

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAREY G. STEWART

APPELLANT

VS.

CAUSE NO. 2007-CA-0098-7

BESSIE M. STEWART

APPELLEE

BRIEF OF THE APPELLEE

(ORAL ARGUMENT NOT REQUESTED)

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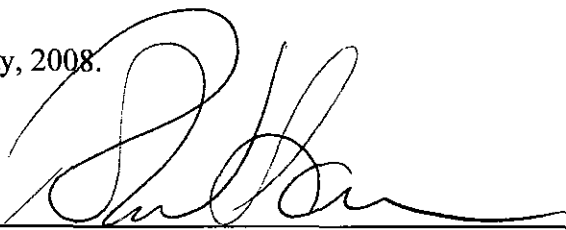
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of record pursuant to R28 MRAP certifies the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of the Supreme Court and or the Judge of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Carey G. Stewart - Appellant
2. Bessie M. Stewart - Appellee
3. Robert W. Lawrence - Attorney for Appellee
4. W. Brady Kellems, Joseph P. Durr - Attorneys for Appellant
5. Steve Amos - Chancery Clerk of Copiah County, Mississippi
6. Honorable Edward Patten, Chancellor for the 15th Judicial District

SO CERTIFIED this the 7th day of May, 2008.



Robert W. Lawrence
Attorney for the Appellee

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
SUMMARY OF THE ARGUMENT.....	1
ARGUMENT.....	2
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

MISSISSIPPI COURT CASES

<u>A&L, Inc. v. Grantham</u> , 98-CA-00496-SCT, 97-CA-01193 SCT (Miss. 1999), 747 So. 2d 832 (Miss. 2008).....	4, 7
<u>Brock v. Brock</u> , 2003-CA-01394-COA (Miss. 2005), 906 So. 2d 879.....	4
<u>Craft v. Craft</u> , 2000-CA-02101-SCT (Miss. 2002), 825 So. 2d 605.....	7
<u>Drumright v. Drumright</u> , 1999 -CA-00016-COA (Miss. 2001), 812 So. 2d 1021.....	3, 4
<u>Ferguson v. Ferguson</u> , 639 So. 2d 921 (Miss. 1994).....	1, 5, 9, 10
<u>Geiger v. Geiger</u> , 550 So 2d 185 (Miss. 1988).....	10
<u>Grant v. Grant</u> 1999-CA-00736-SCT (Miss. 2000), 765 So. 2d 1263.....	10
<u>Hemsley v. Hemsley</u> , 639 So. 2d 909 (Miss. 1994).....	1, 5, 9, 10
<u>Johnson v. Johnson</u> , 2002-CA-01552-COA (Miss. 2004), 877 So. 2d 485.....	7
<u>Martin v. Martin</u> , 566 So. 2d 704 (Miss. 1990).....	9
<u>McKee v. McKee</u> , 418 So. 2d 764, (Miss. 1982).....	1, 8, 9, 10
<u>O'Neil v. O'Neil</u> , 501 So 2d 1117 (Miss. 1987).....	9
<u>Oswalt v. Oswalt</u> , 2006-CA-01254-COA.....	4, 5
<u>Shorter v. Shorter</u> , 1999-CA-00154-COA (Miss. 1999) 740 So. 2d 352.....	10
<u>Smith v. Smith</u> , 614 So. 2d 394 (Miss. 1993).....	8, 9

SUMMARY OF THE ARGUMENT

The Plaintiff, Appellant in this case is Carey Stewart. The Defendant, Appellee in this case is Bessie Stewart. The Trial Court properly considered all of the financial factors between Bessie and Carey Stewart, applied the Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994) and Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994) factors, and arrived at an equitable distribution package that encompassed the totality of the circumstances. The Court specifically analyzed and addressed Carey Stewart's claim for credit of \$23,000.00 from the sale of the marital residence and Carey Stewart's property acquired after the marriage and ruled them marital and subject to distribution. In a well thought out, carefully crafted analysis, the Chancellor avoided the necessity of alimony for Bessie Stewart in arriving at the distribution package. The Court awarded Appellee reasonable attorneys fees after considering the Appellee's lack of assets, inability to pay, and the McKee v. McKee, 418 So. 2d 764, (Miss. 1982) factors. The Appellee should be awarded one-half (½) of the attorneys fees awarded by the trial court on this appeal.

ARGUMENT

1.A. THE TRIAL COURT PROPERLY CONSIDERED, CLASSIFIED, EVALUATED AND ANALYZED ALL PROPERTY IN ARRIVING AT AN EQUITABLE DISTRIBUTION BETWEEN THE PARTIES AS DEFINED IN THE STIPULATION FOR DIVORCE.

The Appellant contends that the Chancellor failed to give Carey Stewart credit for \$23,000.00 from the sale of the parties' first marital residence which Carey Stewart contends is his separate estate property. The Chancellor specifically addressed the issue of \$23,000.00 in proceeds from the sale of the parties' first marital home which was originally owned by Carey Stewart prior to marriage. The trial court found that the prior residence had been used by both parties as the marital residence for 9 years and the court reasoned:

"This Court takes due note of the fact that Cary Stewart owned a home prior to the marriage that was sold and that he realized \$23,000 from that sale that was applied to the construction of his new home. The Court find that Cary Stewart is not entitled to any credit for this \$23,000.00 for several reasons. First, Cary Stewart testified that he and Bessie Stewart lived in the home for approximately three years and that about \$3,000 to \$4,000 in equity developed during that time period. This testimony is not credible because the parties married in 1994 and the new home was built in 2002 or 2003, which means they lived in the old home for as long as nine years. Second, both homes were used by the family for family use. Third, Bessie Stewart, while having no ownership interest in the new home built during the marriage, was liable on the promissory note to Erwin Mortgage Corporation, the marital residence lien holder." (Appellant's record excerpts-Findings of Fact and Conclusions of Law, Page 6).

The four volume trial transcript is rambling and confusing. The Appellant testified that he received the parties' first marital residence located on Highway 28 through his prior divorce (T147) and that he and Bessie Stewart were married in April, 1994 (T403) but they only lived in the house "I'm going to say three years" (T174). The parties built their new residence, sold the first residence, moved into the new residence and occupied the property as the marital domicile until their separation

and ultimate divorce. The Chancellor concluded that the parties lived in the first Highway 28 residence for a minimum of 9 years. (Appellant's record excerpt-Findings of Fact and Conclusion of Law, Page 6). The Chancellor's conclusion is much closer in fact to the 11 years of occupancy Carey Stewart declared on his loan application (Appellee's Record Excerpt, P-9) than Carey Stewart's erroneous sworn testimony of occupancy of "about 3 years" he made in open court. (T-174).

Carey Stewart's loan application (Appellee's Record Excerpts, P-9) dated May 22, 2003, reflects the parties lived at the old home on Highway 28 for 11 years and they had been living in the new house on Highway 51 South for 1 year on the date of the loan application, May 22, 2003. Either the Appellant is very confused or engaged in a deliberate dishonesty when he recited that he and Bessie Stewart only lived in the home 3 years. Mathematically, Carey and Bessie Stewart lived in the Highway 28 property 9 years from April of 1994 until 2003.

Bessie Stewart clearly states that she and Carey Stewart moved in together when they married in April of 1994 (T-405). Bessie Stewart quit work upon marriage and raised the parties child and Carey Stewart's children by prior marriage. (T-407). Additionally, Bessie Stewart testified when she returned to work as a teacher with Friends of Children (T-400) that all of her meager earnings were used on the home, kids, groceries, cleaning supplies and household items. (T-439).

The issue of commingling of separate non-marital assets has been addressed by this Court on several occasions. In Drumright v. Drumright, 1999 -CA-00016-COA (Miss. 2001), 812 So. 2d 1021, Mr. Drumright owned a separate residence prior to marriage. Mr. and Mrs. Drumright married in February 1993 and divorced in 1998 after five years of occupying Husband's home as the marital domicile. The trial court awarded Ms. Drumright an equitable portion of the marital residence

owned by Mr. Drumright which was affirmed by the Court of Appeals.

The facts in this case are much more compelling than those in Drumright. The Stewarts were married for over 11 years. Bessie Stewart was a full time mother who subsequently returned to work and used her small income to support the Stewart's child and her step-children with nothing financial to show for her efforts (T-439). The first residence had been occupied as the marital residence of the Stewart marriage from 1994 until the Stewart's occupied the new residence in 2003. Carey Stewart claims the \$23,000 net proceeds from the sale of the prior residence is his alone, but he cannot produce any coherent flow of separate funds which would entitle him to this money. Indeed, all of Bessie's income also flowed into the home and family use. (T-439).

"When separate property and marital property are mixed to such a degree that the elements cannot be distinguished, i.e., that the separate element cannot be traced, then the entire property is considered marital property: the single property has transmuted by commingling into marital property." Brock v. Brock, 2003-CA-01394 (¶ 50).

Carey Stewart's case for claiming the proceeds from the sale of the prior marital residence is very similar to the husband's claim in A&L, Inc. v. Grantham, 98-CA-00496-SCT, 97-CA01193-SCT, 747 So. 2d 832, (Miss. 1999). Mr. and Mrs. Grantham married in 1985 and divorced in 1997. Mr. Grantham argued that all of the proceeds from the sale of the prior home, which was his separate pre-marital property, and which was rolled over into the new marital home, was his alone. The Court denied Mr. Grantham's claim and affirmed the Chancellor's ruling stating "However, the proceeds, totaling \$84,349.00, were used by John to support this family and for construction of a new home for the couple. This commingling of assets converted the proceeds into marital assets which the Chancellor properly found to be subject to distribution." A&L, Inc., ¶ 9.

In the recent case of Oswalt v. Oswalt, No. 2006-CA-01254-COA (10/2/2007 rehearing denied 2/19/2008) the Mississippi Court of Appeals was again confronted with the issue of how to deal with a separate home owned prior to marriage and occupied as the marital residence for approximately 6 years before divorce. The trial court awarded wife an interest in the marital home. The Chancellor was upheld by the Court of Appeals concluding: "We find that the Chancellor correctly found the couple's home was marital property." Oswalt ¶ 22.

The Chancellor's extraordinary eighteen page analysis of the Stewart's financial situation specifically addressed Carey Stewart's claim for exclusive credit to the \$23,000 proceeds and correctly rejected it. The Court used Ferguson and Hemsly and applied the factors to craft a total equitable distribution package between Carey and Bessie which should be affirmed.

1.B. THE CHANCELLOR CORRECTLY ADJUDICATED THE BUSINESS PROPERTY OWNED BY CAREY STEWART PRIOR TO MARRIAGE AS NON-MARITAL AND ADJUDICATED CERTAIN BUSINESS ASSETS ACQUIRED AFTER MARRIAGE AS MARITAL PROPERTY.

Carey Stewart owns an unincorporated body shop doing business as Copiah Body Shop, a/k/a Stewart Body Shop. The Body Shop has been a source of marital income of Carey and Bessie Stewart and the source of the majority of their standard of living. All of Bessie's income has also been expended for family purposes but she has no assets or property (T-439). Bessie only makes \$11.16 per hour (Appellee's Record Excerpt, P-1) and grossed \$15,313.00 income for 2005 (Appellee's Record Excerpt, P-2). The body shop consists of real and personal property Carey Stewart acquired before marriage and which the Chancellor adjudicated to be Carey Stewart's separate non-marital property not subject to distribution (Appellant's record excerpt Findings of Fact

and Conclusion of Law, Page 6-7) and property, equipment, inventory acquired after marriage which the Court ruled were subject to equitable distribution.

Since the parties' marriage in 1994, Carey Stewart has made substantial improvements to the property, bought and sold automobiles, inventory and equipment, and had a good income. Carey testified to acquiring on paper \$81,000 in assets after marriage (T-356) and the he buys and sells vehicles (T-357). Stewart testified to the increase in value accruing to him after marriage (T-358). Additionally, Mr. Stewart, on cross, confessed to owning additional vehicles acquired after marriage not disclosed to the court on his Rule 8.05 financial disclosure (T-364).

The Appellant's position seems to be that Carey Stewart has a carte blanche license to acquire whatever property he wishes, shelter whatever income he wishes after marriage, and the court has no authority over property or increase in value acquired during 11 years of marriage. The Appellant contends that all property acquired by Carey Stewart in his business after marriage is non-marital property and not subject to equitable distribution. This position is contrary to established law and the facts of this case.

No one disputes that Carey Stewart owned an unincorporated body shop doing business as Copiah Body Shop or Stewart Body Shop prior to marriage. The business consisted of real property, equipment and vehicles. The Chancellor correctly adjudicated the sole proprietorship owned by Stewart prior to marriage as non-marital. The Appellee offered proof that after marriage, Carey Stewart acquired substantial new improvements, vehicles, and equipment. The Chancellor analyzed the post marriage acquisitions and found them to be marital property. The Appellant now complains that a 1996 Jeep, a 1991 Chevrolet, a 1999 Taurus and 1984 Chevrolet and \$75,029.00 of other equity all acquired after marriage are somehow protected. The Appellant indirectly suggests that

Carey Stewart, who has a gross worth of \$600,000.00 (Appellee's Record Excerpts, P-9) owes Bessie Stewart, who has a net worth of \$0, nothing after 12 years of marriage.

What analysis did the trial court apply to the property Carey Stewart acquired after marriage. The trial testimony was that Carey Stewart acquired substantial equipment, improvements and assets after marriage. (T-356-364). The Chancellor made a thorough and exhaustive analysis of this issue on Page 5 and 6 of his opinion and applied the analysis in Craft v. Craft, 2000-CA-02101-SCT (Miss. 2002), 825 So. 2d 605 in awarding Bessie Stewart a portion of the value of this post marriage property. (Appellant's record excerpt Findings of Fact and Conclusion of Law, Page 5, 6).

This court has held that the increase in value of a Husband's stock he owed prior to marriage in a specific corporation is a marital asset. Johnson v. Johnson, 2002-CA-01552-COA (Miss. 2004), 877 So. 2d 485 and A&L, Inc. The trial court weighed the evidence and correctly applied the case law.

Bessie Stewart was a housewife for the first 4 years of marriage who raised her step-children and their child of this marriage. Bessie returned to work and made meager wages as a teacher for Friends of Children. All of her paycheck was exhausted for marital purposes (T-439, 444) and she now has no savings, no property, and nothing after 12 years of marriage. Carey Stewart has a paper income of \$5,000 per month to draw off the business (T-189) and untold hidden cash income. (T-341, 342). One of Carey's primary witnesses testified that he was paid \$400-600 per month by Carey Stewart in cash (T-101, 342), off the books, and did not get a W-2 (T-99). The record is replete with Carey Stewart paying cash for employees and property, (T-341-342) including the addition to his house (T-99). Wherever Carey needed cash it was available.

Carey Stewart's standard of living so far exceeds his stated source of income that Carey's

testimony is impossible to believe. His testimony reflects he has \$5,000.00 per month to draw off the business (T-189) and \$30,000 additional funds (T-190) totaling \$60,000 (T-190). Carey Stewart refused to certify that his 2005 federal tax return was true and correct under penalty of perjury (T-193).

The Chancellor correctly assigned Carey Stewart's pre-marital business property not subject to distribution in divorce and correctly assigned the post-marital acquisitions or increase in value as subject to equitable distribution and should be affirmed.

2. THE TRIAL COURT CORRECTLY AWARDED ATTORNEYS FEES TO APPELLEE.

Carey Stewart would have the Court believe that he is a poor hard working man with no money and no assets. Page two of his loan application to Irwin Mortgage, which was not created in anticipation of litigation, reflects he had total assets of \$639,289 and total liabilities of \$252,841 or a net worth of \$386,448 (Appellee's Record Excerpts, P-9). Bessie Stewart left with the clothes on her back, no money, and no ability to pay attorneys fees (T-439, 444).

Bessie Stewart offered an itemized bill of her attorneys fees with an attorney McKee affidavit (Appellee's Record Excerpt, P-13) admitted into evidence without objection. The trial court awarded Appellee \$7,054.10 in attorneys fees. (Appellant's Record Excerpt Findings of Fact and Conclusions of Law, P. 17.) The Appellant did not object to the amount of attorney fees nor the McKee factors. (T-444). The Appellee suggests the trial court erred in awarding Appellee attorneys fees per se.

The trial of this case took three days and consists of four volumes of testimony excluding exhibits. The Chancellor very meticulously analyzed the testimony, exhibits and issued an eighteen

page findings of fact and conclusion of law. (Appellant's record excerpt Findings of Fact and Conclusions of Law, P. 1-18). The Court specifically addressed the issue of attorneys fees on Page seventeen of the Findings of Fact and Conclusions of Law, stating:

"The Court considered the amount of attorneys fees, the McKee affidavit and concluded that the question of attorney's fees in a divorce action is largely a matter of the trial court's discretion. Smith v. Smith, 614 So. 2d 394, 398 (Miss. 1993). Generally speaking, if a party is financially able to pay his or her attorney's fees, he should do so. Martin v. Martin, 566 So. 2d 704, 707 (Miss. 1990). The court's discretion is not unlimited, and certain guidelines have been established to assist the court in its determination. McKee v. McKee, 418 So. 2d 764, 767 (Miss. 1982). The court has considered Exhibit 24 and the attached affidavit made pursuant to the requirements of McKee v. McKee. The court finds that payment by Bessie Stewart of her attorney's fees would unduly deplete her equitable distribution of marital assets and that she has a present inability to pay those fees." [Emphasis added].

The lower court carefully considered the Ferguson and Hemsley factors and crafted an equitable distribution of the parties assets and liabilities. As a part of the equitable distribution, the Court made a deliberate attempt to avoid alimony to Bessie Stewart (Appellant record excerpts Findings of Fact and Conclusions of Law, P. 17). The Court considered the uncontested McKee affidavit filed by the Appellant (Appellant record excerpts Findings of Fact and Conclusions of Law, P. 17), considered Bessie Stewart's lack of income and assets with which to pay her attorneys fees (Appellant record excerpts Findings of Fact and Conclusions of Law, P. 17) and found that if Bessie Stewart were required to pay her attorneys fees it would ". . . unduly deplete her equitable distribution of marital assets and that she has a present inability to pay these fees." (Appellant record excerpts Findings of Fact and Conclusions of Law, P. 17).

The lower court cited Smith v. Smith, 614 So. 2d 394, 398 (Miss. 1993), Martin v. Martin, 566 So. 2d 704, 707, (Miss. 1990), McKee v. McKee, 418 So. 2d 764, 767 (Miss. 1982) as authority for its award of attorneys fees. The Appellee contends the court crafted a complete equitable

distribution plan considering the totality of the circumstances and cited sufficient Supreme Court authority for its actions.

The case law is settled that “the matter of determining fees in a divorce action is largely entrusted to the discretion of the Chancellor.” (O’Neil v. O’Neil, 501 So 2d 1117, 1119 (Miss. 1987). Attorneys fees were specifically considered by the Court in crafting Bessie Stewart’s share of her equitable distribution and the need to avoid an alimony award under the totality of the parties’ financial circumstances. This Court has often ruled that it is “. . . reluctant to disturb a Chancellor’s discretionary determination of whether or not to award attorneys fees and the amount of the award.” Geiger v. Geiger, 550 So 2d 185, 187 (Miss. 1988).

The Chancellor’s decision to award attorneys fees to Bessie Stewart was supported by the facts and law of the case and was an integral part of the Chancellor’s total equitable distribution package and should be affirmed.

PRAYER FOR ATTORNEYS FEES ON APPEAL

Appellee was awarded \$7,054.10 in attorneys fees by the trial court citing her inability to pay attorneys fees. (Appellant record excerpts Findings of Fact and Conclusions of Law, P. 17). The amount awarded was supported by an affidavit reciting the McKee criteria and accepted into evidence without objection. (Appellee’s Record Excerpt, P-13). This Court historically awards one-half of the lower court attorney fee award on appeal Grant v. Grant 1999-CA-00736-SCT (Miss. 2000), 765 So. 2d 1263, Shorter v. Shorter, 1999-CA-00154-COA (Miss. 1999), 740 So. 2d 352 (Miss. 1999). Failure to award attorneys fees on appeal will negatively impact the carefully crafted, well thought out equitable distribution package designed by the Chancellor and is inequitable. Appellee prays this Court award her one-half of the lower court award of attorneys fees on this

appeal.

CONCLUSION

The Chancellor made an extraordinary thorough analysis of the relative financial assets and liabilities of Carey and Bessie Stewart. The Court correctly assigned marital and non-marital property to the respective parties using the criteria required by Ferguson and Hemsley.

Carey Stewart could not trace the flow of equity from the sale of the parties' first marital residence. Indeed, the Stewarts resided as a family in the first residence for nine years with both parties making financial and domestic contributions. The Chancellor correctly found commingling of assets.

Carey Stewart was credited with all of his business property acquired prior to marriage. The trial court correctly adjudicated acquisitions or increase in value after marriage to be marital property.

The Chancellor correctly analyzed the total package assigned to Carey and Bessie Stewart and as a part of her total package, the Court awarded attorneys fees to Bessie Stewart due to her lack of assets and inability to pay attorneys fees.

Respectfully Submitted,

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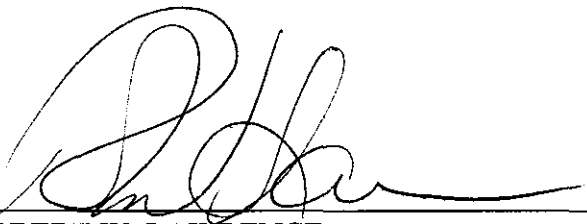
I certify that I have this day served a true copy of the above and foregoing document by placing a copy of same in the United States Mail, postage prepaid to the following:

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This the 7th day of May, 2008.



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