

**IN THE SUPREME COURT OF MISSISSIPPI**

**CAREY G. STEWART**

**APPELLANT**

**VS.**

**CAUSE NO. 2007-CA-0098-7**

**BESSIE M. STEWART**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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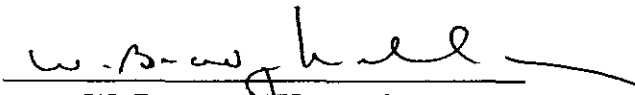
**APPELLEE**

**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.

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

**SO CERTIFIED** this 15<sup>th</sup> day of February, 2008.

  
\_\_\_\_\_  
W. BRADY KELLEMS  
Attorney for Appellant

## **STATEMENT OF ISSUES**

- 1. Whether or Not The Chancellor Erred in the Property Division and Allocation of Debts? The Specific sub-issues being:**
  - A. Did the Chancellor Commit Error In the Failure To Give Carey G. Stewart credit for \$23,000.00 from the Sale of Separate Estate Property?**
  - B. Did the Chancellor Commit Error In Classifying Vehicles, Shop Equipment and Inventory as Martial Property when the Same were part of the Separate Estate Property of Carey Stewart's Business known as Stewart's Auto Sales and Body Shop?**
- 2. Whether or Not the Chancellor Erred in Awarding Attorney Fees to the Appellee?**

## **STATEMENT OF THE CASE**

The appellant, Carey G. Stewart, appeals the Final Judgment of Divorce dated May 10, 2007, rendered by the Chancery Court, Copiah County, Mississippi, Honorable Edward E. Patten, Jr., Chancellor, as to issues involving equitable distribution and an award of attorney fees. The aforesaid Final Judgment incorporated findings of facts and conclusions of law of the Chancellor dated April 23, 2007.

## **PROCEDURAL HISTORY**

The procedural history of this case is as follows:

1. On May 11, 2005, Carey G. Stewart filed his Complaint for Divorce and Related Relief against Bessie M. Stewart.
2. On May 1, 2005, a Rule 4 Summons was issued for Bessie M. Stewart.
3. On May 25, 2005, Bessie M. Stewart filed an Answer to the Complaint for Divorce and Counterclaim.
4. On May 25, 2005, a UCCJA affidavit was filed with the court.
5. On May 26, 2005, Carey G. Stewart filed an Answer to the Counterclaim for Divorce.
6. On May 22, 2006, a Stipulation for Divorce on the Grounds of Irreconcilable Differences with the Court to Decide Certain Contested Issues was filed. The issues to be decided by the court are as follows:
  - A. Determination of child custody and support;
  - B. Determination of marital property and marital liabilities and the division thereof;
  - C. The amount of contribution, if any, of the defendant toward the accumulation

of marital assets;

- D. Is the defendant entitled to attorney's fees and, if so, the amount?
  - E. Is the defendant entitled to alimony and, if so, the nature and amount?
  - F. Is plaintiff entitled to a monetary offset against any awards to the defendant for defendant's misrepresentation that her daughter's (Amy Jenkins) father was deceased when he was to and plaintiff's financial support of the daughter throughout the marriage?
  - G. Is the 2000 Kia automobile in defendant's daughter's name a marital asset and, if so, the value?
7. On March 27, 2007, the parties filed an amended stipulation and consent for divorce to grant physical and legal custody of the parties' minor child, Jamar Stewart, to the father Carey G. Stewart, with Bessie M. Stewart having visitation rights in accordance with this court's guidelines, a copy thereof being attached to the stipulation.



### **STATEMENT OF FACTS**

The trial Court summarized the undisputed facts, in relevant part, as follows: Plaintiff and Defendant are both resident citizens of Copiah County, Mississippi, and have been such for more than six months preceding the filing of the complaint for divorce. The plaintiff resides at 9199 Highway 51 South, Hazlehurst, Mississippi 39083. The plaintiff and defendant were legally married to each other on or about March 23, 1994, in Copiah County, and lived together as husband and wife until on or about December 5, 2004, at which time they separated from one another. That they reconciled on approximately February 4, 2005, and lived together as husband and wife until their final separation on or about March 6, 2005, and they have not cohabitated as man and wife since that time. That there has been one child born of the aforesaid marriage; namely, Jamar Stewart, age nine, date of birth, September 3, 1996.

Subsequent to trial, but before the Court opinion was rendered, the parties submitted a Joint Amended Consent and Stipulation Agreement which as adopted by the Court. Carey G. Stewart was granted physical and legal custody of the parties' minor child, Jamar Stewart, subject to visitation rights of Bessie M. Stewart in accordance with the trial court's visitation guidelines.

Additionally, relevant facts are that prior to marriage Carey G. Stewart owned and operated a business (as a "sole proprietor" type of business entity) known as Stewarts Auto Sales and Body Shop. The primary business operations being automobile body shop type of repairs, purchase and resale of used vehicles, inclusive of purchase and repairing wrecked vehicles for re-sale.

Additionally, Carey G. Stewart owned a separate residential property, prior to marriage, as did Bessie M. Stewart, and upon the sell of Carey G. Stewart's separate residential property the sum of \$23,000.00 flowed from the separate estate property into the newly constructed "marital property" residence.

## **STANDARD OF REVIEW**

The scope of review in domestic relations matters is limited by the familiar substantial evidence/manifest error rule. Stevison v. Woods, 560 So.2d 176, 180 (Miss.1990). “This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” Bell v. Parker, 563 So.2d 594, 596-97 (Miss.1990). See also Ferguson v. Ferguson, 639 So.2d 921 (Miss.1994); Faries v. Faries, 607 So.2d 1204, 1208 (Miss.1992). In other words, “[o]n appeal [we are] required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong.” Newsom v. Newsom, 557 So.2d 511, 514 (Miss.1990). See also Dillon v. Dillon, 498 So.2d 328, 329 (Miss.1986). This is particularly true in the areas of divorce, alimony and child support. Tilley v. Tilley, 610 So.2d 348, 351 (Miss.1992); Nichols v. Tedder, 547 So.2d 766, 781 (Miss.1989). The word “manifest”, as defined in this context, means “unmistakable, clear, plain, or indisputable.” *Black’s Law Dictionary* 963 (6th ed.1990). Also, See Spahn v. Spahn, 959 So. 2d 8, 12 (Miss. Ct. App. 2006) (court does not conduct a new *Ferguson* analysis, but reviews for abuse of discretion); Lauro v. Lauro, 924 So. 2d 584, 590 (Miss. Ct. App. 2006) (property division reviewed under abuse of discretion standard); Dunn v. Dunn, 911 So. 2d 591, 595-96 (Miss. Ct. App. 2005) (appellate court does not conduct new *Ferguson* analysis); Barnett v. Barnett, 908 So. 2d 833, 837-38 (Miss. Ct. App. 2005) (appellate court reviews division of assets under manifest error standard if chancellor used proper legal standards); Rush v. Rush ex rel. Mayne, 914 So. 2d 322, 325 (Miss. Ct. App. 2005) (en banc) (appellate court does not reweigh *Ferguson* factors).

## **SUMMARY OF THE ARGUMENT**

The undisputed evidence was that Carey G. Stewart owned a home prior to marriage, which upon sale produced a net of \$23,000.00 that flowed into the construction of a new "marital" home.

The unrefuted testimony was that Carey and Bessie Stewart resided in the "separate estate" home for approximately three years during which time the equity position increased by \$3-\$4,000. There was no evidence of contribution by Bessie Stewart in the \$3-\$4,000 equity increase, much less the net \$23,000.00 that flowed into the new residence. Carey Stewart contends that the Chancellor erred in failing to give him credit of the \$23,000.00 flowing from his separate estate, or alternatively, at least the \$19-\$20,000 after the deduction of the \$3-\$4,000 equity increase during the marriage.

Additionally, Carey G. Stewart contends that the Chancellor erred in the classification of vehicles, shop equipment and inventory in Carey's business as being marital property notwithstanding that the business, buildings and real estate were separate estate property owned by Carey prior to marriage.

The nature of Carey's business being automobile body repairs, purchase and re-sale of automobiles and report of purchased vehicles for re-sale.

The undisputed evidence being that Carey Stewart operated and made all contributions to his business; that Bessie did not contribute and that the vehicles classified as "marital" were in the nature of ever changing and rotating vehicles of the business. It is further contended that regardless of classification, that it was improper to award Bessie an

equitable distribution of the business assets in that she made no contributions to the business.

Finally, Carey Stewart argues that it was improper to award attorney fees to Bessie M. Stewart in that with the award of \$74,372.50 in marital assets, inclusive of an award of a savings account in the amount of \$2,900.00, along with a cash award in the amount of \$56,610.00, that she has the ability to pay her on attorney fees.

## **ARGUMENT**

### **1. Whether or Not The Chancellor Erred in the Property Division and Allocation of Debts? The Specific sub-issues being:**

#### **A. Did the Chancellor Commit Error In the Failure To Give Carey G. Stewart credit for \$23,000.00 from the Sale of Separate Estate Property?**

Carey G. Stewart purchased approximately 13.25 acres during the marriage, with one (1) acre being transferred prior to the divorce hearing leaving a balance of 12.25 acres in which the marital home was built. Exhibits 6,7. After the separation, a garage was renovated into a den, and the Court appropriately found that the valuation of the home should be as it was during the marriage and prior to the renovation of the garage. In Exhibit 13, Connley D. Moak appraised the property prior to the garage improvements \$230,000.00, The Court found that the mortgage payoff was \$188,171.00 leaving net equity of \$41,829.00 which is supported by Exhibits 8, 9 and 10. Also, T. 382. The Court appropriately adjudicated that the marital home was marital property and the net equity was subject to division.

However, the undisputed evidence was that Carey G. Stewart owned a home prior to marriage that was sold and \$23,000.00 from the sale was applied to the construction of the new marital home. T. 385 Carey G. Stewart testified that he and Bessie M. Stewart lived in the separate estate home for approximately three (3) years and that \$3,000.00 - \$4,000.00 equity developed during that time period. T.174,175 The trial Court denied Carey G. Stewart any credit for the \$23,000.00 finding that the testimony of Carey G. Stewart that he and Bessie M. Stewart lived in the home for three (3) years was not credible

based on the fact that the parties were married in 1994 and the new home was not built until 2002 or 2003. And the Court speculated that the parties could have lived in the separate estate home for as long nine (9) years. The Court also noted that the separate estate home was used for the family for family use.

Carey G. Stewart respectfully contends that the trial Court erred in that there is no credible evidence refuting Carey G. Stewart's claim that the parties lived in his separate estate house for three (3) years with \$3,000.00-\$4,000.00 equity developing during that time period. T.174,175 Bessie M. Stewart did not testify that the parties lived in the separate estate house for the entire period prior to building the new house, (there is no testimony to support the Judge's conclusion the parties lived in the separate estate house for 9 years) and even had the parties lived in the separate estate house, there is not evidence to refute that only \$3,000.00-\$4,000.00 equity developed during the period. Bessie testified that Carey had provided a separate home for her as early as 1986. T. 403 Moreover, there was no evidence introduced by Bessie M. Stewart that she made any contribution toward any improvements or the \$3,000.00-\$4,000.00 in equity that developed during the time period the parties lived in the separate estate property. T.174 It should be noted that Bessie's credibility for finances was suspect, in that she admitted to wrongfully taking \$3,660.00 from the Red Cross and FEMA. T. 463

In Duncan v. Duncan, 915 So. 2d 1124, 1127 (Miss. Ct. App. 2005) (en banc) the Court held that the marital home that was owned by the wife prior to marriage should be awarded to her because it was separate property and the husband made no contribution. In Brock v. Brock, 906 So. 2d 879, 887-88 (Miss. Ct. App. 2005) the home inherited by wife was classified as separate and the husband was not awarded any interest in the same

although the couple has lived in the home several times during the marital. Also in the Brock case the Court rejected the husband's argument that the house was converted to marital by commingling because he paid taxes and because he made repairs on the house. The Court stated that separate property is transmuted into marital by commingling only when assets are so mixed that the separate property cannot be traced; "the key to . . . . . transmutation by commingling as to whether marital assets can be identified." Also in Ory v. Ory, 936 So. 2d 405, 411 (Miss. Ct. App. 2006) (en banc) the wife separate property land was not converted because of the husband's claims of planting seedlings and hauling dirt onto the land and that there was not evidence that the value increased during marriage.

In the present case, there was no evidence by Bessie M. Stewart that she did anything to contribute directly or indirectly, toward the \$3,000.00-\$4,000.00 increase in equity that developed in the separate estate property during the time period the parties lived in the separate estate house. Assuming arguendo that Bessie M. Stewart made some contribution so as to classify the \$3,000.00-\$4,000.00 increase in equity as marital, then there is still no justification for not giving Carey G. Stewart for the remaining \$19,000.00-\$20,000.00 derived from the sale of the separate estate property which went into construction of the new home which was utilized as marital property.

**B. Did the Chancellor Commit Error In Classifying Vehicles, Shop Equipment and Inventory as Martial Property when the Same were part of the Separate Estate Property of Carey Stewart's Business known as Stewart's Auto Sales and Body Shop?**

The Court adjudicated that Copiah Body Shop a/k/a Stewart Body Shop is not marital property. However the Court found that there were several vehicles that had no debt associated with the business, particularly a 1996 Jeep valued at \$2,000.00, a 1991 Chevrolet



Van valued at \$2,000.00, a 1999 Taurus valued at \$3,000.00. and a 1984 Corvette valued at \$4,300.00 for a total of \$11,300.00. The Court disregarded the other vehicles in the business because they were listed on the "floor plan" and were secured for corresponding floor plan indebtedness. Additionally, as to shop inventory and equipment as reflected on Exhibit "17" and "18" the Court found that the sum of \$75,029.00 was purchased during the marriage but that the only evidence of valuation was that of Carey G. Stewart who testified the equipment inventory was worth \$50,000.00, which after deduction for an indebtedness associated with a service truck wrecker in the amount of \$4,629.00 left a net balance of \$45,371.00 and the Court considered eighty percent of that as a marital asset which calculated to be \$36,296.00.

Carey G. Stewart contends that the Court committed error in finding that the shop inventory and equipment purchased during the marriage and the automobiles should have been classified as separate estate, but even if they were construed as marital property, Bessie M. Stewart was not entitled to division thereof in that she made no contribution. Carey G. Stewart's business known as Stewart's Auto Sales and Body Shop, located in Copiah County, is a body shop business wherein Carey G. Stewart not only repairs vehicles, but purchases damaged vehicles and repairs them for resale. The Court properly found Stewart's Auto Sales, (referred to by the Court in its opinion as Copiah Body Shop), was a business owned by Carey G. Stewart before marriage (T. 389) and continues to be the separate estate property of Carey G. Stewart. Carey had owned the business for 15 years prior to marriage. T. 389 Carey G. Stewart testified that he buys and sells vehicles on a rotating basis which is merely inventory of the business and is in a constant state of change or rotation. T.388 At the time prior to marriage, Carey G. Stewart had vehicles as

inventoried in his business, which throughout the marriage there were substitute vehicles as part of the auto sales business. T. 365 Carey testified that Bessie did not work or contribute to the business. T. 72, 73, 74; 162-163. According to the exhibits introduced, Carey G. Stewart was the sole party responsible for indebtedness owing on the business, both as to mortgage and as to personal properties, and Bessie M. Stewart was not liable for said debts. T. 389; also, see Exhibit 3, 4 and 5.

Bessie M. Stewart testified that she worked for a short period of time in the business, but as the Court correctly found she was compensated for her minimum work and that her efforts did not cause any conversion of separate estate property to marital property. T. 387 Moreover, the business when Bessie worked was a separate business at a separate location, which closed after only one year of operation. T. 159, 160, 388 There was no testimony or evidence presented to show that Bessie M. Stewart contributed anything toward the rotating vehicles, the furniture or equipment, the shop inventory or other equipment or that the marital assets went into the acquisition of said items. Further, there was not evidence presented that supported or showed that Bessie M. Stewart contributed toward the acquisition of the business assets. According to Carey, the money for the shop equipment and business automobiles (for re-sale) came from the separate business (T. 365) account funds and Bessie never contributed. T 219, 220, 228. T. 365, 388, 389

The Court found that the Stewart Auto Sales business had approximately \$86,407.00 in non-marital assets, which constituted the building and land owned prior to marriage, but in essence found that the vehicles associated with the business in the amount of \$11,300.00, as well as the shop inventory and equipment in the amount of \$36,296.00 constituted marital property.

In the case of Pearson v. Pearson, 761 So. 2d 157 (Miss. 2000) the court found the wife was not entitled to part of the clamming business that was owned by the husband prior to marriage, nor was she entitled to the assets acquired through a holding company that was part of the husband's pre-marital assets. The trial Court in Pearson did award lump sum alimony to the wife, but as to equity distribution, there was no showing that the wife had contributed to the acquisition, or improvement of business assets acquired through the business and therefore was not entitled to equitable distribution of the same.

In Elam v. Hinson, 932 So. 2d 76, 80 (Miss. Ct. App. 2006) the wife was not awarded a share of a family business that the husband had prior to marriage. The Court finding that the wife's contribution to the growth of the family business was minimal. In Seymore v. Seymore, 960 So. 2d 513, 518-19 (Miss. Ct. App. 2006) the Court held that stocks owned by the husband before marital remain separate in that there was not proof of increase in value.

In the present, Carey G. Stewart recognizes that the Courts have held that appreciation of separate estate property may be considered marital based on the active efforts attributable to the owner. Craft v. Craft, 825 So. 2d 605 (Miss. 2002). However, in order to properly determine the increase in value the parties seeking part of the assets would have the burden of proving value at the time of marriage and value at the time of the alleged increase. In the case Carnathan v. Carnathan, 722 So. 2d 1248 (Miss. 1998), the chancellor was affirmed in refusing to award the wife part of a farming corporation owned by the husband, because the wife failed to prove any value. The trial Court in Carnathan held that the farming corporation was not exempt from consideration, but stated that the wife had the burden to prove the value of the appreciation.

In the present case, there is not evidence as to the value of Carey G. Stewart's separate estate property being his auto sale and body shop business prior to or at the time of marriage. There was no showing of present day value or comparison to the value of the assets prior to marriage. More importantly, regardless of classification, there was no showing of contribution by Bessie M. Stewart in the acquisition of the automobiles, shop equipment and inventory that the trial Court classified as marital. Further, there was not evidence of family use of the shop equipment, inventory or automobiles maintained at the business for resale or as showing a family use of the same.

In the same of Fogarty v. Fogarty, 922 So. 2d 836, 840 (Miss. Ct. App. 2006), the husband's separate property home was classified as marital based on family use and commingling in that the family lived in the home and added a carport. However, there was to showing in the present case that Bessie M. Stewart used any of the vehicles in question, any of the shop equipment or inventory nor that any of the same of commingled by the parties. In Spahn v. Spahn, 959 So. 2d 8, 12 (Miss. Ct. App. 2006) the pre-marital warehouse of the husband was not converted and the same maintained its classification as separate property. Just as in the Elam v. Hinson, the wife's alleged contribution for minimum and therefore she is not entitled to any share of the business or any distribution of the same as marital property.

## **2. Whether or Not the Chancellor Erred in Awarding Attorney Fees to the Appellee?**

Generally, under Mississippi law attorney fees may be awarded only by statute or by contract. However, in domestic cases the Chancellor has discretion to award fees under certain circumstances. An award of attorney fees is entrusted to the sound discretion of the

Court. Lauro v. Lauro, 924 So.2d 584, 591 (Miss. Ct. App. 2006) (attorneys' fees awards entrusted to discretion of court).

However, in domestic cases (other than actions for contempt) there must be a showing of inability to pay for an award of attorney fees. Cheatham v. Cheatham, 537 So.2d 440. (Miss. 1988). Attorney fees should not be awarded to a spouse with financial means out of which to pay her own attorney fees. Geiger v. Geiger 530 So.2d 185 (Miss. 1988). If the record is insufficient to demonstrate inability to pay, an award of attorney fees is an abuse of discretion. Benson vs. Benson, 608 So.2d 709 (Miss. 1992). The party seeking attorney fees has the burden of proving inability to pay. Duncan v. Duncan, 915 So.2d 1124, 1128 (Miss. Ct. App. 2005) (en banc) (party seeking fees has burden of proving inability to pay).

The present case did not involve contempt and there was absolutely no evidence introduced demonstrating the defendant's inability to pay her own attorney fees. The trial Court divided marital assets on a 50/50 basis with Bessie M. Stewart receiving \$74,372.50 of the marital estate. The award to Bessie M. Stewart including her retaining a savings account in the amount of \$2,900.00 and the plaintiff being requiring to pay her the sum of \$56,610.00 in cash, which requires Carey G. Stewart to liquidate assets inclusive of cashing in life insurance policies to pay said amount. The Court also required Carey G. Stewart to pay 80% of the marital credit card debt, which would be \$30,990.00 with Bessie M. Stewart assuming 20% or \$7,747.00.

In Spahn v. Spahn, 959 So. 2d 8, 12 (Miss. Ct. App. 2006) the appellate Court held that the trial court did not err in refusing to award attorneys' fees to wife who received \$56,000 in lump sum alimony, shares of stock, and an income-producing business); In

Seymour v. Seymour, 950 So. 2d 513, 521 (Miss. Ct. App. 2006) the Court reversed an award of attorneys' fees to wife who received most of the \$155,000 marital estate, including \$16,000 investment account; In Jones v. Jones, 917 So. 2d 95, 103-04 (Miss. Ct. App. 2005) the award of attorneys' fees was reversed where the wife with equity in home and retirement account of \$62,000 and could pay fees. Bessie M. Stewart with the Court's award, has failed to show an inability to pay her attorney fees and it is an abuse of discretion to award her the same.

## CONCLUSION

The Chancellor erred in failing to give Carey Stewart credit to the \$23,000.00, or at a minimum the \$19-\$20,000.00, after deduction of the \$3-\$4,000.00 equity appreciation during the marriage, that clearly flowed into the construction of the new home built during the marriage.

Further, the inventoried vehicles of the business, shop equipment and other inventory flowed from the separate estate property, being Carey's business, without contribution, or efforts by the wife, and it was error to classify or divide the same as marital property.

As to attorney fees, it is clear from the record that the wife has adequate assets to pay her attorney fees.

Respectfully submitted,

**CAREY G. STEWART**

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## **CERTIFICATE OF SERVICE**

I hereby certify that I have served a true copy of the above and foregoing document on the following:

**Robert W. Lawrence**  
**P.O. Box 191**  
**Crystal Springs, MS 39059**

**Betty Sephton**  
**Supreme Court Clerk**  
**P.O. Box 117**  
**Jackson, MS 39205**

**Honorable Ed Patten**  
**Chancellor**  
**P.O. Box 707**  
**Hazlehurst, MS 39083**

placing a copy of the same in the United States mail, postage prepaid, addressed to their regular business mailing address.

This the 15<sup>th</sup> day of February, 2008.

  
\_\_\_\_\_  
W. BRADY KELLEMS



