$12,600 in 1994 with proceeds from their joint checking account. (Tr.pp. 45-47.) During the marriage, the couple built an addition to the marital dwelling and added other improvements including a storage shed. (Tr.pp. 50-54.)

Nancy testified that in 1994 James purchased twenty-one and a half acres adjoining the marital property from Wayne and Lavelle Young for \$12,000 and that they paid the promissory note with checks from their joint checking account. (Tr.pp. 49-50.) In 1997, a house and three more acres were purchased from Jimmy and Barbara Parker in

the amount of \$26,000.² (Tr.p. 54.) Also in 1997, James purchased 60 acres of land from Rickey Grissom for the amount of \$20,218 which was paid for through a note securing the marital dwelling. (Tr.pp. 55-56.)

As stated above, the party seeking to exclude an item from the marital estate bears the burden of establishing its separate character. *A & L, Inc. v. Grantham*, 747 So.2d 832, 839. Non-marital property "may be converted into marital assets if they are commingled with marital property or utilized for domestic purposes, absent an agreement to the contrary." *Jackson v. Jackson*, 922 So.2d 53, 58 (¶11)(Miss.Ct.App.2006) (citing *Boutwell v. Boutwell*, 829 So.2d 1216, 1221(¶20)(Miss.2002) (emphasis added) (citations omitted).

Because James failed to offer any testimony or evidence concerning his separate estate, he did not meet his burden of establishing a separate estate and, therefore, any and all arguments on this issue are fatal.

Issue No. 4:

Whether the Court erred in failing to credit James Parker for equity in real estate brought into the marriage by James Parker but classified by the Court to be marital property.

James argues that he should have been given credit for his interest in Lube# 1

²This property would be subsequently sold back to Jimmy and Barbara Parker by James in contravention of the emergency order entered prohibiting each party from disposing of assets. (Tr.pp. 54-55.)

prior to the marriage and further argues that the Court failed to make specific findings of fact and conclusions of law regarding his pre-marital interest in the business.

Nancy testified that she and James married on September 2, 1992 and that at the time of the marriage, James owned a business called Parker's Quick Lube or Lube# 1. (Tr.p. 15.) On November 26, 1992, the bank held a foreclosure which necessitated James repurchasing the business for \$62,000. (Tr.pp. 16, 26-27.) Nancy further testified that the money to pay the note came from lube center proceeds. *Id.* Regardless of the reason for the foreclosure, at the time it was repurchased by James, it took on the characteristic of having been acquired during the marriage and, therefore, subject to equitable division. *Hemsley*, 639 So.2d 909, 915.

Even if Nancy had not worked in the businesses (and the fact is that she testified that she did work at the businesses), the Chancellor properly classified Lube# 1 as marital property. (Tr.pp.15-18.) A chancellor has the authority to look beyond mere legal title to make an equitable division of property acquired during the course of the marriage by the joint efforts of the parties or by the individual effort of either one of them. *Ferguson*, 639 So.2d 921, 927; *Jordan v. Jordan*, 2005-CA-01834-COA (¶35)(Miss.Ct.App.2007); *Pucylowski*, 741 So.2d 998, 1001 (¶11).

Furthermore, James cites no authority for the proposition that he should have been

given credit for his interest of ownership in Lube# 1 prior for to the marriage.³ Failure to cite authority on appeal renders the issue meritless. *Jones v. Howell*, 827 So.2d 691, 702 (¶40)(Miss.2002); *Parker v. Parker*, 929 So.2d 940, 944 (¶14)(Miss.Ct.App.2005) .

Issue No. 5:

Whether the Court erred in deducting one-half of the appraised value of Quick Lube No. 3 and one-half the appraised value of 3.01 acres sold by James in contravention of the temporary order in this cause, and in deducting one-half of the difference between the appraised value of Quick Lube No. 2 and its price brought at judicial sale, from James' share of the equitable division of proceeds from the sale of marital property.

This Court reviews a chancellor's division of marital property under an abuse of discretion standard. *Jackson*, 922 So. 2d 53, 57 (¶9); *Seymour v. Seymour*, 2005-CA-00668-COA (¶14)(Miss.Ct.App.2006); *Shoffner v. Shoffner*, 909 So.2d 1245, 1250 (¶11)(Miss.Ct.App.2005). Findings of the chancellor will not be disturbed or set aside on appeal unless the decision of the trial court is manifestly wrong and not supported by substantial credible evidence, or unless an erroneous legal standard was applied. *Carrow v. Carrow*, 741 So.2d 200, 202 (¶9)(Miss.1999).

In reaching his decision of the equitable distribution of the proceeds of the judicial sale, Judge Littlejohn initially divided the proceeds of \$296,512.66 in half with each

³Neither did James offer any testimony on the record of what the value of his interest in Lube # 1 at the time of the marriage, much less did he offer testimony concerning his ongoing business and experience. He can hardly complain that the Chancellor failed to make findings of fact when he failed to offer the facts.

party being awarded \$148,253.33. (Tr.pp. 392-397.) Because the Judge determined that James disposed of assets in derogation of the December, 2002 order prohibiting the parties from disposing of assets, the Judge made adjustments which he found necessary to recognize Nancy's equitable interest in the assets disposed of by James. (Tr.pp. 303, 397-399.)

Testimony during the trial clearly established that James had transferred ownership of Lube# 3 to his niece, Susie Grissom, and her boyfriend, Ralph David Owens, in March, 2004. (Tr.pp. 41, 178, 253; Ex. 6.) After the judicial sale and on November 18, 2005, the parties stipulated to the value of Lube# 3 to an amount of \$145,000. (Tr.p. 316.) Because the transfer had already taken place, the Judge recognized Nancy's equitable interest in Lube# 3 for one-half of the stipulated value. (Tr.p. 398.)

With regard to the house and three acres James transferred back to Jimmy and Barbara Parker in 2003, Nancy testified that they purchased the property in 1997 for \$26,000. (Tr.pp. 54-55.) James agreed on cross that the property was worth \$36,000 at the time they purchased it. (Tr.p. 258.) Again, the Chancellor recognized Nancy's one-half equitable interest in the marital property. (Tr.p. 398.)

Judge Littlejohn awarded Nancy one-half of the difference between the judicial sale price of \$55,850 and the stipulated value of \$100,000 on Lube# 2. (Tr.pp. 316, 397-398.) Testimony established that after the court order prohibiting disposal of assets was

entered, James leased Lube# 2 to Jerry Enis. (Tr.pp. 32, 253.) Jerry Enis was the successful bidder on Lube# 2 for an amount of \$55,850; however, Nancy filed her objection to confirmation of the sale to Enis based upon a statement made by Enis at the sale wherein he announced that he had a lease on the property and that the announcement had an adverse affect on bidding. (R. 114.) At the confirmation hearing held on December 15, 2005, Nancy withdrew her objection predicated upon stipulations that Enis entered into the lease with James wherein Enis initially paid James \$20,000 followed by sixteen monthly payments of \$1,000 each for a total of \$16,000 and that the stipulated value of Lube# 2 is \$100,000. (Tr.p. 345.) Judge Littlejohn recognized the fact that Nancy did not share in the \$36,000 that James received from the lease of Lube# 2 ; however, the Chancellor made no adjustment for the \$36,000 and, instead, recognized Nancy's equitable interest in the difference between the judicial sale price and the stipulated value.⁴ (Tr.p. 398.)

In light of the dissipation of marital assets as well as James' calculated plan to do so (as discussed under Issue Number 8), Judge Littlejohn did not abuse his discretion in his decision of equitable distribution. Concerning equitable distribution, "the matter is

⁴Another ground for Nancy's objection to confirmation of the sale regarded the sale of Lube# 4 \$60,000 to Tammy Woolbright which had a stipulated value of \$125,000. (R. 114, 132.) On December 15, 2005, the Chancellor did not confirm the sale of Lube# 4 based upon the objection and the property was auctioned a second time and for which Woolbright was the successful bidder for \$62,000 which was confirmed on February 21, 2006. (Tr.pp. 364-366, R. 273.) Judge Littlejohn did not compensate Nancy for the difference between the sale price and the stipulated value of 125,000.

within the chancellor's discretion, as he has all equities and relevant circumstances in mind and is in the best position to decide such matters.” *McKnight*, 951 So.2d 594, 596 (¶6) (citing *Pittman v. Pittman*, 652 So.2d 1105, 1109 (Miss.1995)).

Issue No. 6:

Whether the Court erred in failing to credit James with payment of taxes and other debts owed against the marital property between the time of the court’s temporary order and its final Judgment.

While James cites law, he cites no law for the proposition that the Chancellor was to take into consideration debt reduction or tax payments made during the pendency of this action. Furthermore, James’ reliance on *Watson v. Watson* is misplaced. *Watson* did not hold that a party should be credited for payments made between the time of the filing of divorce and the hearing on the merits. In *Watson*, the husband was aggrieved because of the assigned value of the marital dwelling by the Chancellor and the Court reversed and remanded for a determination of the value of the home. 882 So.2d 95, 106-107 (¶¶55-60)(Miss. 2004). Among the husband’s other arguments, he complained about the lack of credit he received for the payments he made on the mortgage. *Id.* at 107 (¶¶58-59). The Court merely suggested that the matter “may be revisited upon remand.” *Id.* (¶60). There was no finding that the Chancellor should have credited the husband with mortgage payments after the filing of the divorce. As noted above, such a failure to cite to authority can render an issue on appeal meritless. *Jones*, 827 So.2d 691, 702 (¶40).

James argues that reversal is required because there were no findings of fact and conclusions of law on this issue. This argument, too, is meritless and, furthermore, the response to Issue No. 8 develops fully the argument against any failure on the Chancellor's part to make findings of fact and conclusions of law.

Issue No. 7:

Whether the Court erred in awarding attorneys fees to Nancy's counsel and in deducting same out of the proceeds of James' share of the liquidated marital assets.

An award of attorney's fees in domestic cases is largely a matter entrusted to the sound discretion of the trial court, *Poole v. Poole*, 701 So.2d 813, 819 (¶26)(Miss.1997); *Varner v. Varner*, 666 So.2d 493, 497 (Miss.1995), and the Court is reluctant to disturb a chancellor's discretionary determination whether to award attorney fees. *Geiger v. Geiger*, 530 So.2d 185, 187 (Miss.1988). Absent an abuse of discretion, the chancellor's decision in such matters will generally be upheld. *Armstrong v. Armstrong*, 618 So.2d 1278, 1282 (Miss.1993).

As noted by the Court of Appeals recently, "there is no steadfast requirement that one must show an absolute inability to pay attorney's fees before an award can be granted." *Kelley v. Kelley*, 2005-CA-01678-COA (¶14)(Miss.Ct.App.2007). In *Kelley*, the inability to pay attorney's fees by the awardee, who was also the non-prevailing party, was sufficiently demonstrated through the testimony and exhibits which revealed that she earned significantly less than her ex, she owned no assets, she had filed bankruptcy, and

she had begun selling her furniture. *Id.* In affirming the award of attorney's fees, the Court additionally noted that the other party made no inquiry as to her ability to pay attorney's fees. *Id.* Based on the review of the record, the Court found that it was not error for the Chancellor to award the attorney's fees. *Id.*

In the case of *Poole*, the Supreme Court upheld an award of attorney's fees where the husband argued that his ex-wife had not shown an inability to pay attorney's fees. 701 So.2d at 819 (¶25). The case was before the Court on appeal of the husband's petition to modify his child support payments of \$2,000 a month. The ex had also been awarded lump sum alimony at the time of the divorce three years earlier at the rate of \$1,000 per month for 10 years. The Supreme Court denied his request for modification and affirmed the award of attorney's fees and in so doing, recognized the broad discretion a chancellor has in awarding attorney's fees stating, "We are reluctant to disturb a chancellor's discretionary determination whether or not to award attorney's fees and of the amount of any award." *Id.* at (¶26) (quoting *Ferguson*, 639 So.2d 921, 937). In 2006, the Supreme Court found an award of attorney's fees in the amount of \$19,391.95 was not an abuse of discretion where the wife had been awarded the proceeds from the sale of the marital home, \$3,000 a month in alimony, and \$2,001 a month in child support. *Lauro v. Lauro*, 924 So.2d 584, 591 (¶¶28-31)(Miss.2006).

Here, Nancy quit her job with FHA two years into the marriage to work full time in the lube business with her husband and, at the time, she also took her retirement of

approximately \$16,000 which was used for the purchase of a vehicle, furniture, and improvements on the marital dwelling. (Tr.pp.15-18, 75.) Nancy inherited \$12,000 during the marriage which was used for improvements to the home and on legal fees for James' son. (Tr.p. 75.) She testified that she had to move from the marital dwelling because she couldn't pay the bills and James would not provide any monetary assistance. (Tr.pp. 23-24.) During the long separation period from the filing of the divorce in December of 2002, Nancy's vehicle was repossessed and James had her indicted on charges of forgery for which she was non-adjudicated.⁵ (Tr.pp. 24-25, 76-77, 148-149.) Additionally, she no longer had her job at the lube businesses and had only \$731 a month in retirement. (Tr.pp. 23-24.)

Conversely, James continued to work in the businesses during the separation and proceeded to dissipate assets, including the lease of Lube# 2 to Jerry Enis, the sale of Lube# 3 to his niece, and the transfer of a house and three acres back to the original seller. (Tr.pp. 32-41, 54-55.) Tisha Todd, a woman James admitted having sex with, testified that he had paid rent for her and had given her a job. (Tr.p. 122.) James testified that at the time of the trial Cindy Pendergraph was living with him but he denied having sex with her stating that he cannot get an erection so Pendergraph is at his house to clean and cook and, additionally, that she works at the lube center. (Tr.pp. 228, 245.)

⁵Nancy testified that she had written three checks immediately after the separation signing his name as she had done for years in the business. (Tr.pp. 23-24, 76-77, 148-149.) One check was to Ford Motor on the vehicle note which was in her husband's name, one check was to Farm Bureau for insurance payments, and the third check was for groceries. (*Id.*)

James further testified that he pays her cell phone bill and pays her a salary for working at the lube center. (Tr.p. 245.)

Clearly, Nancy Parker is deserving of her attorney's fees due to the fact she was left homeless, unemployed, and penniless by her husband while he dissipated assets, and entertained and employed other women during the pendency of this action. While Judge Littlejohn did award Nancy \$260,831.33 from the proceeds of the judicial sale, she currently has no assets except for her retirement check of \$731 per month. Should this Court affirm the ruling of the lower court, Nancy would be in a position to pay her attorney's fees just as the wife was in the Supreme Court of *Adams v. Adams*, 591 So.2d 431 (Miss.1991). In *Adams*, the Court affirmed the award of attorney fees where the wife had investments of \$110,000.00 and an income of \$14,000.00 and testified that she would eventually be able to pay her own fees. *Id.* at 435.

Likewise, the Supreme Court found it was appropriate to award attorney's fees in a divorce where the wife worked at a hospital, had \$2900 in an IRA, \$1600 in savings, and was awarded \$20,000 from her husband's car business, use and possession of the marital dwelling, and benefitted from the husband being ordered to pay the \$1500 monthly note securing the marital dwelling. *Dunn v. Dunn*, 609 So.2d 1277, 1287 (Miss.1992). When considering an award of attorney fees, the lower court must take into account a sum sufficient to secure a competent attorney; the relative financial ability of the parties; the skill and standing of the attorney employed; the nature of the case and

novelty and difficulty of the questions at issue; the degree of responsibility involved in the management of the cause; the time and labor required; the usual and customary charge in the community; and preclusion of other employment by the attorney due to the acceptance of the case. *McKee v. McKee*, 418 So.2d 764, 767 (Miss.1982).

Judge Littlejohn obviously considered Nancy's inability to pay her attorney's fees given the destitute nature she was left by her husband, and, additionally, obviously considered the amount of litigation, court appearances, and preparation involved in this divorce which would have precluded trial counsel for Nancy, Michael Malski, from other employment. The divorce trial consumed two days, March 30 and 31, 2005. There were six court appearances, including various hearings, after the trial on its merits.⁶ Findings of fact and conclusions of law were submitted to the judge on two occasions: after the trial on its merits (Tr. p. 285, 289) and prior to the Court's final judgment. (Tr. p. 384). Furthermore, Judge Littlejohn obviously thought well of Michael Malski's skill and standing since Judge Littlejohn relied exclusively on Mr. Malski to prepare orders for the two very long bench opinions (Tr. p. 312, 402) as well as orders on the various rulings between the bench opinions. (Tr. pp. 340, 366, 386, 402).

⁶Both sides filed Objections to the Confirmation of Sale and, additionally, a bidder intervened and filed numerous pleadings when his purchase was not confirmed due to an omission of 15 acres in the listing. (R. pp. 114, 126, 132.) James attempted to file an interlocutory appeal which was followed by a motion to reconsider after the bench opinion on May 12, 2005. (R. 73,101.) James also filed a motion to reopen the case for additional evidence in April, 2006 (which was overruled) as well as a motion to reconsider in August, 2006, both of which necessitated hearings. (Tr.pp. 368-387; 403-410)

Even though he did not specifically apply the *McKee* factors in awarding attorney's fees of \$10,000 to Nancy, Judge Littlejohn did recognize his discretion to award fees and, additionally, his failure to specifically enumerate the *McKee* factors is not fatal. (Tr.p. 401-402.) In *Varner*, 666 So.2d at 498, the Supreme Court affirmed an award of attorney's fees while stating that even though the record did not reflect that the Chancellor specifically applied the *McKee* factors, the award was reasonable.

Furthermore, where no abuse of discretion for the award of attorney's fees to the appellee on the part of the Chancellor was shown by the appellant, the Supreme Court upheld the award of attorney's fees due to appellant's failure to make such showing and, additionally, the Court awarded the same amount of attorney's fees on appeal. *O'Neill v. O'Neill*, 501 So.2d 1117, 1119 (Miss.1987). In the case at bar, James has failed to demonstrate an abuse of discretion for the award of attorney's fees on the part of Chancellor Littlejohn nor did James make inquiry as to Nancy's ability to pay attorney's fees; therefore, the award should be affirmed. Unless the chancellor is manifestly wrong, his decision regarding attorney fees will not be disturbed on appeal. *Trunzler v. Trunzler*, 431 So.2d 1115, 1116 (Miss.1983).

Issue No. 8:

Whether the Court erred in failing to properly list and make findings of fact as to each of the applicable Ferguson factors and in failing to illustrate, analyze or provide a conclusion of law to explain how each of the applicable Ferguson factors

and findings of fact affected the court's consideration of an equitable division and distribution of the marital property.

When reviewing a chancellor's judgment in property division the appellate court is not to conduct a *Ferguson* analysis anew, but should review the judgment to ensure that the chancellor followed the appropriate standards and did not abuse his discretion."

Jackson, 922 So.2d 53, 59 (¶16); *Shoffner*, 909 So.2d 1245, 1250 (¶12) (citing *Wells v. Wells*, 800 So.2d 1239, 1243(¶8)(Miss.Ct.App.2001)).

Judge Littlejohn recited two lengthy bench opinions into the record in this divorce. (Tr.pp. 289-313, 389-402.) Even though James complains that Judge Littlejohn was derelict in his obligation under the law, the record speaks otherwise. Furthermore, James fails to direct this Court to specific omissions on the part of Judge Littlejohn. It is well settled that "the chancellor is not required to address each and every factor and may consider only the factors which he finds applicable to the marital property at issue."

Ericson v. Tullos, 876 So.2d 1038, 1042 (¶15)(Miss.Ct.App.2004) (citing *Burnham-Steptoe v. Steptoe*, 755 So.2d 1225, 1233 (¶24)(Miss.Ct.App.1999)).

Judge Littlejohn determined that all properties except the guns were marital properties and that Nancy made a substantial contribution to the accumulation of those properties. (Tr.pp. 299-300) He found that James did not contribute to the stability and harmony of the marital relationship due to his infidelities including James' admission of a sexual relationship with Tisha Todd and, more troubling to the Chancellor, the sexual

relationship James had with Nancy's mildly retarded daughter.⁷ (Tr.pp. 300-303.) With regard to dissipation of assets, the Court noted that James did so and would be held accountable upon the equitable division of marital assets. (Tr.p. 303.)

After awarding each party one-half, \$148,253.33 each, of the proceeds from the judicial sale, Judge Littlejohn noted the March, 2004 transfer of the deed of Lube# 3 to James' niece, Susie Grissom, and the January, 2003 conveyance of a house and three acres to the original sellers, Jimmy and Barbara Parker. (Tr.p. 397.) The Judge recognized that the transfers were in violation of the court order of December, 2002 wherein each party was prohibited from transferring or disposing of marital property. *Id.* Judge Littlejohn found the transfers particularly "troublesome" in light of the telephone conversation between James and his niece Susie where James discusses his intention to get rid of marital property.⁸ As discussed under Issue Number Five, the Chancellor adjusted the awards of the parties allowing Nancy credit based upon the stipulated values of the properties transferred. (Tr.pp. 397-399.) The Judge did not award the requested alimony based upon the distribution of the marital assets. (Tr.p. 401.)

⁷Nancy testified that her daughter, who is afflicted with Noonan's Syndrome and has the mind of an eleven-year-old, confessed a sexual relationship with her step-father. (Tr.pp. 19-22.) On cross, a transcript of a recorded conversation between the daughter and James was read in court and entered into evidence which was then followed by the tape itself entered into evidence. (Tr.pp. 107-112, Ex. 32 and 33.) There was no objection by Nancy to the admission into evidence of the transcript and tape.

⁸Susie Grissom admitted having a telephone conversation with James in December of 2002 wherein the transcript reveals that James told Susie, "I got to get her, I got to get everything out of my name." (Tr.pp. 183-186, Ex. 39.)

The findings of fact of the chancery court, particularly in the areas of divorce and child support, will generally not be overturned by this Court on appeal unless they are manifestly wrong. *Nichols v. Tedder*, 547 So.2d 766, 781 (Miss.1989). Because the Chancellor properly applied the law and his decision is supported by substantial evidence, this Court should affirm the ruling of Judge Littlejohn.

CONCLUSION

Basically, James argues that the Chancellor failed to follow the law with regard to classification of assets, valuation of assets, the methodology of distribution of proceeds from the judicial sale, and the alleged failure of Judge Littlejohn to properly follow the factors in *Ferguson*. Because James did not provide factual testimony or exhibits to support his arguments and because James has failed to supply this Court with cites to support his legal arguments, his enumerated issues one through six and eight must fail.

With regard to his argument against the award of attorney's fees under issue number seven, this Court should affirm the decision of Judge Littlejohn based upon his familiarity of the case, its complexity, time constraints, and the knowledge the Chancellor has of the skill and competency of trial counsel for Nancy, Michael Malski.

This Court should affirm the rulings of Judge Littlejohn on all eight issues presented by James and deny the relief sought for by James.

CERTIFICATE OF SERVICE

I, Luanne Thompson, hereby certify that I have on this date mailed by United States Mail, a true and correct copy of the above and foregoing Brief of Appellee to the following:

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So certified, this the 1st day of October, 2007,


Luanne Stark Thompson