

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2008-CA-01362

DRAKE L. LEWIS

APPELLANT

VS.

TONIA D. LEWIS

APPELLEE

APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY,
MISSISSIPPI, SECOND JUDICIAL DISTRICT, CHANCERY COURT
CAUSE NO. C2402-06-747(4)
HONORABLE CARTER BISE, PRESIDING TRIAL JUDGE

BRIEF OF APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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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:

Drake L. Lewis, Appellant

Tonia D. Lewis, Appellee

Thomas W. Teel, Perry, Murr, Teel & Koenenn, P.A., P. O. Box 7158,
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Honorable Carter Bise., Trial Judge

Respectfully submitted, this the 18th day of May, 2009.



DEAN HOLLEMAN
ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
A. STATEMENT OF THE ISSUES.....	1
B. STATEMENT OF THE CASE.....	1
C. SUMMARY OF THE ARGUMENT.....	17
D. ARGUMENT.....	18
CONCLUSION.....	35
CERTIFICATE OF SERVICE.....	36

TABLE OF AUTHORITIES

CASES:

<u>A.& L. Inc. v. Gantham</u> , 747 So.2d 832 (Miss. 1992.	26
<u>Bowen v. Bowen</u> 982 So.2d 385, 395.	26
<u>Carrow v. Carrow</u> , 642 So.2d 901, 904 (Miss. 1994)	19
<u>Craft v. Craft</u> , 825 So.2d 605,609 (Miss. 2002)	25
<u>Dunaway v. Dunaway</u> , 749 So.2d 1112, 1118 (Miss.Ct.App.1999)	24
<u>Ferguson v. Ferguson</u> , 639 So.2d 921 (Miss. 1994)	19
<u>Franks v. Franks</u> , 759 So.2d 1164, 1169 (Miss. 1999)	24
<u>Grantham v. Grantham</u> , 747 So.2d 832 (Miss.1999)	28
<u>Hankins v. Hankins</u> , 866 So.2d 508, 511 (Miss.Ct.App.2000)	24
<u>Heigle v. Heigle</u> , 654 So. 2d 897 (Miss. 1995)	28
<u>Hemsley v. Hemsley</u> , 639 So.2d 909 (Miss. 1994)	19,23,26,28
<u>Irby v. Estate of Irby</u> , No. 2007-CA-00689-SCT	24
<u>Johnson v. Johnson</u> , 650 So.2d 1281,1286 (Miss. 1994)	24
<u>Kabase v. State</u> , 12 So.2d 758, 31 Ala. App. 77	28
<u>Magee v. Magee</u> , 661 So. 2d 1117, 1122 (Miss. 1995)	18
<u>Maslowski v. Maslowski</u> , 655 So.2d 18, 20-21 (Miss. 1995)	28
<u>Newsom v. Newsom</u> , 557 So.2d at 514	24
<u>Owen v. Owen</u> , 798 So.2d 394, 397 (Miss. 2001)	19
<u>Oswalt v. Oswalt</u> , 981 So.2d 993 (Miss.Ct.App.2007)	19
<u>Oxley v. Oxley</u> , 695 So.2s.364 (Fla.Dist.Ct.App.[4 th Dist.] 1997)	27

<u>Pearson v. Pearson</u> , 761 So.2d 157 (Miss. 2000)	23
<u>Smith v. Smith</u> , 994 So.2d 882 (Miss.App.2008)	27
<u>Stewart v. Stewart</u> , 2 So.3d 770 (Miss.Ct.App. 2009)	18,25
<u>Stewart v. Stewart</u> , 864 So.2d 934 (Miss. 2003)	23
<u>Williams v. Rembert</u> , 654 So. 2d 26, 28 (Miss. 1995)	19

A. STATEMENT OF ISSUES

Drake raises six distinct assignments of error upon which he asks this Court to reverse the trial court:

- (a) "Legacy Holdings: The Court placed a value on a business that had no assets".
- (b) "Trust Properties: The Court incorrectly found property gifted to the husband from a trust to be marital property".
- (c) "Hickory Hills and St. Martin: The Court treated a previously owned property as a [sic] existing as [sic]".
- (d) "Loan to Legacy: The Court treated a loan as both income and an asset".
- (e) "The Equitable Distribution". (The assignment of error is not included in the title)

For the above reasons Drake asserts the trial court's equitable distribution was manifestly wrong and in error. Each of these allegations will be addressed separately herein below.

Tonia's response will be based upon the evidence adduced at the trial below and will be specifically referenced to the record below as required by the Mississippi Rules of Appellate Procedure.

B. STATEMENT OF THE CASE

The marriage of Tonia and Drake Lewis spanned some 15 years. The end came after Drake began and continued his adulterous

relationship with Tonia's purported best friend. They were married March 2, 1991, and separated June 12, 2006. They had three (3) children: Jordan Lewis, age 16; Madison Lewis, Age 10; and Caullin Lewis, age 8.

On August 3, 2006, Tonia filed her Complaint for Divorce against Drake. Drake did not file an answer. C.P. Case History Listing. The trial was conducted on July 19 and 20, 2007. Upon conclusion of the evidence, the Court took the case under advisement, pending receipt of proposed findings of fact and conclusions of law from both parties. Tonia filed her proposed findings with the Court. Drake filed nothing. C.P. p.9.

Final Judgment

On January 11, 2008, the trial court entered its Judgment Incorporating Findings of Fact and Conclusions of Law. (C.P. Volume 1, Pages 9-36). As a result of the Judgment, the assets of the parties were equitably distributed.

The trial court made specific findings as to the identity of the assets owned by Tonia and Drake. Each asset was separately listed and referenced to the exhibit supporting the asset:

Asset	Value	Debt	Equity	Title	Comments
Home- 9021 Marina Ave. Ocean Springs, Ms.	\$250,00 0 Ex.4,5a	\$146,0 00 Ex.2a, 4	\$104,00 0	Joint	Marital-Family home occupied by Tonia and kids.
Suma Hills, Lot	\$190,00	\$142,0	\$48,000	Joint	Marital-Legacy Spec

7 Livingston, La.	0 Ex.4,29	00 Ex.4,29			home. Estimated profit \$38k to \$48k. ¹ Ex.4,29
Lot 15 & 16 Grasslands Sub. Columbia, Mo. (Sold)	\$93,000 +	\$0	\$93,000	Joint	Marital. Sold. Drake holds \$93,000 check (with a tax refund for total of \$104,000)
Richland Road Columbia, Mo. (Sold)	\$132,81 2T \$132,81 2D	\$0	\$132,81 2T \$132,81 2D	Joint	Marital. These net funds are divided. Drake has \$132,000 left; Tonia has \$120,000 left
Lot 13 Hickory Hills	\$10,512	\$0	\$10,512	Drake	Claims as non-marital gift from trust. Ex.19
Lots 1-4-Spec Homes Pinehurst	\$680,00 0 Ex.5	\$421,00 00 Ex.29 ²	\$259,00 0	Drake	Marital property being developed by Legacy.
St. Martin 10 Acres	\$200,00 0 Ex.5a, 20, 2	\$0	\$200,00 0	Drake	Claims as non-marital gift.
Swamp Road Land	\$30,000 Ex.2	\$0 Ex.2	\$30,000	Drake	Claims as non-marital gift.
Tiger bend Apartments 15020 Tiger bend Road Baton Rouge, La	\$130,00 0 Ex.5	\$33,50 5	\$96,545	Drake 1/5 th intere st. Ex.22	Claims non-marital gift. ex. 22.
4912 Kennesaw Drive (Shenandoah) Baton Rouge, La	\$250,00 0 Ex.5,4,2	\$82,00 0 Ex.2,4	\$168,00 0	Drake	Claims non-marital. Purchased 4/00.
2003 Yukon	\$20,000 Ex.2a	\$17,58 6	\$2,414		Marital.
2000 Corvette	\$27,000	\$0	\$27,000	Drake	Claims non-marital. Purchased 2/04.
2004 SK1 Truck	\$27,000 Ex.1,4	\$0	\$27,000	Drake	Marital.
Aim ...5256	\$2,304 Ex. 12.		\$2,304	Drake	Marital. IRA
Aim ...1916	\$3,141		\$3,141	Drake	Marital. IRA

¹ Drake testified as to the specifics of this property value, debt and expected profit.

² Exhibit 25 is a profit and loss statement for the Pinehurst homes being built by Legacy. Drake's testimony indicated a balance on all construction loans of \$421,000.00 (127k+115k+30k+149K).

	Ex.12				
IRA Drake	\$5,300		\$5,300	Drake	Marital. IRA
IRA Tonia	\$2,950		\$2,950	Tonia	Marital. IRA
Legacy Holdings, LLC "Personal Loan to LLC"	\$156,555 Ex.2a		\$156,555	Joint	Marital. Equity in company.
Bay liner Boat	\$5,000 Ex.2a.		\$5,000		Marital. Purchased by Drake after separation.
Tax Refund	\$9,000 Ex.2a		\$9,000	Joint	Marital. Held by Drake along with \$93,000 for total of \$104,000
Legacy Holdings, LLC	\$1,148,270 Ex.1,4,7		\$1,148,270	Joint	Marital. See balance sheets, Ex.1, 4, 7.
Lot 29 Hickory Hills	\$10,000	\$0	\$10,000	Joint	Purchased by parties during marriage. Ex. 1

The Court awarded Tonia Lewis the following assets, along with any debt associated with a particular asset:

[Each asset has been numbered for reference in this Brief]

Asset	Value	Debt	Equity
(1) Home: 9021 Marina Ave. Ocean Springs, Mississippi	\$250,000	\$146, 000	\$104, 000
(2) Proceeds from sale of Lots 15, 16 Grasslands	\$93,000	n/a	\$93,000
(3) Proceeds from sale of Richland Road Columbia, MO	\$265, 624	n/a	\$132,812 \$132,812
(4) St. Martin 10 Acres	\$200,000	n/a	\$200,000
(5) 4912 Kennesaw Dr. Shenandoah Baton Rouge, LA	\$250,000	\$82,000	\$168,000
(6) 2003 Yukon	\$20,000	\$17, 586	\$2,414

(7) AIM 5256	\$2,304	n/a	\$2,304
(8) AIM 1916	\$3,141	n/a	\$3,141
(9) IRA (Drake)	\$5,300	n/a	\$5,300
(10) IRA (Tonia)	\$2,950	n/a	\$2,950
(11) Tax Refund	\$9,000	n/a	\$9,000
(12) Lot 29 Hickory Hills Jackson County, MS	\$10,000	n/a	\$10,000

Total Net Value to Tonia: \$865,733.00

(As corrected by trial court, CP 77)

To Drake Lewis, along with any debt associated with a particular asset, the Court made the following distribution:

Asset	Value	Debt	Equity
(13) Suma Hills, Lot 7 Livingston, LA	\$190,000 Ex. 4, 29	\$142,000	\$48,000
(14) Lot 13, Hickory Hills	\$10,512	n/a	\$10,512
(15) Lots 1-4 Pinehurst Spec Homes	\$680,000 Ex. 5	\$421,000 Ex. 29	\$259,000
(16) Swamp Road	\$30,000 Ex. 2	n/a Ex. 2	\$30,000
(17) Tiger Bend Apartments Baton Rouge, LA	\$130,000 Ex. 5	\$33,505	\$96,545
(18) 2000 Corvette	\$27,000	n/a	\$27,000
(19) 2004 SK1	\$27,000	n/a	\$27,000
(20) Loan to Legacy Holdings, LLC	\$156,555 Ex. 2a	n/a	\$156,555
(21) Bayliner	\$5,000	n/a	\$5,000
(22) Legacy Holdings, LLC	\$1,148,270 Ex. 1, 4, 7		\$1,148,270

Total Net Value to Drake: \$1,807,882.00

Post Trial Motions

After the judgment, both parties filed post trial motions. Drake filed a Motion for Reconsideration, alleging the judgment was contrary to the overwhelming weight of evidence. Tonia filed a Motion to Alter or Amend the Judgment requesting that numerical errors contained in the Judgment be corrected to reflect the correct value of assets awarded to Tonia. CP 77.

The Court, on its own motion, entered an Order Modifying Judgment. The Court vacated the portion of the judgment which awarded attorney's fees of \$7,000.00 to Tonia, finding that after the distribution of assets, Tonia was capable of bearing her own attorney's fees. CP 65.

The Court denied Drake's Motion for Reconsideration and interestingly made the following comments, *inter alia*:

1. "The Court notes initially that in its Judgment, it noted that the Defendant was shown to have been less than credible by his failure to reveal certain assets and income to the Court at the hearing on temporary relief as well as at the trial of this matter". CP 82.³

2. "Credibility being so severely damaged, the Court could only look to the documentation produced by Tonia Lewis as being more reliable, even though some of it may have been questionable (her 8.05, the balance sheet which she took off of his computer which contained

³ Inadvertently, a temporary order was not entered, but the parties follow the Court's ruling.

some elements that were no longer held⁴; the brochure for Legacy Builders with its “uncertified” balance sheet”).⁵ In particular, the Court notes that the penalties for submitting a fraudulent tax return assure greater accuracy with Exhibit 8”.⁶ CP 82-83.

3. “This Court left it to Defendant Drake Lewis to maintain an open record to bring in his CPA to corroborate his valuation of the various holdings, which he did not. This portion of the Motion is not well taken and is DENIED”.⁷ CP 83.

The Marriage:

At the time of trial in July 2007, Tonia Lewis was 37 years of age. She was raised in the State of Idaho. Tr.10. After graduating from high school, she was employed as an administrative assistant with a cattleman’s association. Later she worked for J.C. Penny’s in a secretarial position. Tr.11.

Tonia and Drake met as seniors in high school at a Church retreat. At that time, he lived in Missouri. Tr.12. In 1990 Tonia moved to

⁴ When she filed her divorce, Tonia printed Drake’s ‘balance sheet’ which included assets previously sold. None of the ‘sold’ assets were included in the Court’s finding and distribution. The inclusion of these ‘sold’ assets in Drake’s ‘balance sheet’ only showed the historical extent of his comingling of various assets.

⁵ In July 2007 Tonia printed this balance sheet from Legacy’s computer. It was what it was, as Drake controlled Legacy from July 2006 until the trial in July 2007. Of course, he disputes the information thereon.

⁶ The Court is noting that the filed Legacy tax returns and balance sheets are the more credible evidence to rely upon, having not been prepared in anticipation of divorce.

⁷ This is the Court’s acknowledgement of Drake’s burden of proof as to showing other values and even more information on various holdings, i.e. what Drake claims are non-marital. Similar to Drake’s not filing an answer to the Complaint, not filing written discovery until just before the trial, and not providing supporting documentation for his claims of non-marital assets, he again did not carry out his burden of proof and his promise to the Court.

Missouri and became engaged to Drake by 1991. They married in Columbia, Missouri, on March 2, 1991. By that time Tonia was working as a secretary in an insurance agency. Drake was in college. Tr.12-13. Their initial plans were for Drake to finish college and Tonia would then raise the soon-to-come children. Tr.15.

From 1991 through 1999 Tonia and Drake had three children. The parties stipulated at trial that they would share joint legal custody of the minor children and Tonia would have the primary physical custody of the children. Tr.17.

During the early part of the marriage, they lived with Drake's parents. Drake held jobs as a stereo installer and at an insurance agency. Tr.18. Tonia continued to work as a secretary. Both parties' income was used to pay for their living expenses. Tr.18.

After the first child was born in 1991, the parties moved to Indianapolis, Indiana, to be on their own and away from Drake's parents. Tr.17-18. The only assets they owned were some used cars Drake would buy and sell. They purchased a home with their joint income. Tr.21. When they eventually moved to Mississippi in about 1996, they sold their home and made about \$15,000.00 in profit. Tr.21.

Move to Mississippi:

Drake told Tonia he wanted to move the family to Mississippi for them to begin to build homes on some land his father advised was a good

investment.⁸ Tr.21. Drake told Tonia the move would allow her to be a “stay at home” mom and the real estate development would be a “good income for us” and their family. Tr.22.

Tonia became the mom and homemaker i.e. ‘the June Cleaver’, Box v. Box, 622 So.2d 284 (Miss.1993). She amazingly went beyond that role and also worked side by side with Drake to develop lots in the Hickory Hills subdivision in Jackson County, Mississippi. Tr.23. In essence she did it all: being fully devoted to the family, the children, her husband Drake and the family business.

Lewis Management-Legacy Holdings, Inc:

Tonia and Drake began doing business as “Lewis Management”. Exhibit 3 (Example: 1997 Tax Return Profit and Loss From Business). Drake’s father also joined them in the venture. Tr.24. Thus began the comingling of assets from Drake’s father with the business of Tonia and Drake.

Four lots were purchased in Drake and Tonia’s name, with the financing being backed by Drake’s father. Tr.24-25. Another four lots were purchased for Drake’s father to be an investment for Drake and his siblings, i.e. Drake refers to as the ‘trust lots’.⁹ Tr.24.

⁸ Drake’s father is a retired attorney who is a major real estate developer living in Baton Rouge, Louisiana. CP 10.

⁹ While there is a lot of reference by Drake in the record to a “Trust”, there was no trust document placed in evidence, no corroborating testimony of such, and when questioned on the trust and its holdings Drake just plead ignorance.

The lot development and management of completed units was handled by Tonia and Drake. Tr.319-320. Drake's dad did not assist. Drake and Tonia opened an account for the 'trust lots' on which they both signed. Tr.320. While Drake testified the trust compensated Tonia and Drake for their work over the years, on cross examination he could not demonstrate such compensation with any document. Tr.321.

There was no separation of the business of the 'trust' and the business of Tonia and Drake. From the inception, the funds were comingled and used by Tonia and Drake. Afterwards, the comingling continued throughout the marriage as other business related to the 'trust' was handled by them.¹⁰ Tr.322-323, Exhibit 8, Exhibit 7.

One example of their continuing to comeingle the business of Legacy and the trust is found in the 2003 tax return of Tonia and Drake's later formed company, Legacy Holdings, Inc. Under "statement 4" there was a loan receivable from 'trust villas' for \$68,801.00. Tr.322-323; Exhibit 8. In other words, Tonia and Drake had funded the business of the 'trust' with their own money that both worked to earn. Very little separation or distinction of the business of either is seen here.

According to Drake, "They [Legacy and the 'Trust'] loaned money back and forth to each other as they needed it." Tr.326. As further indication of the extent of the comingling of the business and income of the 'trust' with the business of Tonia and Drake, Drake admitted Legacy

¹⁰ The family even lived in each of the 'trust villas' as they were built. Tr.28-29.

had subsidized the "Trust" in some of its operations on the villas.

Tr.330-331. Again, there was little, if any, separation of the business of Legacy and the business of the 'trust'. That is comingling.

The first condominium built was on their lot at 8124 Fairway Villas in which they lived beginning in or about 1997. Tr.25. Over the following years, they continued purchasing lots, building homes and living in the homes for a short while until sold. Tr.28-29. As condominiums were built on each of the 'trust lots', they lived in each. Tr.28-29. All of this development was not easy on the family as they lived in 21 different residences during their marriage. Tr.27.

Tonia and Drake were both involved in the development and building of the condominiums, including those built on the 'trust lots'. Tr.29. Tonia worked on the developments by choosing materials, carpet, paint, countertops. Tr.29. Further, she and Drake rented and collected the rents from the 'trust lots' condominiums as they were rented. Tr.29.

As Tonia and Drake would complete new homes, they would move everything they had to the new home and set up again. Tonia would handle most of the move and would try to "make the children feel like they had a home" after each move. Tr.31. When they moved they would use trucks, trailers, and a minivan to move their belongings with Drake, Tonia and the kids all doing the work. Tr.99. Drake told Tonia that the building of homes, the constant moving and the selling of the homes would eventually enable them to 'build a home free and clear'. Tr.32.

The Business Grows:

Tonia and Drake's first sale was in 1999. Things went very well for them, as their rentals in 1999 generated \$80,928.00. From the late 1990's into the 2000's, Tonia and Drake's business and investment ventures abounded. Some ventures were very profitable. In 1998, with the advice of Drake's father, Tonia and Drake bought and sold an \$890,000.00 piece of Louisiana land (2.55 acres) on the same day and made a profit of \$46,362.00. Exhibit 3, Joint Tax Returns.

In 1999, they purchased their first speculation home lot. In this venture they were 50% partners with another gentleman. Tonia was involved in the development of the home. She described herself as the 'gopher'. She was the one who paid the bills, handled the checking, and she performed interior design work for the clients. The design work included meeting with clients and picking out the design items in the homes. Tonia's work involved several hours per day and several days per week. The joint efforts of Tonia and Drake began to pay off through more business.

More Real Estate Acquisitions:

Tonia and Drake continued to invest in other real estate holdings. They purchased a lot in Livingston, Louisiana (Suma Hills-Satsuma) to build a speculation home. Tr.36-37. They purchased real estate with his

father in Missouri (Richland Road) and during the divorce litigation this land was sold with \$265,624.00 in net profit. Tr.28;38-39;292-293.

They purchased other real estate with his father in Missouri (Grasslands) and during the divorce litigation Drake and Tonia sold their interest for \$93,000.00. Tr.37. Additionally, they purchased more lots in Ocean Springs, Mississippi, (Pinehurst) on which Legacy was building speculation homes at the time of the trial. Tr.39-40. Other accumulations were as follows:

Hickory Hills Lot 29 (#12): This lot was acquired by the parties during the marriage and remained vacant. Tonia valued the lot at \$10,512.00 based upon Drake's 2006 financial statement pulled from the computer. Exhibit 1, 4. Drake valued the lot at \$500.00 in his 2007 financial declaration. Exhibit 2a.

10 Acres-St. Martin (#15): According to Tonia this property was purchased by the parties in 2001 with equity from property sold in Missouri. Tr.40-41;95-97;147. The asset was included on the 2007 balance sheet of Legacy. Tr.41; 173; Exhibit 7. According to Drake, this property was received in 2001 in exchange for equity of \$85,000.00 for an undocumented sale of another Hickory Hills Lot, Lot 13, which Drake received from a trust in 1994. Exhibit 19, 20. The documents offer to support the exchange do not identify Lot 13 as being involved. Exhibit 20.

Tigerbend Apartments-1/5th Interest (#17): Originally the property was owned by the 'trusts' of Drake and his other siblings. In 2001 a 1/5th interest was deeded to Drake's individual name. Exhibit 22. There was a \$130,000.00 mortgage assumed by Drake or 1/5th of the mortgage. The balance of the mortgage had been reduced to \$33,505.00 at the time of trial. The details of how the debt was reduced and whose money was used to reduce the debt is unknown, as Drake refused to provide such information. Tonia and Drake reported the rents on their returns, Drake plead ignorance to any knowledge of the rents and where they were. Tr.290-291.

Kennesaw/Shenandoah (#5): While Drake claims he was 'gifted' this asset by the 'trust', the evidence shows the property was deeded to Drake in 2000 for \$160,000.00. Exhibit 21. The balance of the mortgage on the property was \$82,815.00 at the time of trial. Exhibit 21. There was no evidence of any gift. Again, we know nothing of how the debt was reduced and with what money. The rents were reported on the parties' income tax returns. Drake claimed ignorance of any knowledge about the rents and where they were located. Tr.290-291.

Legacy Builders, Inc.-2000: In 2000 Tonia and Drake formed Legacy Holdings, Inc. The construction and management business had gross sales of \$975,802.00, with a gross profit of \$101,091.00. Its office was in the marital home from 2001 to 2003, after which time it acquired

a separate office. Tonia and Drake each owned 50%. Legacy built speculation homes and custom built homes for others. Exhibits 7, 8.

The health of Legacy's business over the years is best found in its tax returns. After being formed in 2001, Legacy's business grew quickly.

Its tax returns (Exhibit 8) show a pattern of gross sales as follows:

Year	2001	2002	2003	2004	2005
Gross Sales	\$612,699.00	\$811,947.00	\$2,491,294.00	\$2,068,778.00	¹¹ \$2,397,266.00

As will be shown herein below, Legacy's assets grew from \$1,950.00 in 2000 to over \$2,000,000.00 in 2005 as shown on its tax returns. Exhibit 8.

The Parties Final Separation-June 2006:

In June of 2006, Tonia learned Drake was having an affair with her previous best friend. This affair was ongoing since 2003. Additionally, she learned Drake had a second affair in 2002. Tr.79-83,201.

It is not coincidental that at or about the time Tonia learned of the affairs in 2006 and filed for divorce, the parties' financial condition, according to Drake, became dim and those assets which were valuable were claimed as 'non-marital' or of 'no value'. Exhibit 2, 2a,8, and 8a.

When Tonia filed her divorce she was residing in the home with the children. Drake was in control of Legacy and living with his girlfriend.

¹¹ Drake states in his brief he was the "one real asset" of Legacy. Was he worth \$2,397,266.00?

During summer 2006, Tonia lived mostly from her American Express credit card with charges of \$10,263.00. She had no income and she had monthly expenses of \$6,373.00. Drake lived off of Legacy. Exhibit 1, 2, 2a, 9 and 13.

At the temporary hearing in September 2006, Drake presented his financial declaration showing his sole income from Legacy of \$4,300.00 per month (gross). Based upon these representations, the Court ordered Drake to pay Tonia \$2,776.00 per month in support, her house note of \$1,346.00, her car note of \$544.00 per month, and her car insurance of \$217.00 per month. Exhibit 2.

Following the temporary hearing, Drake began to secretly draw an additional \$4,300.00 per month from Legacy as a repayment by Legacy to Drake for loans they both had made to the company. Exhibit 9. The records show that Tonia and Drake had loan receivable balances from Legacy as follows: Exhibit 7- \$156,555.10 as of July 2007; Exhibit 7- Legacy Balance Sheet shows \$147,855.00. Drake failed to show this asset on his 2006 financial statement. (Exhibit 4 and Exhibits 2, 2a) Between September 2006 and April 2007 Drake drew \$28,848.00 from Legacy as a loan receivable. (Exhibit 9). This money represented a marital asset belonging to both parties, which he had no right to use as he pleased.

Additionally, in furtherance of his attempts to control the cash assets of the parties and/or Legacy, Drake began doing business as

Legacy Builders, a sole proprietorship in September 2006. Drake did not separate Legacy Holdings, Inc., business from Legacy Builders and included Legacy's ongoing work in this new sole proprietorship. He opened a new checking account under this name, purportedly so that Tonia could not get any of the money.

In another attempt to better his own financial status, between the temporary hearing in September 2006 and the trial in July 2007, Drake paid down the credit card debts he had, leaving Tonia with her family American Express bill from 2006. In 2006 he owed \$8,700.00 to Citibank, \$14,000.00 to MBNA, and \$12,000.00 to Chase for a total of \$34,700.00. (Exhibit 1, 2, 2a) By the time of trial he had paid all but \$8,700.00 (Exhibit 2a). However, Tonia's American Express had a balance of \$7,044.00 at trial, and she had no funds with which to pay that debt. (Exhibits 13,) Tr.283-286.

C. SUMMARY OF ARGUMENT

This court should affirm the Chancery court's determination of marital assets and valuations, as the Chancellor committed no error in making an equitable distribution of assets and liabilities. The trial court's value placed on Legacy Holdings, Inc., was based upon credible evidence, including but not limited to Federal Tax Returns, Balance Sheets and Financial Statements. The trial court was correct in failing to find the St. Martin property should be redefined as a non-marital asset

as there was no credible evidence of a 'gift'. The trial court did not include any asset in its asset determination which was previously sold by the parties and all assets included by the trial court were in existence as shown by the credible evidence. The trial court was correct in finding from the credible evidence the parties were owed approximately \$156,555.00 from their company Legacy Holdings, Inc, for which Drake was receiving payments without disclosing these payments and the child support ordered by the trial court was proper.

D. ARGUMENT

Almost a year of time and some \$17,115.00 in attorney fees and costs were expended by Tonia in the pursuit of her divorce from Drake on the grounds of adultery. Exhibit 17. Drake did a very poor job of placing credible testimony or documentary proof before the trial court for its determination. Drake's request for this appellate court to now discard the findings of the chancellor should be received with great caution and care. Drake had his opportunity to present his case and he failed. He now asks this Court for another chance, all at the expense of Tonia.

It is well settled this Court reviews a chancellor's decision in a divorce proceeding solely under an abuse of discretion standard. The Judgment of the trial court should not be disturbed unless the findings are manifestly wrong or clearly erroneous. *Stewart v. Stewart*, 2 So.3d 770 (Miss.Ct.App. 2009); *Magee v. Magee*, 661 So. 2d 1117, 1122 (Miss.

1995). This Court may reverse the Judgment below ONLY if there is an absence of "substantial, credible evidence" justifying the trial court's finding. Williams v. Rembert, 654 So. 2d 26, 28 (Miss. 1995). The trial court findings and judgment are based upon substantial and credible evidence presented by Tonia.

In making his determination of equitable distribution, the trial court below is given broad latitude and is charged only with following the guidelines established by the Mississippi Supreme Court in Hemsley and Ferguson. Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994); Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994). The trial court followed the 'charge' completely in rendering its Judgment below. CP.21, et.seq. Further, the trial court's decision and distribution should "be upheld if supported by substantial credible evidence." Oswalt v. Oswalt, 981 So.2d 993 (Miss.Ct.App.2007) (citing Carrow v. Carrow, 642 So.2d 901, 904 (Miss. 1994); See also Owen v. Owen, 798 So.2d 394, 397 (Miss. 2001) ("This court will not substitute its judgment for that of the chancellor 'even if this Court disagrees with the lower court on the findings of fact and might ... [arrive] at a different conclusion.'").

As reflected in the record, there is credible evidence to support the trial court's equitable distribution. The trial court carefully followed the law governing equitable distribution, and there is no showing that it misapplied any of the Ferguson factors. Drake cannot show that the chancellor abused his discretion or that he was manifestly wrong in

making his equitable distribution determinations. The Judgment should be affirmed.

- A. BASED UPON THE EVIDENCE PRESENTED, THE RECORD SUPPORTS THE CHANCELLOR'S FINDING THAT LEGACY HOLDINGS, INC., HAD A VALUE OF \$1,148,270.00 AND IT WAS EQUITABLE TO AWARD THIS ASSET TO DRAKE.
- B. BASED UPON THE EVIDENCE PRESENTED, THE RECORD SUPPORTS THE CHANCELLOR'S FINDING THAT DRAKE FAILED TO MEET HIS BURDEN OF PROOF TO REDEFINE ASSETS AS NON MARITAL AND NOT SUBJECT TO EQUITABLE DISTRIBUTION.
- C. THE TRIAL COURT PROPERLY INCLUDED THE HICKORY HILLS, LOT 13, AS AN ASSET WITHOUT CREDIBLE EVIDENCE TO SHOW THE PROPERTY HAD BEEN TRANSFERRED BY DRAKE AND ALSO PROPERLY INCLUDED THE ST. MARTIN PROPERTY AS A MARITAL ASSET WITHOUT ANY CREDIBLE PROOF THE ASSET WAS NON MARITAL.
- D. BASED UPON THE EVIDENCE PRESENTED, THE RECORD SUPPORTS THE CHANCELLOR'S FINDING THAT LEGACY HOLDINGS, INC., OWED TONIA AND DRAKE SOME \$156,555.00 WHICH WAS PROPERLY INCLUDED AS AN ASSET.
- E. BASED UPON THE CREDIBLE EVIDENCE PRESENTED, THE RECORD SUPPORTS THE CHANCELLOR'S EQUITABLE DISTRIBUTION OF THE MARITAL ASSETS.

After the parties separated in June 2006, Drake was in control of the operations of Legacy Holdings, Inc. Drake unbelievably asserts in his brief Legacy was 'not in operation' in July 2007, the time of trial. Such an assertion is a self serving manipulation of the facts presented and the evidentiary record below: See Exhibit 9 (shows Drake drawing money from Legacy Holdings, Inc., as late as April 2007); Exhibit 24 (shows ongoing work on Pinehurst lots and construction). Drake asks this Court to ignore the credible proof which includes the 2005 Federal Tax

Return which showed assets in excess of \$2,000,000.00 as of December 31, 2005, just six months prior to the divorce being filed. Exhibit 8.

Drake argues Legacy had no assets. As to the makeup of what the assets were, such information would have definitely been within the knowledge of Drake and surely his CPA who he chose not to call as a witness.

Drake complains of the inclusion in the record of Exhibit 1 (Tonia's financial declaration), Exhibit 4 (Personal Balance sheet Tonia printed from Drake's computer in June 2006), and Exhibit 7 (compilation of Legacy information, including a July 2007 Balance Sheet Tonia printed from Legacy's computer at the time of trial). Yes, Tonia sponsored these exhibits to provide the trial court with credible evidence upon which to base its decision. Yes, Drake did not like some of the information on the exhibits. Yes, Drake chose to not offer any credible evidence to the contrary. Yet, Drake represents there was "no real evidence of any value" of Legacy even in light of the presence of the heretofore reference exhibits? His assertion is totally without merit.

It is Drake's argument that Legacy Builders owned no assets and that it was error to award Drake this company with a stated value of \$1,148,270.00. CP.32. There is no question Drake's accountant would have known the 'rest of the story' (if there is one) of what assets were owned or not owned by Legacy Builders, Inc. However, Drake did not give us the benefit of the testimony of the accountant, although he

advised the trial court he would do so. Tr.275. CP.83. Drake wants this Court to believe Legacy is worth nothing, i.e. ignore the tax return balance sheets, ignore the value of 'total assets' on the filed tax returns; ignore the tax return gross income and ignore the obvious falsity of his assertions.

As evidence of assets being owned by Legacy and its history of earnings, Tonia provided the trial court with the Federal Tax Returns of Legacy Builders. Exhibit 8. These returns provide a 'true' financial picture of Legacy's financial health, i.e. not prepared by Drake to present in his divorce case. These returns were filed with the Internal Revenue Service year after year. What these tax returns revealed were yearly balance sheets showing that Legacy holds substantial assets, contrary to the unsubstantiated testimony of Drake:

Total Assets: Legacy Builders Federal Income Tax Return Balance Sheets

Year	2001	2002	2003	2004	2005
Total Assets	\$1,950.00	\$1,622,861.00	\$1,621,603.00	\$1,556,589.00	\$2,219,539.00

The 2005 return was filed in 2006, which is the year of the final separation. Can Drake seriously and honestly maintain a position that Legacy has no assets? How can Drake argue the trial court committed 'manifest error' in its fact findings when such documentary evidence has been received?

Drake's testimony painted a totally different financial picture of the status of Legacy's sales and assets and the value of the marital estate. His testimony was completely opposite of the documentation in evidence. Much of Drake's posturing for a 'poor' financial condition appeared to be motivated by his own desire to abandon his marriage to Tonia. This assignment of error is without merit.

Classifying the property as either marital or non-marital is the first step in the distribution of assets. Stewart v. Stewart, 864 So.2d 934 (Miss. 2003) (citing Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994)). The Supreme Court, in Hemsley, provided the current definition of marital property as used in the classification of assets. Hemsley, 639 So.2d at 914 ("any and all property acquired or accumulated during the marriage"). The Supreme Court further articulated, "Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor." *Id.* Unless it is shown that an asset is associated solely with one party's estate prior to or outside of marriage, then the asset is subject to equitable distribution. Pearson v. Pearson, 761 So.2d 157 (Miss. 2000). Every asset owned by Tonia and Drake and addressed by the trial court in its distribution was 'acquired or accumulated during the course of the marriage' and presumed to be and defined as a marital asset.

The Mississippi Supreme Court has noted that the classification of martial property also includes separate property that has been

“commingled with the joint marital estate.” *Johnson v. Johnson*, 650 So.2d 1281,1286 (Miss. 1994). Even in spite of proof that assets may be attributable to a party's separate estate, “when separate, non-marital property is commingled with marital property, the separate property can lose its characterization as such and become marital property subject to equitable distribution.” *Stewart*, 2.So.3d at paragraph 9 (quoting *Franks v. Franks*, 759 So.2d 1164, 1169 (Miss. 1999). In addition to commingling with separate assets, use of assets for familial benefit will also result in the loss of characterization as a non-marital asset. *Hankins v. Hankins*, 866 So.2d 508, 511 (Miss.Ct.App.2000) (holding the long term family use of the property converted the residential house and lot into marital property).

The Mississippi Supreme Court has recently reinforced its view of the burden of proof a party has to prepare the evidence touching on matters important to a party’s position in a case:

The only evidence presented to the trial court as to the value of the Back Clinic was the uncontroverted testimony of Henry. The chancellors of this state are not responsible for the evidence that is presented at trial. As the Court of Appeals has said, “it is incumbent upon the parties, and not the chancellor, to prepare evidence touching on matters pertinent to the issues to be tried.” *Dunaway v. Dunaway*, 749 So.2d 1112, 1118 (Miss.Ct.App.1999). Where a party fails to provide information, the chancellor is entitled to proceed on the best information available. *Id.* The value of the Back Clinic was a factual finding supported by credible evidence. *Newsom v. Newsom*, 557 So.2d at 514.

[emphasis ours] *Irby v. Estate of Irby*, No. 2007-CA-00689-SCT.

The record below is replete with a demonstration of the significant contributions made by Tonia to the family, as well as to the marital estate. However, even where there may be a lack of specificity or accuracy of what increase in value has occur to some asset that is argued to be non marital, the trial court can conclude from the evidence that Tonia's direct or indirect contribution to the accumulation of assets is worth a "significant amount" and it can make an equitable distribution touching on all assets, both marital and nonmarital. Stewart v. Stewart, 2 So.3d 770, (Miss. App. 2009); citing Craft v. Craft, 825 So.2d 605,609 (Miss. 2002).

The record is conclusive that Tonia was an equal contributor to the success of Lewis Management and Legacy Holdings, Inc. The record is conclusive that she was a significant contributor to the purchase and development of the trust lots and that she managed the lots and the income from the lots. Further, the record is conclusive that Legacy was heavily intertwined with this 'trust' and that monies were owed to and from this "trust" to Legacy. There is no evidence of Tonia and Drake being compensated for any work done for this 'trust'.

As to the other properties Drake claims to be 'non marital', the proof fails to adequately demonstrate what monies were used to purchase all or a portion of these assets, i.e. Shenandoah and Tiger Bend. Who is to say that the rental income from these assets earned and accumulated during the marriage and reported on the parties' tax

returns were not used to purchase the assets? Can Drake come to the trial court and just say 'I did not actually receive the income and do not know where it is'? Can he neglect to bring to the trial court the necessary and supporting documentation to demonstrate an asset is 'non marital' or not comingled, i.e. deeds, closing statements, bank accounts, etc.? The answer to all of these propositions is an emphatic "NO".

As held many times by the Mississippi Supreme Court "any and all property that is acquired or accumulated during the marriage is defined as marital property." Bowen v. Bowen 982 So.2d 385, 395. And when a party in Drake's position fails to present the necessary evidence and 'merely demonstrate' by his uncorroborated testimony that an asset is non marital, the status of being defined as a 'marital asset' does not change. *Id.* When the trial court is not provided sufficient proof to 'draw a precise line of demarcation' between what is marital and non marital then it is correct in leaving an asset accumulated during the marriage defined as marital and subject to equitable distribution. A.& L. Inc. v. Gantham, 747 So.2d 832 (Miss. 1992).

It was Drake's burden to demonstrate to the trial court the non-marital character of every asset he contended was non marital. Hemsley v. Hemsley, 639 So.2d at 915. Drake's burden went beyond a mere demonstration that the asset was acquired prior to marriage or that it was 'gifted'. When the evidence suggests that the net equity in the assets may have increased due to the spouse/owner's efforts, directly or

indirectly, as opposed to enhanced value passively acquired, there must be a showing by Drake such as would allow the chancellor to separate the former, a marital asset, from the latter, a non-marital asset. *See also Oxley v. Oxley*, 695 So.2d 364 (Fla. Dist. Ct.App. [4th Dist.] 1997).

Having failed to meet this burden, the trial court was not in error in rejecting Drake's claims of non marital status of certain assets and the trial court did not commit manifest error in its equitable distribution to Tonia and Drake.

It is well settled that the goal of the chancellor in a divorce case is to do equity. *Smith v. Smith*, 994 So.2d 882 (Miss.App.2008).

Chancellors are entrusted with that duty, and thus, decisions made by chancellors should be regarded as the most equitable evaluations in the eyes of the law of Mississippi. To consider such decisions otherwise would detract from the authority which the law has entrusted within the chancellor and the functions of chancery courts.

All real and personal property acquired by either Tonia or Drake during the marriage is considered marital property, subject to equitable distribution by this Court. Drake claims certain marital assets are actually non-marital. While these assets were acquired during the marriage, Drake maintains the claim that they were gifted to him by his father or through a trust and therefore, are non-marital. In light of these claims, the burden of proof was upon Drake to prove by a preponderance

of the evidence that each of these alleged non-marital assets were, in fact, non-marital. He failed to meet that burden.

Even in the unlikely event that Drake could show a particular asset was gifted to him, if the non-marital asset was co-mingled with marital assets, the non-marital asset is converted into a marital asset and subject to an equitable distribution. As stated previously, commingled property is a combination of marital and non-marital property that loses its status as non-marital property as a result of being commingled with marital assets, or used for familial purposes. Heigle v. Heigle, 654 So. 2d 897 (Miss. 1995); Maslowski v. Maslowski, 655 So.2d 18, 20-21 (Miss. 1995). Additionally, the fact that an asset is titled in only Drake's name is not determinative in deciding a party's rights to the property. Hemsley v. Hemsley, 639 So.2d 909, 914 (Miss. 1994).

The non-marital status of an asset purchased during the marriage cannot be assumed by this Court. The burden of proof was upon Drake to prove to this Court each alleged non-marital asset's actual non-marital character. Grantham, 747 So. 2d at 832 (Miss..1999) (citing Hemsley, 639 So.2d at 915). As stated previously, the burden goes beyond a mere demonstration that the asset was acquired prior to the marriage, or that it was a gift. *Id.* To exceed a 'mere demonstration,' Drake must offer 'real evidence' which is "addressed directly to the senses without intervention of testimony." Kabase v. State, 12 So.2d 758, 31 Ala. App. 77. In other words, was there documentary evidence offered to clearly

show from what source Drake received the asset and what the source of funds or other consideration was that was used to acquire the asset, e.g. deeds, trust documents, etc.? With the exception of one asset (Hickory Hills lot 13), Drake failed to meet his burden of proof to support his claims of non-marital status for the other assets.

Drake claims the following properties were non marital assets: Hickory Hills Lot 29 ¹² in Jackson County, Mississippi (#12); 10 acres in St. Martin, Jackson County, Mississippi (#15); Swamp Road Land in Louisiana (#16)¹³; 1/5th interest in Tiger bend Apartments in Baton Rouge, La (#17); and a four-plex on (Shenandoah) Kennesaw Drive in Baton Rouge Louisiana (#5). Each of these assets was acquired and/or accumulated during the course of the marriage. Drake was awarded in his share of the assets all of these assets, but Tigerbend. The evidence offered on each of these assets was as follows, and correctly referenced to the record:

Hickory Hills, Lot 29: Tonia testified this vacant lot was accumulated during the marriage. She testified they had received a quitclaim deed to the lot and had been paying taxes on the lot. Tr.39. This lot was valued by Tonia and Drake's 2006 financial statement at \$10,512.00. Exhibit 1, 4. However, Drake valued it at \$1,000.00 in 2006 and then \$500.00 by the time of trial. Exhibit 2, 2a. The trial

¹² This lot 29 is not to be confused with the lot 13 that Drake owned at one time.

¹³ Tonia makes no claim to the Swamp Road property and the same was awarded to Drake.

court found its value to be \$10,000.00 and awarded this lot to Tonia. CP 21-22.

(To clarify the record below, it must be noted that there was a second Hickory Hills lot: Hickory Hills, Lot 13 (#14). This lot was not listed on either parties' financial declaration. Exhibits 1, 2,2a. However, in an effort to separate the St. Martin property, *infra*, from the marital estate Drake offered as part of Exhibit 19 a 1994 deed from the 'trust' to Drake conveying to him Hickory Hills, Lot 13. Exhibit 19. There was no later instrument of conveyance showing a transfer of this lot to anyone else.)

10 Acres-St. Martin:

According to Tonia in about 2006, using profits from the sale of property in Missouri, they purchased ten acres in the St. Martin area of Jackson County, Mississippi. Tr.40-41;95-97;147. Their plan was to place duplexes on the property and to keep them as rental units. They hired draftsmen and Tonia began to pick out floor plans and develop other details of the duplexes. Tr.41. However, only Drake's name was placed on this property. It was assumed to be an asset of Legacy and was included on its balance sheet as "unimproved property- 10 acres St. Martin. Tr.41;173; Exhibit 7. Drake routinely comingled assets by placing Legacy's name in the title such as "Drake Lewis d/b/a Legacy Builders" or including the asset Legacy's balance sheet. Tr.174; Exhibit 7.

Drake testified he acquired the St. Martin acreage by a 1031 like-kind-exchange for Lot 13 of Hickory Hills Subdivision which he received in 2001 from the trust. Tr.206-207. To support this contention he offered Exhibit 19 which was the 2001 deed to him for Lot 13 from the trust. Tr.206-207. However, he offered Exhibit 20 as support for his contention that five years later in 2006 he exchanged this property for the St. Martin property. Tr.206-207. The proof does not support this contention. If you examine Exhibit 20 (HUD Settlement Statement) you will not find ANY reference to what property was exchanged. The damaging question for Drake is how can Lot 13 be worth \$85,000.00 in 2001 and Lot 29 be only worth \$500.00 in 2007? Exhibits 20, 2a. What it does support is Tonia's testimony and belief that equity from the sale of Missouri property sold by them was used to purchase the 10 acres. In short, Drake failed to offer proof of this claimed exchanged and St. Martin was correctly considered marital and/or comingled.

Tigerbend Apartments (#17):

In 1994 a 1/5th interest this property was deeded to a trust for Drake. In January 2001 this interest was deeded to Drake and placed in his name for a purchase price of \$300,000.00. Exhibit 22, "Act of Collateral Mortgage". It is important to emphasize that the value of the "gift" portion of this transfer was stated in the 2001 "Act of Distribution of Trust Property" and was \$30,000.00 (See Exhibit 22, 2nd page of "Act of Distribution of Trust Property"). Drake assumed responsibility for

1/5th of the balance of the existing indebtedness of \$300,000.00 (See Exhibit 22, 1st page of "Act of Collateral Mortgage").

Beginning in 2003, the rents from Tiger Bend were recorded on Tonia and Drake's joint tax returns. Taxes were paid on those rents. Tr.43. Exhibit 3. Drake testified he never actually received the rents and did not know where they were or how much. Tr..290-291 The appraisal offered by Tonia into evidence provided his 1/5th interest was worth \$130,000.00 and the debt was \$33,505.00. Exhibit 5 and 22. The equity was \$96,545.00. This asset was acquired during the course of the marriage. There was no evidence offered by Drake as to how the debt was reduced and with what money. He failed to prove its non-marital status.

Kennesaw/Shenandoah (#5):

In April 2000, (via a power of attorney to his father) Drake purchased the Kennesaw/Shenandoah property for \$160,000.00 cash. Exhibit 21. According to the mortgage information included in Exhibit 21, the initial mortgage taken by Drake was \$128,000.00 and the balance in 2007 was down to \$82,815.00. Exhibit 21. Tonia was not a party to the transaction and was not made privy to the Cash Sale document marked as Exhibit 21. Interestingly, the document recites that Drake is "married to and living with Tonya Yadon Lewis" and that he was purchasing the land as his "separate property with his separate funds for his separate asset". Exhibit 21. There is no other

documentation showing where the purchase money came from. Drake's contention that he received this land from the trust is not supported by the documents produced. Tr.211; 216; Exhibit 21. There was absolutely no proof offered of a 'gift' as asserted by Drake. The rents were recorded on their returns and taxes were paid on those rents. Tr.44. Exhibit 3. Drake testified he never actually received the rents and did not know where they were or how much. Tr.290-291. Again, without credible evidence to the contrary the trial court properly defined the assets as marital and subject to equitable distribution.

Drake further asserts the trial court erred in holding that the note payable from Legacy Holdings, Inc., of approximately \$156,000.00 to Tonia and Drake was a marital asset. This loan to the company was attributable to monies belonging to Tonia and Drake and even to monies Drake testified came for non-marital assets, although not specifically identified. Drake made payments to himself on this loan during the pending divorce without any notice to the Court or Tonia. In essence, it was his free money. Exhibit 2, 2a, 8, and 9. This loan receivable, which Drake was collecting upon each month up to April 2007, was properly assigned to Drake as he was in control of the company paying the note to him: Legacy Holdings, Inc.

As to child support, the trial court ordered Drake to pay child support for three children in the amount of \$1,606.00. Once again Drake failed to provide the Court with any current credible proof of his

income. What the Court did have before it was the following: Drake's 2005 income was \$67,600.00 in wages from Legacy; Drake's gross rents from the Kennesaw property was \$25,868.00; Drake's gross rents from the Tiger Bend property was \$16,141.00; and by April 2007, he had drawn \$6,000.00 from the loan receivable from Legacy Holdings, Inc. Exhibit 3, 8, and 9. The trial court based its award of \$1,606.00 per month for three children and made the following findings: "The Court specifically notes that while Drake has the ability to earn income from his construction and management business, he also has substantial investments in the Louisiana properties of which he chose not to provide the Court with much financial detail. The Court concludes the children's needs exceed the amount being awarded and believes that Drake's ability is even higher than this amount". CP. 20. So once again, Drake refused to provide credible evidence of his Louisiana holdings and the status of the 'rents' collected over the years but he wants this Court to excuse him of this withholding of financial information that is central to the findings of the court below. Drake had his chance to provide better information if he chose to do so. He did not. The trial court's findings should not be disturbed.

Finally, the trial court below issued a twenty eight (28) page opinion which covered the facts and the evidence presented in detail. The trial court's delineation of the assets of the parties was carefully charted and referenced to which exhibits were being relied upon to

support the values. CP. 21-22. The record is replete with testimony of the contributions of Tonia to the family and the growth of the marital estate. Drake cared not to put forth credible evidence, e.g. his certified public accountant, and the reason probably has to do with the fact that what the trial court had before it for consideration was more near the truth and credible. It must also be noted that the distribution of assets made by the trial court placed some \$942,149.00 more in value in Drake's column than it did in Tonia's column and even awarded Drake the assets he claimed, with the exception of Tigerbend. (Drake: \$1,807,882.00 and Tonia: \$865,733.00 CP 32,77). The trial court's distribution should not be disturbed.

CONCLUSION

In summary, in arriving at his result the Chancellor applied the appropriate legal standards, carefully analyzed the evidence, and concluded that Tonia would receive \$865,733.00 in assets and Drake would receive \$1,807,882.00 in assets. His determinations and designation of the marital assets was supported by the credible evidence offered. The child support ordered was also based upon the credible evidence and took into account Drake's ability to earn and the needs of the parties' three children. The result is supported by substantial evidence and it cannot be said that the Chancellor was manifestly wrong.

Respectfully submitted, this the 18th day of May, 2009.

TONIA D. LEWIS, APPELLEE

BOYCE HOLLEMAN & ASSOCIATES

BY: 


DEAN HOLLEMAN

CERTIFICATE

I, DEAN HOLLEMAN, do hereby certify that I have on this date forwarded a true and correct copy of the above and foregoing Brief of Appellee to Thomas W. Teel, Post Office Box 7158, Gulfport, MS 39506, and to Chancellor Carter Bise, Post Office Box 1542, Gulfport, MS 39502, by United States Mail, postage prepaid.

DATED, this the 18th day of May, 2009.


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