

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL PHILLIPS

APPELLANT

VERSUS

NO. 2008-CA-02019

SARAH PHILLIPS

APPELLEE

APPEAL FROM THE CHANCERY COURT OF
JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CAUSE NO. 2007-0017

THE HONORABLE FRANKLIN C. MCKENZIE, JR., CHANCELLOR, PRESIDING

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

CAVES & CAVES, PLLC
TERRY L. CAVES, MSB [REDACTED]
Attorneys at Law
Post Office Drawer 167
Laurel, MS 39441-0167
Telephone 601-428-0402
Facsimile 601-428-0452

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL PHILLIPS

APPELLANT

VERSUS

NO. 2008-CA-02019

SARAH PHILLIPS

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:

Michael Phillips

Appellant

Terry L. Caves

Attorney for Appellant

Sarah Phillips

Appellee

Sherry Lowe

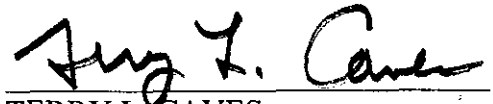
Attorney for Appellee

Honorable Franklin C. McKenzie, Jr.

Chancellor

This the 13th day of May, 2009.

Respectfully submitted,



TERRY L. CAVES
Attorney for Appellant

CAVES & CAVES, PLLC
TERRY L. CAVES – MSB [REDACTED]
Attorneys at Law
Post Office Drawer 167
Laurel, MS 39441-0167
Telephone (601) 428-0402
Facsimile (601) 428-0452

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	iv
STATEMENT OF THE CASE	1
A. Nature of the Case, Course of Proceedings and Disposition Below.....	1
B. Statement of Facts.....	2
C. Summary of the Argument.....	6
D. Legal Argument	7
E. Conclusion	18
CERTIFICATE OF SERVICE	19

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases:	Page
<i>Albright v. Albright</i> , 437 So.2d 1003 (Miss. 1983).....	14
<i>Anderson v. Anderson</i> , 961 So.2d 55 (Miss. Ct. App. 2007).....	15
<i>Childs v. Childs</i> , 806 So.2d 273 (Miss. Ct. App. 2000).....	9
<i>Curtiss v. Curtiss</i> , 781 So.2d 142 (Miss. Ct. App. 2000).....	15
<i>Driste v. Driste</i> , 738 So.2d 763 (Miss. Ct. App. 1998).....	8
<i>Ferguson v. Ferguson</i> , 639 So.2d 921 (Miss. 1994).....	7, 8, 9, 10, 18
<i>Franklin v. Franklin</i> , 864 So.2d 970 (Miss. Ct. App. 2003).....	11
<i>Hemsley v. Hemsley</i> , 639 So.2d 909 (Miss. 1994).....	18
<i>Klauser v. Klauser</i> , 865 So.2d 363 (Miss. Ct. App. 2003)	8
<i>Owens v. Owens</i> , 950 So.2d 202 (Miss. Ct. App. 2006)	12, 13
<i>Polk v. Polk</i> , 589 So.2d 123 (Miss. 1993)	15
<i>Prescott v. Prescott</i> , 736 So.2d 409 (Miss. Ct. App. 1999)	11
<i>Sellers v. Sellers</i> , 638 So.2d 481 (Miss. 1994).....	13
<i>Smith v. Smith</i> , 856 So.2d 717 (Miss. Ct. App. 2003).....	13
<i>Thompson v. Thompson</i> , 799 So.2d 919 (Miss. Ct. App. 2001).....	15
<i>Thompson v. Thompson</i> , 816 So.2d 417 (Miss. Ct. App. 2002).....	9
<i>Watson v. Watson</i> , 882 So.2d 95 (Miss. 2004).....	9
<i>Weathersby v. Weathersby</i> , 693 So.2d 1348 (Miss. 1997).....	9, 10
<i>Wright v. Stanley</i> , 700 So.2d 274 (Miss. 1997).....	14
 Statutes:	
Miss. Code Ann. § 93-11-65 (1972).....	2, 6, 14, 15

I.

STATEMENT OF ISSUES ON APPEAL

1. The Chancellor erred in his equitable distribution of assets and debts of the parties.
 - A. The Chancellor erred in not taking into consideration Sarah's misconduct during the marriage.
 - B. The Chancellor erred in not enforcing the parties' pre-separation agreement concerning the disposition of real property.
 - C. The Chancellor erred in failing to classify and equitably divide loans from Michael Phillips' parents to the parties.
 - D. The Chancellor erred in his classification and division of the marital debt in the sum of \$20,000.00.
2. The Chancellor erred in awarding joint physical custody of the parties' minor children.
 - A. The Chancellor failed to make on the record findings as to why Shayla Phillips' preference to live with her father should not be honored.
 - B. The Chancellor's decision to award custody on an alternating basis was not in the best interest of the children.

II.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

Michael Phillips filed a Complaint for Divorce on January 8, 2007¹. (CP 11) A Temporary Order was entered on March 13, 2007. (CP 26) Michael was granted temporary physical custody of the parties' minor children with Sarah having visitation on the weekends. (CP 26, 27) The trial of the case was conducted on March 5, 2008 and April 2, 2008. (T 1) The Chancellor filed his Opinion on April 10, 2008. (CP 92) The parties filed their joint motion for the court to grant divorce on grounds of irreconcilable differences and for the court to decide certain issues. (CP 64)

The Chancellor entered his Final Judgment on May 8, 2008. (R.E. 4) (CP 104) Michael filed his motion to reconsider, for new trial, to alter and amend judgment, and motion to reopen evidence. (CP 109) The Court entered his order on Michael's motion to reconsider and took other issues under advisement. (T116, 124) (R.E. 23, 25, 26)

The Court entered his order on October 14, 2008 taking additional matters under advisement. (CP 127) (R.E. 25) The Chancellor entered his Final Order on Michael's motion to reconsider, for a new trial, to alter and amend judgment, and motion to reopen evidence on November 12, 2008. (R.E. 26) (CP 136) Michael timely filed his notice of appeal to the Supreme Court on December 9, 2008. (CP 127A)

¹ Reference to "(CP __)" are references to the Clerk's Papers; reference to "(T. __)" are references to pages within the transcribed testimony prepared by the court reporter; reference to "(Ex. __)" are references to Exhibits within the record; Reference to "(R.E. __)" are references to the Record Excerpts.

B. Statement of Facts

Michael and Sarah Phillips were married on December 15, 1984. (T 18) During the marriage, two daughters were born, Shayla, age 14 and Samantha, age 9. The parties finally separated from each other on March 11, 2006. A temporary hearing was held resulting in a temporary order being entered granting temporary physical custody of the daughters to Michael who had them during the week and with Sarah having the children during the weekend. (CP 26) The children remained primarily with Michael from the date of the Temporary Order, March 13, 2007 until this court entered an Order on September 30, 2008 granting joint physical custody with Michael and Sarah sharing the children every other week. (CP 124) (R.E. 23)

Neither party requested joint physical custody in their pleadings. Sarah testified under oath that she wanted primary custody. (CP 59, 19)

Shayla, the oldest daughter, testified that she wanted to live with her father during the week and visit with her mother on the weekends. (T 4-5) The chancellor rejected her preference but did not explain his reasons for doing so as required by Miss. Code Ann. § 93-11-65 (1972), as amended. (R.E. 12, 13) Samantha also testified that she wanted to live with her father and sister during the week and visit with her mother on the weekends. (T 336-337) The daughters tried all types of custodial arrangements during the period of separation which was from March 11, 2006 until the temporary hearing in March, 2007 (T 4-7, 336-337) Both girls testified that they felt safer with their father and in their house that they had grown up in all of their lives. They also testified that at their father's house they had a routine where they came home, ate dinner, did homework, took baths, and went to bed. (T 6-7, 336-337) At their father's house, located at 87 Union Line Road, each daughter had their own bedroom and bathroom. At the house where their mother lived, the girls had to share a bedroom and share one bathroom with

their mother. (T 7) Shayla testified that in the winter there was not enough heat in her mother's house. (T 7) Sarah admitted that there was no heater in the bedroom where the girls were sleeping. (T 256-257) Shayla had been physically abused by her mother and was subjected to nudity by her grandfather. (T 329) Sonny Coates, maternal grandfather, admitted to pulling his pants down and showing Shayla his buttocks. (T 323, 325, 332) Sarah drank beer while driving the girls in her car. (T 11)

Both parties admitted that before the separation, one of the parties would take the children to school. The children were picked up by Michael's parents, Hartley and Marie Phillips, and stayed at their grandparents home until one of their parents picked them up after work. This was the routine for the girls from the time they were born until the trial. The Phillips' kept the children Monday through Friday of each week. (T 7, 256) Sarah admitted that Michael is a good father, capable of taking care of the girls, and a fit parent. (T 254-255) Both Michael and Sarah were in good health. (T 24) Both girls are in good health. (T 25) Shayla attended West Jones Middle School and Samantha attended West Jones Elementary School. (T 25) Michael was employed at various places during the marriage including self-employment. All of his earnings were used to pay for family expenses. (T 19-24) Sarah also worked outside the home during the marriage. (T 261-263)

The parties initially purchased 10.4 acres during the marriage. (T 27) Michael built their new home between March, 2001 and September, 2001 on the 10.4 acre tract. The parties financed the construction of their home with Trustmark National Bank and pledged only the house and one acre which was included within the 10.4 acre parcel. (T 27-29) The parties purchased an additional 5.2 acre tract that adjoins the 10.4 acre parcel. (T 28) The parties financed the purchase of the 5.2 acre tract with Bank of Jones County. Bank of Jones County held a lien initially on the 10.4 acre tract and the 5.2 acre tract less the house and one acre. The

parties finally purchased a one-half acre parcel of land located separately from their homestead property. (T 29-30)

During the marriage, Sarah wasted money and marital assets. She refused to pay the parties' bills which resulted in Michael being dunned by creditors. (T 33-35, 267) Sarah's refusal to pay bills and her delinquency in payment of bills resulted in significant marital conflicts. (T 267-268)

As a result of Sarah's refusal to pay the bills, Michael and Sarah agreed to divide their property between themselves before the separation ever occurred. (T 33-35) The parties agreed that Sarah would deed the 10.4 acre parcel and the 5.2 acre parcel to Michael less the house and one acre in exchange for Michael assuming total responsibility for the loan at Bank of Jones County in the sum of \$12,000.00. Michael also agreed to convey to Sarah the one-half acre parcel. (T 33-35, 259-261, 274-277)

Pursuant to their agreement, the parties employed Wayne Thompson, an attorney, to prepare the deeds. Sarah testified that she freely and voluntarily signed the deed to Michael and Michael signed the deed to her and the girls. Michael removed her name from the loan at Bank of Jones County. Sarah was not coerced and was given meaningful legal advice from Wayne Thompson. Mr. Thompson explained the transaction to her and she voluntarily agreed to exchange the deeds. (T 33-35, 259-261)

In response to the court's questions, Sarah testified Michael did not threaten her or coerce her to sign the deed. She acknowledged they had an agreement and it was finalized. The Court still found that Michael defrauded Sarah because he had her sign the deed in anticipation of a divorce. (CP 98) There was absolutely no proof in the record that the agreement and transaction by the parties to divide certain real property was anything but a valid transaction. (T 33-35, 259-261)

During the marriage, the parties borrowed substantial sums of money exceeding \$40,000.00 from Michael's parents, Hartley and Marie Phillips. Sarah admitted that this money was borrowed from the Phillips. (T 50-54, 265) Both parties admitted that these loans were used to pay family expenses that benefitted the family. The parties signed a promissory note to the Phillips for the sum of \$15,000.00. (T 50, Ex. 6) Sarah admitted that the parties made some payments back to the Phillips on this loan. (T 265-266) She also admitted that the loan had not been paid back. Even though both parties admitted that they owed the Phillips, the Chancellor did not take this debt into account in the distribution of property. (CP 92, 101) The court initially found that the statute of limitations had run on this debt. However, no party in the pleadings or during the trial raised the statute of limitations as a defense to this note. (CP 101)

The testimony was undisputed that after the separation of the parties but before the temporary order was entered on March 13, 2007, Michael had to borrow \$20,000.00 from Bank of Jones County to pay off debts that were incurred by Sarah and Michael before the separation. (T 47-48) The Chancellor only found that \$12,201.65 of the \$20,000.00 debt was marital. (CP 136) The Court gave no explanation why all of this debt was not marital. (CP 136) Michael was left solely responsible for the balance of this debt. (T 48) Sarah also wasted assets during the marriage by making payments on her parents' loans with Central Sunbelt Federal Credit Union without Michael's knowledge. She deceived Michael by having the statements mailed to her parents' house and to a post office box at her employer. (T 268-273)

Sarah was clearly guilty of adultery. She admitted to having sex with another man during the marriage. (T 288)

The court mistakenly found that both parties had a significant other. (T 288) (R.E. 12) There was absolutely no testimony in the record that Michael Phillips had another relationship at

the time of the trial. (CP 95) Sarah also had medical problems. (T 284-289) These problems caused conflict in their marriage. (T 286)

C. Summary of the Argument

The chancellor erred in his equitable distribution of assets and debts of the parties. The chancellor failed to classify loans from Michael's parents to the parties and failed to equitably divide this debt. The court failed to classify and equitably divide a loan in the sum of \$20,000.00 that was incurred to pay family expenses. Without explanation, the Court found only \$12,201.65 of the \$20,000.00 to be marital debt. (CP 136) The parties admitted that they entered into a pre-separation agreement concerning the disposition of certain real property. Both parties agreed to the disposition and executed deeds for valuable consideration. Michael removed Sarah's name from a debt at Bank of Jones County in consideration for her executing a deed to two parcels of land. The chancellor erred in finding that Michael committed fraud or deceived Sarah into entering into this agreement.

The court erred in awarding joint physical custody of the parties' minor children. The chancellor failed to articulate his reasons for rejecting the 14 year old daughter's preference to live with her father as required by Miss. Code Ann. § 93-11-65 (1972). The chancellor further failed to take into consideration Sarah's adultery and misconduct during the marriage. The court made a mistake in finding that Michael had a girlfriend when in fact, there was no proof of such relationship. The Court failed to consider the living conditions of the parties' homes together with the conduct of the maternal grandfather in the custody determination. The chancellor should not have changed the custodial arrangement which the children had become accustomed and preferred for approximately two years prior to the court entering his alternating week custody order.

D. Legal Argument

1. The Chancellor erred in his equitable distribution of assets and debts of the parties.

The Supreme Court in *Ferguson* established the guidelines that chancellor's are to consider when deciding issues of marital property division. The Supreme Court directed all chancellors to consider the following guidelines, where applicable, when attempting to effect an equitable 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 or to an individual spouse;
5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distributions;
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. *Klauser v. Klauser*, 865 So.2d 363, 366-367 (Miss. Ct. App. 2003); citing *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss. 1994)

The chancellor in this case made findings of fact that were clearly erroneous and manifestly wrong as follows:

A. The Chancellor erred in not taking into consideration Sarah's misconduct during the marriage.

On the issue of fault, the chancellor erroneously found that Michael was having an affair at the time of the trial. The chancellor failed to take into consideration that Sarah committed adultery.

There was no proof that Michael Phillips was having an affair at the time of the trial or during the separation. When considering moral fitness of the parents as a factor, the court found "apparently both of these parents have now found significant others in their lives. That is a neutral factor as far as the court is concerned." (CP 95) (R.E. 12) There is no question that Sarah admitted to adultery right before trial, after having denied adultery during the entire proceedings. (T 287-289) However, there was no evidence that Michael Phillips had found a "significant other." The court committed manifest error and was clearly erroneous in finding this factor as neutral.

Marital misconduct is a factor for consideration in property division in both fault based and irreconcilable differences divorces. *Driste v. Driste*, 738 So.2d 763, 768 (Miss. Ct. App. 1998) Michael spent substantial sums having to hire private investigators to prove that Sarah was committing adultery. All the while, Sarah denied committing adultery and denied claiming that Michael was entitled to a divorce until it was evident that she had been caught. The chancellor did not consider the attorney's fees and expenses that Michael had to spend to prove

Sarah's adultery. The chancellor also did not consider her adulterous conduct because he found that the parties were entitled to equal division of marital assets. In *Watson*, a chancellor was reversed where he ignored marital misconduct. *Watson v. Watson*, 882 So.2d 95, 108-109 (Miss. 2004) The chancellor erred by not taking this factor into consideration.

B. The Chancellor erred in not enforcing the parties' pre-separation agreement concerning the disposition of real property.

The chancellor erroneously found that Michael committed fraud or intended to deceive Sarah with regard to the exchange of deeds and assumption of debt.

A divorcing couple's prior distribution of assets by agreement is relevant to classification and division of property. *Thompson v. Thompson*, 816 So.2d 417, 419 (Miss. Ct. App. 2002);, *Childs v. Childs*, 806 So.2d 273, 275 (Miss. Ct. App. 2000); *Weathersby v. Weathersby*, 693 So.2d 1348, 1353 (Miss. 1997); citing *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994)

The evidence at trial was undisputed that because Sarah refused to pay bills Michael was being dunned and his credit adversely effected. Because of her irresponsibility, Michael and Sarah reached an agreement whereby Michael would assume total responsibility for a loan at Bank of Jones County and deed Sarah and the daughters the one-half acre of land in consideration for Sarah deeding Michael the 10.5 acre parcel of land and the 5.2 acre parcel of land less and except the house and one acre. The house and one acre parcel remained in both parties names. (T 33-35, 259-261) Pursuant to the parties' agreement, they both employed Wayne Thompson, an attorney in Laurel. Sarah admitted that, pursuant to the agreement, she went to Mr. Thompson's office. (T 33-35, 259-261) She admitted Mr. Thompson explained the transaction and reviewed the deed with her. She admitted that she freely and voluntarily executed the deed pursuant to the parties' agreement. She admitted that no one coerced her into signing the deed. In reliance on Sarah's agreement, Michael had Sarah's name removed from

the loan at Bank of Jones County and he signed a deed to her and the girls for the one-half acre of land as agreed. (T 33-35, 259-261)

Sarah never objected to this transaction until she employed her attorney in these divorce proceedings and alleged fraud in the transaction. (CP 19)

The record is devoid of any evidence indicating fraud or misconduct in this transaction on the part of Michael Phillips. However, the chancellor, in view of the uncontradicted testimony that Sarah intended to sign the deed and follow through with their agreement, found that Michael overreached and/or committed fraud in attempting to put himself at an advantage when it was time to come to court.

The chancellor stated the following:

“What the court believes the intent of this was, is that Michael anticipated a divorce was about to occur between he and Sarah. He felt like that by her signing this deed, it would put him at an advantage when it came time to come to court and have a division of marital assets.” (CP 97-99) (R.E. 15)

The chancellor found that Michael had some undisclosed intent to deceive Sarah in signing the deed so that he would have an advantage at the time they came to court for their trial. There is no evidence in the record to support this finding. Parties are free to decide on a pre-divorce disposition of assets. *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) Chancellor’s are to consider that the parties have previously made an equitable division of jointly owned property. In this case, the chancellor made a mistake by disregarding the prior agreement of the parties. *Weathersby v. Weathersby*, 693 So.2d 1348, 1354 (Miss. 1997) The chancellor erred in not enforcing the predisposition agreement and awarding title to Michael to the 10.4 acre tract and the 5.2 acre tract of land since he has assumed the total debt on the property and conveyed his interest in the one-half acre parcel to Sarah and their two daughters.

C. The Chancellor erred in failing to classify and equitably divide loans from Michael Phillips' parents to the parties.

Although Sarah admitted that she and Michael had borrowed approximately \$40,000.00 from Michael's parents and had signed a note for \$15,000.00 of that total, the chancellor initially found that the statute of limitations had run and then later ordered that the debt was valid but did not take it into consideration in an equitable division of debt. (CP 10, 124, 125)

Debts incurred for the benefit of the marriage are marital debts. *Prescott v. Prescott*, 736 So.2d 409, 418 (Miss. Ct. App. 1999) A spouse seeking payment of debt as part of equitable distribution must provide some evidence of the debt and its amount. The evidence is undisputed that Sarah and Michael borrowed \$15,000.00 from Hartley and Marie Phillips. Sarah admitted that this loan was owed. (T 50-54, 265) They signed a promissory note. (Ex. 6) She further admitted that they had made partial payments on the debt. Michael and Sarah both admitted that there were other loans in addition to the \$15,000.00 note from Hartley and Marie Phillips. Michael's uncontradicted testimony revealed that they had borrowed at least \$40,000.00 from his parents. Sarah could not remember the exact amount of the loans. Even though these debts were admitted to by Sarah and uncontradicted in the record, the chancellor did not include this debt in making an equitable division of the assets.

If marital debt is not calculated in the net division of assets, it may be treated as a factor in property division. *Franklin v. Franklin*, 864 So.2d 970 (Miss. Ct. App. 2003) The chancellor, in his final judgment, did not take these loans into consideration when awarding Sarah one-half of the value of the parties' assets. The court only reduced the value of the parties' assets by the Trustmark National Bank loan, credit card debt, a Bank of Jones County note in the sum of \$14,000.00 and a Bank of Jones County note in the sum of \$12,201.65. (Ex. 11) The court also did not take into consideration the loans from Michael's parents. Although Sarah received one-

half of the parties' equity, Michael was burdened with a total of \$47,798.35 in loans from his parents and Bank of Jones County. The chancellor committed manifest error by failing to adjust the award to the wife based upon her obligation to pay one-half of these debts.

In addition, the court initially found at trial that the statute of limitations had run on this debt. CP 10) Sarah never pleaded that the statute of limitations had run on this debt nor did she advance this position at trial. Statute of limitations being an affirmative defense must be pled and raised at trial. The chancellor in his order addressing Michael's motion to alter or amend, did find that both parties were obligated on the loan to the Phillips' but did not take these loans into consideration in dividing the parties' marital assets. (CP 124 - 125) (R.E. 26)

D. The Chancellor erred in his classification and division of the marital debt in the sum of \$20,000.00.

The chancellor was required to classify debts as marital or non-marital. *Owens v. Owens*, 950 So.2d 202 (Miss. Ct. App. 2006)

The testimony was undisputed that the parties had family expenses that had been past due because of Sarah's irresponsibility. Sarah was responsible for paying these bills and she did not thereby causing Michael financial problems. (T 267-268) She admitted being delinquent on paying bills. (T 267) She further admitted she spent more money than what was taken in which resulted in marital conflict. (T 268) She admitted deceiving Michael by making payments on her parents' loans and mailing the statements to her parents' house and her employment so that Michael would not find out. (T 268-273)

As a result of Sarah's irresponsible spending, Michael was required to take out a loan in the sum of \$20,000.00 to pay these family bills. (T 47-48)

The purpose of the \$20,000.00 loan was not disputed by Sarah. The payoff on the \$20,000.00 debt was admitted in evidence as Exhibit number 11 with the total payoff being \$20,566.76.

In this case, the chancellor never addressed or commented on this substantial debt when he rendered his first opinion. (CP 92, 104) Michael raised this issue in his motion for reconsideration, for new trial, to alter and amend judgment, and motion to reopen evidence. (CP 109, 112-113) The court later entered his order finding that only \$12,201.65 of the \$20,000.00 was marital. (R.E. 26) The court did not articulate how he arrived at the classification of this amount. (R.E. 26-27)

Therefore, the parties incurred a debt in the sum of \$20,000.00 which was never classified by the court. The court should have classified all of this property as marital debt and included this debt in the net division of marital assets. This debt was further reflected on Michael's 8.05 Financial Statement where it shows a debt to the Bank of Jones County in the sum of \$35,000.00. This sum included the \$20,000.00 debt and the debt in the sum of \$14,767.10. (CP 107, Ex. 1 Page 6) Chancellors are required to classify debt as part of their equitable division of marital assets and debts. *Smith v. Smith*, 856 So.2d 717, 719 (Miss. Ct. App. 2003), *Owens v. Owens*, 950 So.2d 202, 217 (Miss. Ct. App. 2006) This court should reverse and remand for the Chancellor to classify all of the debt as marital and include same in his equitable division.

2. The Chancellor erred in awarding joint physical custody of the parties' minor children.

In all child custody cases, the polestar consideration is the best interest of the child. *Sellers v. Sellers*, 638 So.2d 481, 485 (Miss. 1994) In making a child custody determination, it is well settled law that the trial court is to consider several facts which include: the age of the

children; the health and sex of the children; which parent had the continuity of care prior to the separation; which parent has the best parenting skills; and which has the willingness and capacity to provide primary child care; the employment of the parents and their responsibilities in that employment; the physical and mental health and the age of the parents; the emotional ties between parent and child; the moral fitness of the parents; the home, school, and community record of the child; the preference of the child, if of sufficient age; the stability of the home environment and employment of each parent; and, any other relevant factors. *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983) In custody cases, the appellate court is bound by the limits of their standard review and may reverse only when the decision of the trial court was manifestly wrong, clearly erroneous, or an erroneous legal standard was employed. *Wright v. Stanley*, 700 So.2d 274, 280 (Miss. 1997)

A. The Chancellor failed to make on the record findings as to why Shayla Phillips' preference to live with her father should not be honored.

Shayla Phillips was 14 years of age at the time of this divorce trial. She testified that she wanted to live with her father during the week and visit with her mother on the weekends. (T 4-5) She testified that she and her sister had tried all kinds of custodial arrangements during the separation of the parties and that the current arrangement of living with her father during the week and visiting with her mother on the weekends worked best for them. (T 4-5) The children had become accustomed to this arrangement during their separation from March 11, 2006 through the date of the last trial on April 2, 2008. For approximately two years, these girls have lived with their father during the week at his home and visited with their mother on weekends.

Miss. Code Ann. § 93-11-65 (1972) as amended, provides as follows:

The chancellor may consider the preference of a child 12 years of age or older as to the parent with whom the child would prefer to live in determining what would be in the best interest and welfare of the child. The chancellor shall place on the

record the reason or reasons for which the award of custody was made and explain in detail why the wishes of any child were or were not honored.

In a similar case, the Mississippi Supreme Court reversed a chancellor when the chancellor found only that the best interest of the child did not require that his custody be changed. *Polk v. Polk*, 589 So.2d 123 (Miss. 1993) In *Polk*, the chancellor denied the child his choice of custodial parent under Miss. Code Ann. § 93-11-65 (1972) as amended, but did not make on the record findings as to why the best interest of the child is not served. The court remanded the case for further consideration on that issue.

In *Anderson v. Anderson*, 961 So.2d 55 (Miss. Ct. App. 2007), this court reiterated the law as established in *Polk* stating that the chancellor must make an on the recording finding as to why the best interest of the child would not be served. *Anderson v. Anderson*, 961 So.2d 55, 59 (Miss. Ct. App. 2007) Also see *Thompson v. Thompson*, 799 So.2d 919 (Miss. Ct. App. 2001) and *Curtiss v. Curtiss*, 781 So.2d 142 (Miss. Ct. App. 2000)

In this case, the chancellor failed to articulate why he rejected Shayla's preference to live with her father. In addition, Samantha, although only 10 years of age at the time of the trial, testified that she preferred to live with her father during the week and her mother on the weekends. (T 336) Both girls preferred to live with their father and the chancellor did not articulate his reasons for not following their preference. This is important in light of the fact that these girls had been living with this arrangement for approximately two years prior to the trial. The chancellor found that this arrangement was suitable at the temporary hearing and entered his temporary order on March 13, 2007 providing that the children would be with their father during the week and the mother on weekends.

This court should reverse the chancellor's decision and award physical custody to Michael.

B. The Chancellor's decision to award custody on an alternating basis was not in the best interest of the children.

Sarah admitted Michael was a good father and was very capable of taking care of the two girls. (T 254-255) She further testified that he had a good relationship with the girls and they loved him. There is no question that Michael is a fit parent. (T 254-258) Sarah further admitted that from the time the girls were born, they had a routine that continued through the date of the divorce trial on April 2, 2008. The routine consisted of Sarah or Michael carrying the girls to Michael's parents' house in the mornings. (T 255-256) The girls stayed with Marie and Hartley Phillips until one of the parents picked the children up after work. Sarah admitted that the children spent more time with Marie and Hartley Phillips during the week than they did with her and Michael. (T 256-257)

Michael lived in a nicer house which contained a bathroom and bedroom for each child. Sarah lived in a house that included two bedrooms with only one bath for her and the two girls. (T 257) Sarah further admitted that there was no heater in the bedroom. (T 257) Shayla also articulated reasons why she preferred to live with her father during the week. She testified that they had a routine and that it was a nicer home. (T 6-7) She did not feel safe in the neighborhood where her mother lived. (T 6-7) She also stated that in the winter there was not enough heat in the bedroom where she and Samantha slept. (T 7-8)

Sarah lived across the driveway from her parents, Sonny and Glenda Coates. Sonny Coates and his wife admitted that Sonny pulled his pants down in the presence of Shayla revealing his naked buttock. (T 323, 325, 332)

Shayla also had problems with her mother physically grabbing and pushing her. (T 329) She also had a problem with her grandfather, Sonny Coates, bruising her arm. (T 10)

Shayla also testified that her mother had been drinking beer while driving her and her sister to a ballgame. (T 11)

In addition to the court not articulating his reasons for rejecting Shayla's preference to live with her father, the court did not reference any of the above facts nor take them into consideration in determining what was in the best interest of the children.

The court found that the mother was a nurturing parent and the father was a disciplinarian. (R.E. 10) The chancellor also stated that the fact that the children were females would tend to support a favorable finding that their custody should be with their mother because of the special needs of female children that can be provided by the mother. (R.E. 11) However, Sarah admitted that Michael was just as capable of taking care of these girls as she was. (T 254-255) The court further found that Shayla's preference would favor a custody determination for Michael.

The court found all other Albright factors to be neutral. Without discussing Shayla's preference, the court found that "this appears to be a classic case in which the court should consider and does consider an award a joint physical custody of these two children." (CP 96)

On the issue of moral fitness of the parents, the court found the following:

Apparently both of these parents have now found significant others in their lives. That's a neutral factor as far as the court is concerned. (CP 95)

The court made a mistake by stating that Michael had a girlfriend. Apparently, this is the reason he found that Michael had a significant other. (T 288, CP 95)

However, there is no evidence in the record that Michael had a girlfriend. Sarah admitted to committing adultery. (T 288) She also admitted that she had herpes which created a conflict with Michael during the marriage. (T 286)

The court erred by finding that the moral fitness of the parents was a neutral factor. In addition, Sarah was dishonest with her pleadings before the court. She denied committing adultery throughout the proceedings until she finally admitted on cross-examination that she had committed adultery. The only reason she finally admitted committing adultery was because Michael spent substantial sums of money employing private investigators to prove that she was an adulteress. (T 152-164)

This court should reverse and award physical custody to Michael. In the alternative, this court should reverse and remand this case for the court to reconsider Sarah's misconduct, the child's preference to live with her father, and the parents' living conditions.

E. Conclusion

The parties had incurred a joint marital debt in the sum of \$20,000.00 to pay family expenses. The Court failed to classify and divide this debt according to *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994) and *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994). The court failed to enforce a pre-separation disposition of real property agreement that was undisputed. The court failed to classify joint marital debts to Michael's parents and failed to equitably divide this debt.

The court should have followed Shayla's preference to live with her father and awarded primary custody of both children to Michael Phillips. The court failed to articulate any reason for rejecting Shayla's preference to live with her father.


Sarah's adultery, misconduct during the marriage, and the parties' home living conditions should have been considered by the chancellor in determining what was in the best interest of these children. The court should also have considered the fact that these children had a routine for approximately two years that was working for the children and should have awarded custody of the children to Michael during the week with visitation by their mother on the weekends.

Therefore, this court should reverse the decision of the trial court and remand for the court to reconsider equitable distribution and custody of the parties' minor children.

Respectfully Submitted,

MICHAEL PHILLIPS

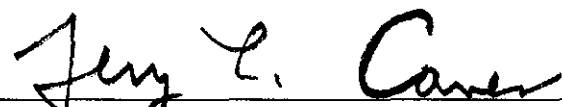
BY: 
TERRY L. CAVES

CAVES & CAVES, PLLC
TERRY L. CAVES -MSB 
Attorneys at Law
Post Office Drawer 167
Laurel, MS 39441-0167
Telephone (601) 428-0402
Facsimile (601) 428-0452

CERTIFICATE

I, Terry L. Caves, Attorney for Michael Phillips, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing document, to Honorable Sherry Lowe, Attorney at Law, Post Office Box 550, Sandersville, Mississippi, 39477; and Honorable Franklin C. McKenzie, Jr., Chancellor, Post Office Box 1961, Laurel, Mississippi 39441, their usual post office address.

This the 13th day of May, 2009.


TERRY L. CAVES