

**IN THE SUPREME COURT / COURT OF APPEALS
OF THE STATE OF MISSISSIPPI**

TERRY STEIN

APPELLANT

VS.

NO. 2008-CA-00820

KAREN STEIN

APPELLEE

**APPEAL FROM THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI**

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

COUNSEL FOR APPELLANT:

**J. PEYTON RANDOLPH, II (MSB [REDACTED])
LAW OFFICES OF J. PEYTON RANDOLPH, II
613 STEED ROAD
RIDGELAND, MISSISSIPPI 39157
TELEPHONE (601) 605-8537
FACSIMILE (601) 605-8539**

CERTIFICATE OF INTERESTED PARTIES

THE UNDERSIGNED counsel of record certifies that the following persons have an interest in the outcome of this case, the presentation of which is made in order that the Justices of the Court may evaluate possible disqualifications or recusal:

1. Terry Stein, Appellant;
2. Karen Stein, Appellee;
3. J. Peyton Randolph, II, Counsel for Appellant;
4. Debra Allen, Counsel for Appellee; and,
5. Honorable J. Dewayne Thomas, Chancellor for the First Judicial District of Hinds County, Mississippi.

Respectfully submitted,

TERRY STEIN

BY:



J. PEYTON RANDOLPH, II

COUNSEL FOR APPELLANT:

J. PEYTON RANDOLPH, II (MSB [REDACTED])
LAW OFFICES OF J. PEYTON RANDOLPH, II
613 STEED ROAD
RIDGELAND, MISSISSIPPI 39157
TELEPHONE (601) 605-8537
FACSIMILE (601) 605-8539

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STATEMENT OF THE ISSUES

- I. The Chancellor erred as a matter of law and applied an erroneous legal standard in granting Wife a divorce on the grounds of habitual cruel and inhuman treatment.
- II. The Chancellor committed manifest error in creating several key inferences in his final opinion, which stood in stark contrast to the substantial, credible evidence in the record.
- III. The Judgment of Divorce should be denied; however, in the alternative, should the Judgment stand, the division of marital assets should be revised to take into account Wife's dissipation of marital assets.

STATEMENT OF THE CASE

1. Nature of the Case

This Court is being asked to render the Judgment of Divorce between Terry and Karen Stein void. In the alternative, if the Judgment should stand, this Court is being asked to revise the division of marital assets to take into account Wife's dissipation of marital assets, both during the marriage and subsequent separation.

2. Course of Proceedings and Disposition in the Court Below

On the 5th day of October, 2006, Ms. Karen Stein ("Karen" and/or "Wife") filed a Complaint for Divorce and Motion for Temporary Relief against Mr. Terry Stein ("Terry" and/or "Husband") in the Chancery Court of the First Judicial District of Hinds County, Mississippi, alleging habitual cruel and inhuman treatment and caused process to be served

soon thereafter. (C.P. 1.) Terry then filed his Answer and Affirmative Defenses to said Complaint on the 19th day of December, 2006, denying any entitlement to a divorce. (C.P. 8.) Karen later requested leave from the Court and the Court allowed an Amended Complaint for Divorce to be filed on or about the 5th day of April, 2007, in which Karen further alleged habitual drunkenness in addition to the original allegation. (C.P. 15.) Terry answered the same, again denying any entitlement to a divorce. Karen later filed a Complaint for Partition of Real Estate in a new cause number, against Terry and Wells Fargo Bank, National Association, seeking the partition of the marital residence, undeveloped real property located in Hinds County, Mississippi, and undeveloped real property located in Jefferson Davis County, Mississippi. (C.P. 21.) An Agreed Order Consolidating Cases was entered on August 6, 2007. (C.P. 26.) This matter was tried on August 8 and December 10, 2007, following which, on December 27, 2007, the Court rendered its Memorandum Opinion. (C.P. 27.) This was followed on January 31, 2008, by the filing of the Final Judgment of Divorce. (C.P. 65.) On February 11, 2008, Terry filed his Motion to Reconsider. (C.P. 74.) The Court rendered its Memorandum Opinion of Court Concerning the Defendant's Motion to Reconsider on April 10, 2008. (C.P. 79.) And finally, on April 18, 2008, an Order Denying Defendant's Motion to Reconsider and Amended Final Judgment and Memorandum Opinion of this Court was entered. (C.P. 97.)

3. Statement of the Facts

Terry and Karen Stein were married in Prentiss, Mississippi on the 30th day of May, 1981, and separated in Hinds County, Mississippi on or about the 21st day of September, 2006. (C.P. 28.) During the marriage, they had two children, Nicholas, born on the 28th day of

February, 1984, who was 23 years old at the time of the hearings and emancipated by age, and Lindsey, born on the 19th day of November, 1987, who was 20 years old at the time of the hearings. (C.P. 28.)

Throughout their marriage, Terry had worked as an electrician, the majority of which he was employed by Klinger Electric. Terry financially supported his family and contributed to the household responsibilities. He also took time to spend with his children, by coaching his son in little league, attending their band activities, teaching both children how to repair cars, shooting fireworks, watching movies, and simply participating in all other daily activities with his children that fathers who worked would normally do. Although Karen alleges that the children moved away from the marital home as a result of Terry's behavior, each child separately testified they left the home for other reasons instead. (T. 158 & 171.)

While Terry was a dedicated employee of one company for the vast majority of this marriage, Karen held numerous jobs. Normally she was employed as a nurse and she typically worked in psychiatrics. Karen was released from one of her positions at the University Medical Center, because she was engaging in an affair with another co-worker, and she was also released from another job, because some medications were unaccounted for and it was assumed that she took them.

The parties had a unique financial situation during their marriage, in that they each had their own checking accounts. Karen has continually complained about the parties' management of finances during the marriage; however, the parties divided financial obligations among themselves in what they apparently deemed to be an equal fashion. In spite of this equal division, and the fact that Karen was employed for the majority of their marriage, Karen failed

to save for her retirement and instead chose to spend the money she earned on personal assets for herself, such as clothes and alcohol. Conversely, in addition to meeting his agreed financial obligations, Terry chose to save some money and he accumulated a retirement account for himself.

Karen testified that she battled depression throughout their marriage and that she took anti-depressants to deal with post-partum depression. She also testified that she had high blood pressure from stress-induced hypertension. (T. 70.) Nonetheless, these medical issues were not corroborated by expert medical or psychological testimony. Karen also testified that the anxiety associated with her marriage caused her to lose weight; however, evidence of diet pills found in the couple's home was introduced at the hearing, which indicated that Karen's weight loss was the result of measures she was purposely taking instead. (T. 89.)

Karen admitted that she would sometimes take medications home from some of the places she worked, including various mood and/or mind-altering medications. (T. 87.) At the insistence of her father and sister, Karen was admitted to a rehabilitative program at St. Dominic's Hospital for alcohol and prescription medicine abuse. While Karen was in rehab, Terry cared for the children and continued to financially support his family. (T. 207.) Terry was also supportive of his wife's efforts to maintain a clean lifestyle after she returned home.

Karen testified extensively that she took off of work for two weeks without pay to be with her dying father. She also testified that during this time, Terry failed to visit her and that he refused to pay her portion of the household expenses for the month, forcing her to borrow money from her mother. Their daughter, Lindsey, contradicted her mother's testimony when she testified separately that Karen did not take off two weeks from work to visit her dying

grandfather. Lindsey testified that her mother may have missed a few days of work during those two weeks, but usually she would go to work for the day, and then would visit her father after work.

Karen testified that Terry's conduct on a few instances entitled her to a divorce on the grounds of habitual cruel and inhuman treatment. Specifically, Karen testified about a time when the two of them were at the Reservoir with friends, sometime in 1987, and Terry allegedly popped her on the back of her legs with a wet towel. There was also a particular time, sometime in the 1980's, when Terry allegedly gave her a black eye. And after the couple had been married for a couple of years, either in 1982 or 1983, Terry allegedly threw a plate of food at Karen. There was one incident sometime prior to Karen entering rehab which resulted in the police being called to the marital home; however, this was largely the result of Karen's own intoxication.

Karen also testified that Terry would yell at her and say demeaning things to her, in the presence of one or both of their children. (T. 64-65.) Each child separately testified that neither of them ever saw or heard their father treat their mother in this manner. (T. 160 & 182.) Even if the evidence of the prior incidents is taken as true, the incidents occurred years ago and are not causally related to the demise of the parties' marriage.

In regards to Terry's drinking, Karen testified that Terry consumed beer on a daily basis; however, there was no evidence that Terry habitually consumed alcohol to the point of intoxication. (T. 74.) The Stein children each testified separately that neither of them recalled a time when their father was intoxicated. (T. 162-163 & 183-184.) Furthermore, Karen consumed alcohol with Terry on numerous occasions, both before and after she was in rehab at

St. Dominic's. Importantly, if the evidence of Terry's drinking habits is taken as true, then Karen knew of such habits prior to their marriage, which indicates that she had ante-nuptial knowledge. Ante-nuptial knowledge serves as a successful defense to a divorce on these grounds.

Terry is not seeking a divorce from Karen, and certainly Terry does not feel that Karen is entitled to a divorce from him, on the grounds of habitual cruel and inhuman treatment, habitual drunkenness or otherwise. Furthermore, Terry is entitled to the defense of recrimination due to the fact Karen carried on adulterous affairs during the course of this marriage. Oddly, the Court seemed to take no notice of the fact that Karen openly testified that at the time of the hearing she was currently dating a man named Dennis. Furthermore, she openly admits that this paramour had sent her cards and flowers, and had even flown her out of town to meet up with him. (T. 103-104.)

SUMMARY OF THE ARGUMENT

The Court below should be reversed as the Chancellor erred as a matter of law by granting Karen a divorce on the grounds of habitual cruel and inhuman treatment. In rendering said divorce, the Chancellor applied an erroneous legal standard. The alleged conduct of Terry was too remote in time to be considered in rendering a divorce on these grounds and, furthermore, the alleged conduct was not sufficiently cruel, nor habitual, to constitute said grounds for divorce. Additionally, there is no causal connection between the alleged conduct of Terry, nor its subsequent impact on Karen, and the divorce. Also, the Chancellor committed manifest error in creating several key inferences in his final opinion,

which stood in stark contrast to the substantial, credible evidence on the record. The Chancellor improperly presumed that because Terry could not affirmatively deny committing the alleged acts, he must have committed them and Karen's testimony was not sufficiently corroborated.

For these reasons, the Judgment of Divorce should be rendered void in its entirety. Terry is, and has been, contesting the divorce and therefore the instituting of a no fault divorce would be improper. Additionally, it was manifest error for the Chancellor to erroneously disregard Terry's claim of recrimination. As an alternative to rendering the divorce void, the division of marital assets should be revised to take into account Karen's dissipation of marital assets.

ARGUMENT

I. STANDARD OF REVIEW

In most cases 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).

Specifically with regard to the modification of the division of marital assets, it has been held that, "[The Mississippi Supreme Court] employs a limited standard of review of property division and distribution in divorce cases." *Bowen v. Bowen*, 982 So.2d 385, 394 (Miss. 2008) citing *Owen v. Owen*, 928 So.2d 156, 160 (Miss. 2006). Further, "[the

Mississippi Supreme Court] has repeatedly stated that the chancellor's division and distribution will be upheld if it is supported by substantial credible evidence." *Id.*

Regarding a claim of cruel and inhuman treatment, "the chancellor's determination of whether a spouse's conduct rose to the level of cruel and unusual treatment is a determination of law." *Kumar v. Kumar*, 976 So.2d 957, 960 (Miss.App. 2008) citing *Potts v. Potts*, 700 So.2d 321, 322 (Miss. 1997); *Reed v. Reed*, 839 So.2d 565, 569 (Miss.Ct.App. 2003). This Court conducts a de novo review for questions of law. *Kumar* at 960 citing *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 721 (Miss. 2002). Therefore, "such a finding is reversible if the chancellor employed an erroneous legal standard." *Kumar* at 960 citing *Potts v. Potts*, 700 So.2d 321, 322 (Miss. 1997).

II. THE CHANCELLOR ERRED AS A MATTER OF LAW AND APPLIED AN ERRONEOUS LEGAL STANDARD IN GRANTING WIFE A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT

Several factors have been used by courts of this state in arriving at the determination that a divorce shall be granted on the grounds of habitual cruel and inhuman treatment. The factors incorporate elements of timing, severity and causal connection. These elements have been emphasized to different degrees based on the specific facts of the particular case at hand; however, it seems clear that none of them are met by Husband's alleged acts.

A. THE ALLEGED CONDUCT OF HUSBAND WAS NOT HABITUAL AND WAS TOO REMOTE IN TIME TO BE CONSIDERED IN RENDERING A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT

In establishing the basis for her argument that she was entitled to divorce on the grounds of habitual cruel and inhuman treatment, Karen relied substantially on allegations of conduct on the part of Terry which occurred in 1982 or 1983, and 1987. This alleged

conduct, if accurate, is too remote in time to be considered in rendering a divorce on the grounds of habitual cruel and inhuman treatment in 2008. In fact, the Mississippi Supreme Court has ruled as such with regard to far more contemporaneous conduct. In *Bland v. Bland* it was held that allegations of cruel and inhuman treatment which occurred 10 years prior to the date of separation were not sufficient to warrant a divorce on those grounds. *Bland v. Bland*, 620 So.2d 543, 544 (Miss. 1993). Specifically the court stated that said conduct, “does not constitute habitual cruel and inhuman treatment as it was too remote in time and did not lead to the separation.” *Id* at 545.

Additionally, the Mississippi Supreme Court held in *Talbert v. Talbert*, a case involving a similar set of facts, that the husband’s conduct early on during the couple’s 27 year marriage did not constitute habitual cruel and inhuman treatment. That court went on to state that the fact that the husband may be insensitive did not amount to proof of habitual cruel and inhuman treatment. *Talbert v. Talbert*, 759 So.2d 1105 (Miss. 1999).

Indeed it is true that, “although a single incident may provide the grounds for divorce, as a general rule the charge of cruel and inhuman treatment is not established by a single act or an isolated incident.” *Ellzey v. Ellzey*, 253 So.2d 249, 250 (Miss. 1971) citing *Stockton v. Stockton*, 203 So.2d 806 (Miss. 1967); *McBroom v. McBroom*, 58 So.2d 831 (1952); *Manning v. Manning*, 160 Miss. 318, 133 So. 673 (1931); *Johns v. Johns*, 57 Miss. 530 (1879). Additionally, the Mississippi Supreme Court has held that, “[h]abitual cruel and inhuman treatment may be established only by a continuing course of conduct on the part of the offending spouse which was so unkind, unfeeling or brutal as to endanger, or put one in reasonable apprehension of danger to life, limb or health, and further, that such course of

conduct must be habitual, that is, done so often, or continued so long that it may reasonably be said a permanent condition.” *Holliday v. Holliday*, 776 So.2d 662, 677 (Miss. 2000) citing *Robison v. Robison*, 722 So.2d 601, 603 (Miss. 1998). The alleged conduct of Terry meets none of these descriptions.

B. THE ALLEGED CONDUCT OF HUSBAND WAS NOT SUFFICIENTLY CRUEL, NOR HABITUAL, TO CONSTITUTE HABITUAL CRUEL AND INHUMAN TREATMENT

Assuming the allegations regarding Terry’s conduct to be true, said conduct was not sufficiently cruel, nor habitual, to constitute cruel and inhuman treatment. The Mississippi Supreme Court has held that, “[t]he divorce grounds of habitual cruel and inhuman treatment may be established by a showing of conduct that either (1) endangers life, limb, or health, or creates a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief, or (2) is so unnatural and infamous as to make the marriage revolting to the non-offending spouse and render it impossible for that spouse to discharge the duties of marriage, thus destroying the basis for its continuance.” *Richard v. Richard*, 711 So.2d 884, 890 (Miss. 1998) citing *Daigle v. Daigle*, 626 So.2d 140, 144 (Miss. 1993). In this regard, the facts of the case speak for themselves. The majority of the alleged conduct occurred over twenty years ago. Yet Karen remained married to Terry. Clearly Karen was neither subjectively nor objectively placed in reasonable fear of life, limb or health, nor was the basis for continuing the marriage destroyed.

Additionally, the Mississippi Supreme Court has stated that, “[o]ur cases require more than mere unkindness, rudeness, or incompatibility to support the granting of a divorce on the grounds of ‘cruel and inhuman treatment.’” *Robinson v. Robinson*, 722 So.2d 601, 603

(Miss. 1998) citing *Brooks v. Brooks*, 652 So.2d 1113, 1124 (Miss. 1995). Furthermore, “The fact that one spouse eventually grows weary of the other’s established behavior pattern does not give rise to the requisite standard for habitual cruel and inhuman treatment.” *Talbert v. Talbert*, 759 So.2d 1105, 1109 (Miss. 1999).

C. THERE IS NO CAUSAL CONNECTION BETWEEN THE ALLEGED CONDUCT OF HUSBAND, NOR ITS SUBSEQUENT IMPACT ON WIFE, AND THE DIVORCE

“A causal connection between the treatment and separation must exist.” *Richard v. Richard*, 711 So.2d 884, 890 (Miss. 1998) citing *Gardner v. Gardner*, 618 So.2d 108, 114 (Miss. 1993). It is true that no longer does this court require the specific act to be the proximate cause of the separation. *Id.* Rather, in implementing a divorce on the grounds of habitual cruel and inhuman treatment, the courts will look for, “habitual or continuous behavior over a period of time, close in proximity to the separation, or continuing after a separation occurs.” *Id.* As has been discussed in the preceding paragraphs, the alleged conduct of Terry was neither habitual nor continuous, nor was it close in proximity to the parties’ separation.

III. THE CHANCELLOR COMMITTED MANIFEST ERROR IN CREATING SEVERAL KEY INFERENCES IN HIS FINAL OPINION, WHICH STOOD IN STARK CONTRAST TO THE SUBSTANTIAL, CREDIBLE EVIDENCE IN THE RECORD

A. THE CHANCELLOR IMPROPERLY PRESUMED THAT BECAUSE HUSBAND COULD NOT AFFIRMATIVELY DENY COMMITTING THE ALLEGED ACTS, HE MUST HAVE COMMITTED THEM

Karen alleged that in one instance of abuse Terry gave her a black eye. (T. 35.) This apparently took place in either 1982 or 1983. At a hearing on this matter, Terry was questioned on direct examination whether he remembered his wife having a black eye, at a

time approximately 25 years ago. In responding Terry noted that he was almost 52 and that his memory had been failing but that he could not remember it. (T. 209.) He was then specifically questioned, “[b]ut you would think you would remember if your wife had a black eye, even 25 years ago?” Terry responded, “Yes.” (T. 209.)

Terry’s testimony, coupled with the testimony of the parties’ two children, placed into serious doubt the truthfulness of Karen’s allegations. Furthermore, a motive for Karen to attempt to break the marital bond between the parties was established at the hearing when she admitted that she was presently dating a man named Dennis. Karen continued to explain that her paramour had sent her cards and flowers, and had even flown her to meet him. (T. 103-104.)

Contrary to such information, the Chancellor states in his Memorandum Opinion that, “one would believe if you didn’t hit, belittle, or harm your wife over these 26 years of marriage that you would remember and could affirmatively deny the same.” (C.P. 35-36). This inference by the Chancellor was mere speculation or conjecture, and as such, was not part of the record on which the Chancellor could base his decision. *Rodgers v. Taylor*, 755 So.2d 33, 38 (Miss.Ct.App. 1999).

B. WIFE’S TESTIMONY REGARDING INSTANCES OF CRUEL AND INHUMAN TREATMENT ON THE PART OF HUSBAND, AND ITS EFFECT ON HER, WAS NOT SUFFICIENTLY CORROBORATED

It is well established that, the party alleging cruel and inhuman treatment must typically corroborate the testimony. *Heatherly v. Heatherly*, 914 So.2d 754, 757 (Miss.App. 2005) citing *Chambers v. Chambers*, 213 Miss. 71, 56 So.2d 33, 34 (1952). In fact, “[o]nly where ‘in its nature or owing to the isolation of the parties, no corroborating proof is

reasonably possible,' should a divorce be granted on the uncorroborated testimony of the plaintiff." *Id* citing *Anderson v. Anderson*, 190 Miss. 508, 200 So. 726, 727 (1941).

At no point has Karen alleged that the conduct took place when the parties were isolated. In fact, a substantial amount of Karen's allegations were based on the assertion that Terry committed these alleged acts in the presence of others, including the children. Yet the only person who Karen called at the hearing to corroborate her testimony was her sister Peggy Murphy. Ms. Murphy's testimony primarily supported the allegation that Terry had an "explosive" temper, and that he would at times "scream." (T. 123.) The only allegation of physical violence which Ms. Murphy's testimony purports to substantiate involved an incident at Ratliff's Ferry in 1987. (T. 126.) Even on this note, Ms. Murphy could only support that Karen had red marks on the back of her leg, since she experienced none of the alleged abusive conduct first hand. (T. 123.) One is forced to question why Karen did not call to testify someone who witnessed the incident first hand, especially if it took place in a crowd of friends, as she contends.

Furthermore, Karen testified that she was drinking to excess in order to escape the stress of her marriage, and that her alcohol intake has diminished since the parties' separation. (T. 68-69.) This was not supported by any expert medical or psychological testimony. Similarly, Karen testified that she had high blood pressure and had battled depression throughout her marriage, and that this too has now subsided. (T. 71-72.) Again, this was never substantiated by expert medical or psychological testimony. In fact, Karen appears to contradict her own assertions when, only a few phrases later, she states that she is

still on an anti-depressant known as Wellbutrin, as well as a blood pressure medicine. (T. 71-72.)

Furthermore, Karen offered several very plausible explanations for all of her symptoms. She testified that while she worked at Jackson Recovery Center there was a box of unused medicines that people could take home, and that she did so, on a regular basis. (T. 87.) She also stated that she took weight control medicine during the parties' marriage that admittedly "made her nervous" and "made her heart beat fast." (T. 89.) Karen's relationship with her paramour, and the subsequent concealment thereof, provided a very stressful and possibly depressing environment which would more than explain her symptoms as well.

Once again, the only person who Karen offered to corroborate her testimony was her sister Peggy Murphy. Ms. Murphy stated that she feels like Karen was drinking to excess in order to cope with her marriage. (T. 119-120.) However, Ms. Murphy was not qualified to testify as a medical or psychological expert, nor was she put forth as such. Ms. Murphy further testified that in spite of Karen's claims, Karen is still drinking, takes blood pressure medicine and an anti-depressant known as Wellbutrin, the latter in order to quit smoking; however, this would certainly appear to contradict the claim she made earlier that Karen was depressed. (T. 145-146.) Finally, Ms. Murphy testified that not only did Karen go to treatment for abuse of alcohol, but also for abuse of prescription medication. (T. 149-150.)

In addition to its serious shortcomings, Karen's testimony and portrayal of the facts was further placed into question by the testimony of the parties' children, Nicholas and Lindsey. They both testified that in contrast to Karen's testimony, neither of them had ever experienced, nor witnessed, the alleged outrageous and "explosive" conduct of their father,

Terry. On cross examination, Lindsey stated that it was Karen who would initiate the parties' arguments. (T. 185.) It is well established that, in a divorce case, where cruelty is relied upon as a ground for divorce, the complainant will not be entitled to a divorce if she provoked the acts constituting the alleged cruelty by her own conduct. *Scott v. Scott*, 69 So.2d 489, 495 (Miss. 1954) citing *Ammons v. Ammons*, 109 So. 795 (Miss. 1926).

IV. IT WAS MANIFEST ERROR FOR THE CHANCELLOR TO ERRONEOUSLY DISREGARD HUSBAND'S CLAIM OF RECRIMINATION

"Under the common law doctrine of recrimination, if each party to a marriage had adequate grounds on which to have a divorce, neither party was entitled to a divorce. This equitable doctrine 'is founded on the basis that the equal guilt of a complainant bars his/her right to divorce and the principal consideration is that the complainant must come into court with clean hands.'" *Dorman v. Dorman*, 7 So.2d 426, 430 (Miss.App. 1999) citing *Parker v. Parker*, 519 So.2d 1232, 1235 (Miss. 1988). Furthermore, it has been established that recrimination is an affirmative defense. *Parker v. Parker*, 519 So.2d 1232, 1234 (Miss. 1988). Additionally, "[t]he offenses committed by each spouse need not be the same, but both offenses must be of a nature sufficient to support a dissolution of the marriage." *Dorman* at 430. Certainly the charge of adultery would support the dissolution of the marriage, and this is the case even if the conduct took place while the parties were separated. *Talbert v. Talbert*, 759 So.2d 1105, 1109 (Miss. 1999).

Importantly, "[a] charge of adultery may be grounds for divorce upon a showing of either an infatuation for a particular person of the opposite sex or a generally adulterous nature on the part of the defendant." *Holden v. Frasher-Holden*, 680 So.2d 795, 798 (Miss. 1996) citing *McAdory v. McAdory*, 608 So.2d 695, 700 (Miss. 1992). "In Mississippi one

seeking a divorce on the grounds of adulterous activity must show by clear and convincing evidence both an adulterous inclination and a reasonable opportunity to satisfy that inclination.” *Holden* at 798 citing *Owen v. Gerity*, 422 So.2d 284, 287 (Miss. 1982); *Magee v. Magee*, 320 So.2d 779, 783 (Miss. 1975); *Rodgers v. Rodgers*, 274 So.2d 671, 673 (Miss. 1973). However, “[s]uch evidence need not prove the alleged acts beyond a reasonable doubt and the plaintiff is not required to present direct testimony as to the events complained of due to their secretive nature.” *Holden* at 798.

As was noted at a hearing of this matter, Karen admitted that she was dating someone, and that this paramour had sent her cards and flowers and had even flown her to meet him. (T. 103-104.) Clearly Karen had “an infatuation for the person of the opposite sex,” and by her own admission, had both “an adulterous inclination and a reasonable opportunity to satisfy that inclination.” And has been stated, the mere fact that the admitted events took place after the parties separated, is no bar to the claim of adultery. *Talbert v. Talbert*, 759 So.2d 1105, 1109 (Miss. 1999).

V. AS AN ALTERNATIVE, SHOULD THE JUDGMENT STAND, THE DIVISION OF MARITAL ASSETS SHOULD BE REVISED TO TAKE INTO ACCOUNT WIFE’S DISSIPATION OF MARITAL ASSETS

As has been extensively discussed, the “substantial credible evidence” in favor of Karen was clearly lacking in this case. Therefore, if this Court finds Karen is entitled to a divorce, this Court should then revise the division of the parties’ assets. *Bowen v. Bowen*, 982 So.2d 385, 394 (Miss. 2008) citing *Owen v. Owen*, 928 So.2d 156, 160 (Miss. 2006). Division of marital assets is now governed under the law as stated in *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994) and *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994). The Court’s

first step is to determine whether the parties' assets are marital or non-marital. When looking at the Steins' property, all assets are marital.

The Court must then look to the eight factors in *Ferguson* to determine the division of marital property.

- 1) Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows: a. Direct or indirect economic contribution to the acquisition of the property; b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
- 2) The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
- 3) The market value and the emotional value of the assets subject to distribution.
- 4) The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance *or inter vivos* gift by or to an individual spouse;
- 5) Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
- 6) The extent to which property division may, with equity to both parties, be

utilized to eliminate periodic payments and other potential sources of future friction between the parties;

- 7) The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
- 8) Any other factor which in equity should be considered.

Under the first factor, both Terry and Karen contributed economically to their family. There was a period of a few years in which Karen did not work and Terry supported their family on his own. Terry and Karen both contributed to the household responsibilities and both were involved in the activities and lives of their children. Terry supported Karen when she attended nursing school.

Under the second factor, the Chancellor found there to be insufficient evidence of unreasonable expenditures or unnecessary disposal of the marital assets, and as such, weighed the second factor evenly for both parties. (C.P. 52.) It is not contested that Karen worked during most of the parties' marriage; however, while she had the opportunity to save money for her retirement, she failed to do so. She chose to spend her money on tangible personal assets for herself, such as clothing and alcohol, as opposed to saving it. In so doing, she dissipated marital assets. Karen also dissipated assets by spending thousands of dollars on a drug and alcohol rehabilitation program, and subsequently continuing to use alcohol. On the other hand, Terry, while continuing to provide for his family, accumulated nearly \$129,000.00 of retirement savings. It is important to note that Karen had the opportunity to create a retirement account through her own employment; however, she was continually fired, due to her drug abuse, affairs, and irresponsible conduct. In light of the aforementioned facts and the parties' unique

financial situation in which they each had their own checking accounts and financial obligations, and since Karen was able to save money for her retirement and failed to do so, Terry should not be required to share his retirement funds with Karen.

Under the third factor, the market value of the parties' assets to be distributed is discussed above. Under the fourth factor, the Court should find that there was no property brought into this marriage by either party, and none has been acquired by inheritance or *inter vivos* gift. Under the fifth factor, the tax and/or economic consequences, if any, would be *de minimis*. Under the sixth factor, the need for periodic payments does not appear to exist for reasons discussed below.

Under the seventh factor, the parties are obviously growing older and neither party has sustained any substantial savings for retirement, other than Terry's pension. Furthermore, Karen's earning power is substantially greater than Terry's, due to the college education she obtained while the parties were married. Because Terry supported her, as well as the family, while she obtained this degree, he has an interest therein.

Finally, the eighth factor is brought into play by Karen's adulterous relationships, especially the most recent one with a man by the name of Dennis. The Court should look at the debts of the parties and find that the parties are equally responsible for the debts listed on the 8.05, specifically \$1,800.00 is owed to Chase Bank, \$262.00 is owed to United Credit, and \$2,440.00 is owed to BankPlus. The outstanding mortgage in the amount of \$61,000.00, with Wells Fargo, will be satisfied when the home is partitioned.

CONCLUSION

The Judgment of Divorce rendered in the Hinds County Chancery Court should be deemed void in its entirety, as the Chancellor erred as a matter of law by granting the same on the grounds of habitual cruel and inhuman treatment. Additionally, it was manifest error for the Chancellor to erroneously disregard Terry's claim of recrimination and by creating several key inferences in his final opinion, which stood in stark contrast to the substantial, credible evidence in the record. As an alternative to rendering the divorce void, the division of marital assets should be revised to take into account Karen's dissipation of marital assets.

Respectfully submitted,

TERRY STEIN

BY:



J. PEYTON RANDOLPH, II

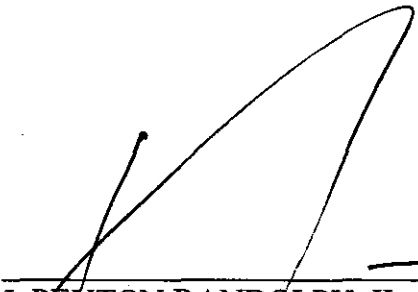
CERTIFICATE OF SERVICE

I, J. Peyton Randolph, II, do hereby certify that I have this date hand delivered or mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

Debra Allen, Esq.
Allen & Conway, PLLC
812 North President Street
Jackson, Mississippi 39202; and,

Honorable J. Dewayne Thomas
Hinds County Chancellor
Post Office Box 686
Jackson, Mississippi 39205-0686.

This the 3rd day of October, 2008.



J. PEYTON RANDOLPH, II

COUNSEL FOR APPELLANT:

J. PEYTON RANDOLPH, II (MSB # [REDACTED])
LAW OFFICES OF J. PEYTON RANDOLPH, II
613 STEED ROAD
RIDGELAND, MISSISSIPPI 39157
TELEPHONE (601) 605-8537
FACSIMILE (601) 605-8539