IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-CA-00072-SCT

ALBERT J. KEA — APPELLANT

V.

SHERIFF KENNETH LEWIS,
ROBERT KEA, LISA KEYS AND
STATE FARM INSURANCE COMPANIES' — APPELLEES

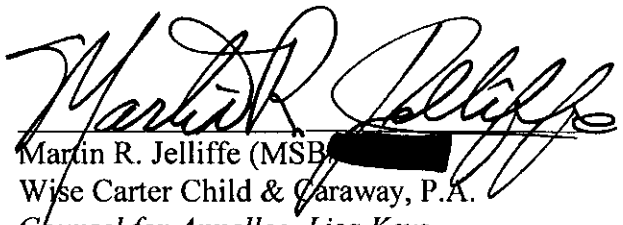
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee 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 Mississippi Supreme Court and Mississippi Court of Appeals may evaluate possible disqualification or recusal:

1. Honorable Robert G. Evans, Circuit Court Judge [deceased];
2. Albert J. Kea, Defendant/Appellant;
3. Lisa Keys, Plaintiff/Appellee;
4. Robert Kea, Defendant [deceased];
5. Sheriff Kenneth Lewis, Simpson County, MS, Defendant;
6. State Farm insurance Companies, Intervenor/Appellee;
7. E. Michael Marks and Julie Ann Epps, attorneys for Defendant/Appellant on appeal;
8. E. Michael Marks, attorney for Defendant/Appellant at trial;
9. James F. Noble, III, Noble & Noble, PLLC, attorney for Intervenor/Appellee, State Farm;
10. Kimberly N. Howland and Charles E. Ross, Wise Carter Child & Caraway, P.A., attorneys for Plaintiff/Appellee Lisa Keys at trial; *and*

11. Martin R. Jelliffe and Kimberly N. Howland, Wise Carter Child & Caraway, P.A., attorneys for Plaintiff/Appellee, Lisa Keys on appeal.

THIS, the 15th day of November, 2010.

By: 

Martin R. Jelliffe (MSB [redacted])
Wise Carter Child & Caraway, P.A.
Counsel for Appellee, Lisa Keys

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STATEMENT OF THE CASE

This litigation has its genesis in a lawsuit previously filed by Albert Kea (sometimes hereinafter referred to as "Albert") against Entergy to recover damages for items of personal property allegedly destroyed in a fire at his house in 1998. *Kea v. State of Mississippi*, 986 So. 2d 358, 359 (Miss. Ct. App. 2008). A list of items which Albert Kea claimed were destroyed in this house fire is Exhibit "13" of this record. Some of the items which Albert Kea claimed to have been destroyed in this fire included the items of personal property which are at issue in this litigation. *Kea v. State of Mississippi*, 986 So. 2d 358, 359 (Miss. Ct. App. 2008). At the Entergy trial, Albert Kea's son, Bob Key a/k/a Robert Keys (sometimes hereinafter referred to as "Bob" or "Robert"), testified that certain items which Kea claimed were lost in this fire were actually in Bob's home in Colorado. *Kea v. State*, 986 So. 2d at 359. As a result, Albert's lawsuit against Entergy was dismissed, and Albert was indicted for perjury. *Id.*

For use as evidence in prosecuting the perjury indictment against Albert Kea, the District Attorney for Simpson County asked Bob and Lisa Keys to bring the property which is the subject of this appeal to Simpson County.[1] (TT at 101-102). They obliged, and in June of 2006 this property (which hereinafter may sometimes be referred to as the "subject property"), was turned over to and kept in the possession of the Simpson County Sheriff's Department. *Id.* When this was done, an inventory and a valuation of the subject property was prepared. (*See* TT at 136; Ex. 37). Prior to bringing the subject property to Simpson County, this property was in the Keys' townhouse in Aurora, CO. (TT at 101-102).

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[1] Also at the request of the District Attorney, Bob Keys brought property which ultimately was awarded to State Farm in the underlying action. This award is not being contested for purposes of this appeal.

Along with the subject property, Bob and Lisa Keys brought receipts showing ownership for many of those items; and those receipts were introduced into evidence in the perjury trial. (TT at 118). Of significance, there was no issue as to ownership at the time of the perjury trial. (TT at 118). After Albert Kea was convicted of perjury, Judge Marcus Gordon, the presiding judge, ordered that the subject property be held pending appeal. (TT at 101-102, 118).

On November 15, 2006, Robert Keys died. (TT at 100). His estate was administered in Colorado and, when it was closed, all of his property was awarded to Lisa Keys (sometimes hereinafter referred to as "Lisa"). (TT at 101). Additionally, Albert Kea filed a claim with the estate for property of the estate, but this was denied. *Id.*

While Albert Kea's perjury conviction was on appeal, Lisa Keys filed a Petition with the Circuit Court of Simpson County, seeking to obtain possession of the subject property being held by the Sheriff. (R006). This request is entitled: "Petition to Intervene and Declaration of Replevin." *Id.* On or about March 4, 2008, Lisa Keys voluntarily dismissed her case, and an Order dismissing this case without prejudice was entered. (R. 045)

After this voluntary dismissal, Janice Clemons of State Farm, by letter dated April 11, 2008, wrote Judge Robert Evans, and informed him that State Farm was staking a claim to specific pieces of this property which were being held by the Simpson County Sheriff's Department. (R. 052). In response, Judge Evans wrote Janice Clemons and advised her that he could not order the property released based on her letter, but that he would consider any motions or pleadings which counsel filed for State Farm. Judge Evans also advised her that some of the items may be held as evidence in the criminal action against Albert Kea which was being handled by Judge Marcus Gordon, and that Judge Gordon probably would not release that property with an appeal pending. (R. 054).

On July 1, 2008, Albert Kea's perjury conviction was reversed and remanded for a new trial. *Kea v. The State of Mississippi*, 986 So. 2d 358 (Miss. Ct. App. 2008). Consequently, as of July 1, 2008, the purpose for which the subject property was being held by the Sheriff of Simpson County was extinguished. Nevertheless, the property was still under the control of the Simpson County Circuit Court.[2]

By letter dated September 9, 2008, Judge Evans wrote parties and/or their attorneys who had expressed an interest in recovery of some or all of the subject property. (R. 062). In this letter, Judge Evans declared his intention to fully and finally dispose of this matter and release the subject property. Consequently, by virtue of this *sua sponte* action, the Circuit Court of Simpson County invited those who had an interest in the property to be present at a hearing, and have legal counsel present as well, for purposes of determining who was entitled to possession of this property. *Id.*

In response to this *sua sponte* notice, on October 6, 2008, State Farm, through counsel, filed its Petition for Intervention and for Replevin of Certain Items of the Personal Property. (R. 063, *et seq.*). By filing this pleading, State Farm declared its intention to assert a claim for and pursue possession of certain items of the subject property. *Id.* State Farm's basis for asserting this claim was that State Farm had paid for these few, specific items as the result of a previous claim submitted by Robert Keys and his wife at the time, Amy Keys, after they reported that their home had been burglarized and that this property was stolen. (R. 081 *et. seq.*; R. 099; R. 083-84; R. 097-98). That Lisa Keys had nothing to do with this previous claim made by Robert Keys and his wife at the time, Amy Keys, for these items of property for which State Farm was now seeking recovery, is more than

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[2] At the underlying trial, Judge Evans stated for the record that Judge Marcus Gordon had been asked to order that the subject property be returned to the person who delivered it. (TT at 119). However, Judge Gordon ruled that he had no jurisdiction to do so, and that is how Judge Evans got involved. *Id.*

clear from the record. State Farm's claims adjuster, Janice Clemons, testified at trial that State Farm was not before this Court seeking possession of property for which Lisa Keys had previously made a claim. (TT at 20-21). Rather, the items that State Farm claimed it was entitled to receive were all part of a previous claim filed by Bob and Amy Keys.[3] (TT at 20-21, 49).

Also in response to the trial court's *sua sponte* declaration of intent to conduct a hearing and award possession of the subject property, on or about October 13, 2008, Kimberly Howland filed her Entry of Appearance on behalf of Lisa Keys and, further, on behalf of Lisa Keys, gave notice of Lisa Keys' intent to assert her claim of ownership, and thus possession, of the subject property. (R. 100). In the Prayer for Relief of this Notice of Intent to Pursue Claim, Lisa Keys requested that the Court award possession of the subject property to her. *Id.* This Notice of Intent to Pursue Claim, along with the Prayer for Relief requesting that possession of the subject property be turned over to her, was essentially tantamount to a Motion for Possession of the Subject Property and/or a Motion to Revive her Previously Dismissed Replevin Claim.

Accordingly, the issue of who is entitled to possession of the subject property was raised *sua sponte* by the trial court, followed by a request for certain items of property being filed by State Farm, and a request for all of the property being filed by Lisa Keys. The issue was joined by State Farm, Albert Kea and Lisa Keys by participation in this proceeding.

After conducting a hearing, the Court awarded to State Farm the four (4) pieces of property

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[3] The four items which were sought by State Farm and which the Court awarded to State Farm are the Mosaic picture, the ivory whale's tooth, the ivory walrus tusk, and the glass fish piece. (TT at 94-95; R. 181). This appeal does not concern these items of property awarded to State Farm, except to the extent that award is jeopardized by Albert Kea's argument that the Circuit Court of Simpson County had no jurisdiction over this matter.

previously noted. (TT at 94-95; R. 181). Evidence was then introduced at trial concerning ownership/possession of the remaining 20 items of personal property. In that regard, Lisa Keys testified that she and/or her late husband, Bob, a/k/a Robert, owned that property. (TT at 100-113). As to fifteen (15) pieces of property, receipts confirming the purchase of each of these were introduced into evidence, along with Lisa Key's testimony concerning them. The transcript cite for Lisa's testimony regarding this and the exhibit number for the applicable receipts is shown below:

	Piece of Property	Testimony	Exhibit #
1.	Armani Jester	TT at 103	No. 15
2.	Jimney Cricket (Jimmy Cricket)	TT at 104-105	No. 16
3.	2 Prism Round Balls	TT at 105-107	No. 17
4.	3 David Schneuer (or Scheuner lithographs)	TT at 107-108	No. 18
5.	Millisiori Plate	TT at 108-109	No. 19
6.	The more expensive Nurse Bunnykins	TT at 109-110	No. 20
7.	Royal Doulton Moor Flambe Figurine	TT at 110	No. 21
8.	Tucan	TT at 110-111	No. 22
9.	Polar Bear	TT at 110-111	No. 22
10.	Ivory Elephant Tusk	TT at 112	No. 12
11.	Royal Doulton Test Piece For Balloon Seller	TT at 112	No. 12
12.	Large scarf from Hungary	TT at 112-113	No. 23

One item, a clown with balloons, was also specifically discussed by Lisa Keys. (TT at 103-

104). However, she could not find a receipt for that piece of property. *Id.* The remaining items for which there was not a receipt were as follows:

- Moorcraft collection – Florian ware vase;
- gold pocket watch;
- walnut stand with gold trim;
- inexpensive Nurse Bunnykins;
- gingerbread lace clock

Lisa Keys confirmed that all of this property was hers, although some of it would have been her husband's had he continued to live. (TT at 78). Lisa further confirmed that her husband never executed any documents transferring these items to Albert; that they never gave any of these items to Albert; that Albert did not give them money to purchase these items; and that none of the subject property was at Albert's house that burned. (TT at 113-114). Although Albert alleges that Lisa and Robert removed these items from his house (Appellant Brief at p. 19, fn. 11), there was no evidence of this presented at trial. Albert admitted at trial that he did not come up with this assertion until the time of his perjury trial in 2006. (TT at 128-129). He did not make this assertion in 2004 during the Entergy trial. *Id.* Furthermore, Lisa testified that she and Bob were in Turkey around the time of Albert's house fire. (TT at 113).

From a procedural standpoint, even though the trial court *sua sponte* initiated this proceeding, the trial court entered an Order reviving Lisa Key's claim *nunc pro tunc* pursuant to the Judge's letter of September of 2008, as if the Order of Dismissal dated March 4, 2008, had never been entered. (R. 191-193; TT at 92-93). After considering all of the evidence before it, the trial court awarded possession of these remaining pieces of property to Lisa Keys. (R. 191-193; TT at 137).

The parties are now here on the appeal filed by Albert Kea. In his Assignment of Error I and Assignment of Error II, Kea asserts that the trial court did not have jurisdiction over this matter, with

Assignment of Error II also containing what essentially amounts to an argument that Lisa Keys should have been estopped from proceeding because previously she argued that the trial court lacked jurisdiction. Assignment of Error III alleges that the trial court erred in failing to dismiss Lisa's claim because her sworn filings in her prior bankruptcy proceeding precluded her from making a contradictory claim in this suit. This too is essentially an estoppel argument. Assignment of Error IV asserts that the trial court erred as a matter of law in failing to award the property to Albert because of an erroneous belief that the trial court had no authority to adjudicate Albert's equitable interest in the property, based on an assumption not articulated that Albert even had such an equitable interest. Assignment of Error V alleges that the evidence did not support the trial court's decision in awarding the property to Lisa.

For the reasons discussed in more detail below, none of these assignments of error have any merit. In fact, many of them are not subject to review on appeal because they were not properly raised and/or preserved at trial. Therefore, the trial court's decision awarding these pieces of property to Lisa should be affirmed.

SUMMARY OF THE ARGUMENT

Assignment of Error No. I.

The property which is the subject of this appeal was voluntarily placed in the possession of the Sheriff's Department of Simpson County by Bob and Lisa Keys at the request of the District Attorney of Simpson County for use as evidence in a criminal proceeding against Albert Kea for perjury. Following Albert Kea's conviction, the Circuit Court of Simpson County ordered that this property remain in custody pending appeal. Consequently, this property was *in custodia legis* under the jurisdiction of the Circuit Court of Simpson County. Because of this, the trial court had inherent authority over the disposition of this property when it was no longer needed as evidence in the criminal proceeding against Albert.

After Albert's perjury conviction was reversed and remanded for a new trial, pursuant to its inherent authority, the trial court notified the interested parties (State Farm, Albert Kea and Lisa Keys) of its intent to determine who was entitled to possession of this property and gave them all the opportunity to appear at a hearing and demonstrate why they were entitled to possession. This *sua sponte* action was well within trial court's inherent authorities over the property. The issue was joined, as all three interested parties participated in the hearing and presented their evidence to the trial court in support of their respective positions.

Although it was not necessary for any interested party to file a request with the trial court to release the subject property, both State Farm and Lisa Keys did. The first pleading Lisa filed was entitled a "replevin" action. Later on, along with a Notice of Entry of Appearance filed by her attorney, she filed a Notice of Intent to Pursue Her Claim as to possession of this property, requesting the trial court to release it to her.

Lisa's petition in "replevin, " which was subsequently voluntarily dismissed and then reactivated by the trial court, did not itemize or value the property. It is this failure which Albert attacks as being fatally deficient for jurisdictional purposes. Disregarding for the moment the fact that this property was *in custodia legis* and that the trial court, by virtue of that, was already conferred with jurisdiction over it, the failure to itemize or value the property in this context is not fatally deficient from a jurisdictional standpoint. This property was already in possession of the Sheriff's Department and an itemization and valuation was already in existence. Circuit courts in Mississippi have original jurisdiction in civil actions when the principal amount in controversy exceeds $200.00. Since the value of the property at issue here is in excess of $200.00, the Circuit Court of Simpson County did have jurisdiction over this matter, assuming, *arguendo*, that replevin was appropriate.

Replevin actions do not really apply to *in custodia legis* property. The property was not being wrongfully held, no bond was being posted and the legal authorities were not being asked to seize the property. However, assuming it was necessary for an interested party to file a request for this property in order for the trial court to proceed, even though State Farm's petition and Lisa Keys' first petition were entitled as "replevin" actions, they really were nothing more than requests for those items of property to be released to them. The same is true with respect to Lisa Keys' Notice of Intent to Pursue Claims, filed later. These satisfy the requirements of the Mississippi Rules of Civil Procedure and were sufficient to procedurally initiate this proceeding. For these reasons, the trial court had jurisdiction over the property in order to do what it did.

Assignment of Error No. II.

This Assignment of Error can essentially be divided into two parts: (1) that Lisa should have

been estopped from going forward as if the court had jurisdiction when she previously argued that it did not; and (2) once her claim for replevin was dismissed, the court did not have jurisdiction to reactivate it *nunc pro tunc*. First, this was not an issue which Albert presented to the trial court for consideration. Consequently, he is procedurally barred from having it considered on appeal. Furthermore, estoppel does not apply in this context. The case upon which Albert relies involves a contract situation which is completely inapposite to the case at hand. Here Lisa did argue that the trial court lacked jurisdiction since her "replevin" petition had been dismissed, and, therefore, there was no cause of action within which State Farm could intervene. However, the court disagreed. Under these circumstances, she certainly cannot be precluded from presenting evidence at the trial of this matter, as Albert suggests.

With respect to the jurisdictional aspect of this argument, as previously indicated with respect to Assignment of Error No. I, the trial court certainly had jurisdiction over this *in custodia legis* property, including the power to enter a *nunc pro tunc* order reactivating Lisa Keys' complaint in "replevin."

Assignment of Error No. III.

Although Albert claims that the trial court erred in failing to dismiss Lisa's claim because her sworn filings in a prior bankruptcy proceeding allegedly precluded her from making contradictory claims in this suit, this estoppel argument was never presented to the trial court for consideration. Therefore, it is procedurally barred from consideration on appeal.

This argument being procedurally barred notwithstanding, Albert cannot prove that estoppel is appropriate here. Albert is essentially contending that if Lisa did not list this subject property in the bankruptcy schedules which she and her husband filed in 2000, then she is estopped from arguing

that she owns the property now. Of the three cases cited by Albert as being applicable here for estoppel purposes, one is a case where quasi-estoppel was applied in order to prevent a party from repudiating his obligations under a contract after first having benefitted by the terms of that contract. This has no application here. The other two cases involve judicial estoppel applied in the context of a debtor in bankruptcy who failed to list a potential legal cause of action on his bankruptcy schedules, and then later filed suit seeking to recover damages based on that legal cause of action. Although it is not believed that judicial estoppel applies in the context presented in the instant case, even if it does, Albert cannot satisfy the three elements that must be proven Under Mississippi law in order for judicial estoppel to apply.

Items of personal property do not have to be specifically listed on bankruptcy schedules as do potential legal causes of action for which judicial estoppel cases typically apply. As a result, the generic listing by Robert and Lisa Keys in their bankruptcy petition of personal property and exempt property in the form of home furnishings, including family heirlooms, is adequate; and it is not at all clear that Robert and Lisa Keys **did not** include the subject property in their bankruptcy petition and schedules. Furthermore, in order for judicial estoppel to apply, the non-disclosure of assets must not have been inadvertent. This essentially amounts to a false representation or an intentional self-contradiction. However, there is no evidence that this is what happened either. Thus, even if it is determined that judicial estoppel could apply in this context, the evidence does not support its application here.

Assignment of Error No. IV.

Albert also argues that the trial court should have considered his "equitable interest" in the subject property. However, whether or not he had an equitable interest in this property was not

presented to the trial court for consideration. Therefore, this is waived and he is procedurally barred from having this considered on appeal. Furthermore, Albert makes no argument and cites to no authority supporting the proposition that he had an equitable interest in the subject property which would have entitled him to possession of some or all of it. This is an additional reason why his alleged equitable interest argument is procedurally barred from consideration on appeal.

Assignment of Error No. V.

The trial court's findings of fact will not be reversed unless they are clearly erroneous. However, if they are not clearly erroneous and they are supported by substantial, credible and reasonable evidence, then the trial court's decision must be upheld. In the instant case Lisa testified that this property belonged to her and her husband, and she produced receipts for most of the property.

Although Lisa denied this, Albert testified that he gave money to Bob and Lisa Keys for them to purchase this subject property and that they gave him the property and gave him the receipts. However, Albert did not introduce any documentary evidence in support of his claim such as cancelled checks or money orders, bills of sale, assignments or transfers of property, nor did he produce any evidence showing that the property was assigned and/or transferred to him. Albert also relies on a letter written in 2002 from his son, Bob, but this letter has absolutely nothing to do with the property in question in this litigation. Based on the evidence before the trial court, it is clear that the trial court's decision that 20 of the 24 pieces of property should be awarded to Lisa was based on substantial, reasonable and credible evidence and should not be overturned.

For these reasons, the trial court's decision should be affirmed.

ARGUMENT

I. Albert Kea's Assertion That the Trial Court Committed Reversible Error of Law in Overruling Kea's Motion to Dismiss Because the Defects in Lisa Keys' Petition Were Insufficient to Confer Jurisdiction on the Court Is Without Merit

A. General

Among other things, circuit courts in Mississippi are conferred with original jurisdiction in all civil actions when the principle amount in controversy exceeds $200.00, and also with respect to crimes. Mississippi Constitution, Article 6, § 156; § 9-7-81 Miss. Code 1972 (Ann.). The property which is at issue in the instant case is property which Lisa and Bob Keys brought to Simpson County at the request of the District Attorney for use as evidence in a perjury trial against Albert Kea. (TT at 101-102, 118). When these items were delivered to the Sheriff, an inventory list was prepared wherein the subject property was specifically itemized and valued. (R. 076; Ex. 37; TT at 136). As this inventory list indicates, the value of this property was in excess of $200.00. Consequently, there can be no doubt that the matter in controversy here, i.e., the ownership/possession of the subject property, met the jurisdictional requirements of the Circuit Court of Simpson County for civil matters. The trial court also had jurisdiction over this property because it was being held by that court as evidence in a criminal proceeding against Albert Kea. For the reasons discussed in more detail below, the trial court had the jurisdiction and authority to do what it did.

B. Albert Never Asked the Trial Court to Dismiss Lisa's Petition Based on These Grounds

Although Albert Kea raised this assertion as an affirmative defense in his Answer and Defenses to the Petition filed by Lisa Keys, he did not file a Motion to Dismiss based on these

grounds, or argue at trial that the case should be dismissed based on these grounds. (R. 102-104; 152-153; TT at 139-142). Thus, to assert that the trial court committed reversible error when it overruled Albert's Motion to Dismiss based on these alleged grounds, is incorrect. The trial court was never presented with an opportunity to rule based on this.

As a general rule, failure to present an argument for consideration by the trial court prevents consideration of that issue on appeal. *Jones v. Fluor Daniel Services Corporation,* 959 So. 2d 1044 (Miss. 2007). However, subject matter jurisdiction may be presented at any time, even for the first time on appeal. *Graves v. Dudly Maples,* L. P. 950 So. 2d 1017, 1022 (Miss. 2007). Therefore, Lisa Keys will address below the issue of jurisdiction and demonstrate that the trial court did indeed have jurisdiction over this matter in spite of the fact that Lisa Keys' Petition in Replevin did not have an itemization and valuation of the subject property attached to it.

C. The Trial Court had Jurisdiction to Decide this Matter

(1) The subject property was being held *in custodia legis* and the trial court had inherent authority to determine who was entitled to possession of that property.

After Bob and Lisa Keys voluntarily placed the subject property in the custody of the Sheriff's Department of Simpson County at the request of the District Attorney, this property remained in the possession of the Sheriff's Department for use as evidence in the criminal proceeding against Albert Kea. (TT at 101-102; 118). Then, at the conclusion of that perjury trial, Judge Marcus Gordon, the presiding judge, ordered that the subject property be held pending appeal. (TT at 101-102, 118).

This situation is very similar to the situation presented in *Newman v. Stuart,* 597 So. 2d 609 (Miss. 1992). In *Newman,* property was lawfully seized pursuant to a search warrant for use in a

criminal prosecution. *Id.* Later on, the issue arose as to who was entitled to possession of this property. *Id.* The Mississippi Supreme Court noted that "when this vehicle was seized, however, the justice court judge became its lawful custodian, subject only to its actual custody being temporarily placed with the highway safety patrol and law enforcement agencies for inspection and use as evidence in a criminal prosecution." *Newman v. Stuart*, 597 So. 2d at 614.

While many states have statutes which govern the disposition of property seized pursuant to a search warrant, Mississippi does not. *Id.* As a result, the Mississippi Supreme Court looked to and adopted common law principles espoused in other jurisdictions in order to determine this issue.

In so doing, the Court held as follows:

> "Property seized under a search warrant is an exercise of the police power of the state, and the state has the authority to keep and maintain control of the property until it is no longer needed in a criminal prosecution or investigation. *People, ex rel. Simpson v. Kempner,* 101 N.E. at 797; *Matter of Documents Seized,* 478 N.Y.S.2d at 490.
>
> "While the property is thus seized, it is under the lawful custody of the magistrate who issued the warrant, or the court having jurisdiction of the criminal prosecution in which the property is material evidence. Miss.Code Ann. § 99-25-17 (1972); *People, ex rel. Simpson v. Kempner; Lawrence v. Mullins,* 224 Tenn. 9, 449 S.W.2d 224 (1969)
>
> "When seized property is no longer needed for criminal prosecution by the state, it should be restored to its lawful owner. If there is no conflict as to ownership, the court having custody of the property ordinarily directs its release to the owner. *Haworth v. Newell, et al.,* 71 N.W. at 405.

Newman v. Stewart, 597 So. 2d at 614.

Newman also gives us guidance about what to do if there is a dispute as to ownership of the property used as evidence in the criminal proceeding, as certainly was the case here. In this regard, the Court in *Newman* went on to say:

> "If there is a dispute as to ownership of allegedly stolen property, this is an entirely civil proceeding in which the state has no interest, and the property is held until the question of ownership has been determined by a civil action in a court of competent jurisdiction. *Moore v. State*, 504 N.E.2d 586, 588 (Ind.App. 1 Dist.1987); *State, ex rel. Schillberg v. Everett Dist. Justice Court*, 585 P.2d at 1180.
>
> "MHP, therefore had no authority on its own in this case to deliver the vehicle to MIC absent court approval with no advance notice to Stuart of its intent to do so, and without giving him an opportunity to contest the matter in a court of competent jurisdiction. The appropriate procedure would have been for MHP, once the pickup served no further purpose in a criminal investigation or prosecution, to make a motion in the justice court for authority to release it to MIC, and give Stuart and MIC reasonable notice of such application and an opportunity to be heard."

Id., at 614-615.

While the property at issue in *Newman v. Stuart* was property lawfully seized pursuant to a valid search warrant, it was property, nonetheless, being held by the court as evidence in a criminal proceeding. This really is no different from the property which is at issue in the case *sub judice*. Just as was the case in *Newman*, the subject property was in the legal custody of the Sheriff's Department of Simpson County at the request of the District Attorney to be used as evidence in a criminal proceeding. Then, after the conclusion of the criminal proceeding against Albert Kea, at the direction of the Circuit Court of Simpson County, the property was ordered to be held pending

appeal. Since there was a dispute as to the ownership and/or entitlement to possession of this evidence, once that evidence was no longer needed in the criminal prosecution, as was the case here after Albert's perjury conviction was reversed and remanded by order dated July 1, 2008, the subject property could not be released until a determination was made by that court as to who was entitled to possession of that property.

In order to accomplish this, the appropriate procedure outlined by the Court in *Newman* was for the applicable law enforcement agency holding the property to file a motion with the applicable court which had ordered the property seized for authority to release it, and to give the other interested parties reasonable notice so that they would have an opportunity to be heard. In the case *sub judice*, although the Sheriff's Department of Simpson County did not file such a motion, the trial court, *sua sponte,* pursuant to its inherent authority over property in its lawful control, notified all interested parties and/or their attorneys of its intent to determine who was entitled to possession of the subject property. (R. 062). This type of action is exactly what the Court in *Newman* intended when there is an issue of who is entitled to possession and/or ownership of evidence being held by the trial court for use in a criminal proceeding, i.e., notice to the interested parties and an opportunity to be heard before a determination is made as to who is entitled to possession.

Because the subject property was being held *in custodia legis,* the trial court had control and inherent authority over it. Therefore, the trial court could, on its own, notify the interested parties of its intent to decide who was entitled to possession of the subject property and give them all an opportunity to be heard before making that decision. *Newman v. Stuart,* 597 So. 2d 609 (Miss. 1992). It was not necessary for the interested parties to file anything in order to set this process in motion. Using its inherent authority over this property, the trial court had the jurisdiction and

authority to do exactly what it did without the necessity of an interested party filing a motion. However, even if the interested parties did need to file something requesting that the court determine who was entitled to possession of this property in order to commence this process, **State Farm and Lisa Keys did.**

(2) Requests for possession of this property were filed by interested parties.

State Farm filed its Petition for Intervention and for Replevin of Certain Items (R. 063, *et seq.*) and Lisa Keys filed her Notice of Intent to Pursue Claim which requested in her prayer for relief that the court award possession to her of the items being held by the Simpson County Sheriff's Department. (R. 100).[4]

While replevin actions have been deemed inapplicable to property being held *in custodia legis, Union Motor Car Co. v. Farmer,* 118 So. 425 (1928), those decisions were likely based on the notion that property being held *in custodia legis* was not wrongfully held, as replevin statutes are designed to address, and that the mechanism provided for in a replevin action, i.e., posting a bond and having legal authorities secure possession of the identified property claimed to be wrongfully held, § 11-37-101 *et seq.*, Miss. Code of 1972 (Ann.), was not the appropriate mechanism needed to obtain a release of property being held *in custodia legis.* Furthermore, these cases pre-date Mississippi's adoption of the Mississippi Rules of Civil Procedure and the broad latitude allowed by Rule 8 M.R.C.P in filing complaints requesting relief. Thus, the Petition to Intervene and Declaration of Replevin initially filed by Lisa Keys and the Petition for Intervention and for Replevin of certain items filed by State Farm, although entitled as "Replevin" actions, were really nothing

[4] Previously Lisa Keys had filed a Petition to Intervene and Declaration of Replevin (R. 006) which had subsequently been voluntarily dismissed, (R. 045) and which was essentially reactivated by the court. (TT at 10, 92-93; R. 191-193).

more than requests for relief under Rule 8 M.R.C.P., i.e., for possession of the subject property. This also would give the trial court jurisdiction to decide that issue on property valued in excess of $200.00. The same is true with respect to Lisa Keys' Notice of Intent to Pursue Claim.

Therefore, even if we assume that the trial court needed something filed by an interested party in order to put this process in motion and confer the trial court with jurisdiction to decide this issue, that most certainly was done.

(3) Even Assuming *Arguendo* That Replevin Was Appropriate, a Failure to Itemize the Property or Value the Property Is Not Defective to Jurisdiction

Although the property sought to be "replevined" by Lisa Keys when she filed her original complaint was not itemized or valued by anything attached to that complaint, the property was identified as property which was already being held by the Sheriff's Department of Simpson County. By document dated June 27, 2006, entitled Simpson County Sheriff's Department Property Release Form, all of this property referenced by Lisa Keys in her complaint was itemized and valued. (R. 076). This is different from the situation presented in the case of *Ezell v. Helton,* 235 So. 2d 247 (Miss. 1970). In that case, the Mississippi Supreme Court specifically noted that the value of the property was not given in the affidavit, the declaration, the sheriff's return, the jury's verdict, or in the final judgment. *Id.* at 248. Thus, the Court was looking beyond the confines of the complaint/affidavit to see if valuation was noted anywhere and to confirm that jurisdiction was appropriately conferred on the trial court. However, in *Ezell* nothing in the record established the value of this property. Therefore, there was no evidence in the record that jurisdiction in the circuit court was appropriate.

The instant case is different. Here there is documentation in the record which states the value

of this property, showing that it is in excess of $200,00, and which confirms that jurisdiction in the Circuit Court of Simpson County was appropriate. (R. 076). Under these circumstances, to now say that the complaint filed by Lisa Keys did not bestow jurisdiction on the Circuit Court of Simpson County because her complaint did not itemize or value this property, when it clearly referenced the property that was being held by the Sheriff of Simpson County (R. 006), and where the itemization and valuation of that property was already in existence and known (R. 076), is to argue that form should prevail over substance. It is not the affidavit with an itemization and valuation of the property which confers that jurisdiction. Rather, it is the value of the property; and here the record confirms that the value of this property satisfactorily conferred jurisdiction on the trial court.

Also of significance is the fact that *Ezell v. Helton,* and other cases of similar holding, were decided before the Mississippi Supreme Court adopted the Mississippi Rules of Civil Procedure. As noted in Rule 81 M.R.C.P.:

> "[T]hese rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.
>
> (1) proceedings pertaining to the writ of habeas corpus;
>
> (2) proceedings pertaining to the disciplining of an attorney;
>
> (3) proceedings pursuant to the Youth Court Law and the Family Court Law;
>
> (4) proceedings pertaining to election contests;
>
> (5) proceedings pertaining to bond validations;
>
> (6) proceedings pertaining to the adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment;

(7) eminent domain proceedings;

(8) Title 91 of the Mississippi Code of 1972;

(9) Title 93 of the Mississippi Code of 1972;

(10) creation and maintenance of drainage and water management districts;

(11) creation of and change in boundaries of municipalities;

(12) proceedings brought under sections 9-5-103, 11-1-23, 11-1-29, 11-1-31, 11-1-33, 11-1-35, 11-1-43, 11-1-45, 11-1-47, 11-1-49, 11-5-151 through 11-5-167, and 11-17-33, Mississippi Code of 1972.

Statutory procedures specifically provided for each of the above proceedings shall remain in effect and shall control to the extent they may be in conflict with these rules; otherwise, these rules apply." Rule 81, M.R.C.P.

Significantly, statutory requirements for a replevin action are not among those procedures listed in Rule 81. Thus, to the extent that the statutory requirements for a replevin under §11-37-101 are in conflict with the Mississippi Rules of Civil Procedure, then Rule 81 makes it clear that the Mississippi Rules of Civil Procedure apply.[5] That being the case, a review of Rule 8 M.R.C.P. is important.

Rule 8(a) M.R.C.P. says that a pleading which sets forth a claim for relief shall contain "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and, (2) a demand for judgment for the relief to which he deems himself entitled." Rule 8(e)(1) says that each

[5] Certainly the identity of the property at issue and its valuation are important in a replevin action for purposes of posting a bond and to identify the property to be picked up by the authorities, neither of which were involved here. Therefore, in a true replevin action, which this is not, a failure to itemize and value the property would prevent the posting of a bond and the seizure of the property. However, if the value of the property is otherwise made clear and is sufficient to confer jurisdiction, as is the case here, then jurisdiction is present.

averment of a pleading shall be simple, concise and direct and that no technical forms of pleading are required. In full compliance with Rule 8 M.R.C.P., this is precisely what Lisa Keys did when she filed her Complaint in Replevin. (R. 006). For purposes of jurisdiction, to the extent that § 11-37-101 requires an itemization and valuation of the subject property, it is in conflict with Rule 8 M.R.C.P. As such, and when construing it so as to do substantial justice, as required by Rule 8(f) M.R.C.P., the Complaint in Replevin filed by Lisa Keys sufficiently complied with the Mississippi Rules of Civil Procedure for purposes of establishing jurisdiction in the instant case.

This situation is similar to the situation faced by this Court in the case of *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008). *Wimley* held that the failure of a plaintiff in a medical negligence case to attach to his complaint either an attorney's certificate of consultation with a medical expert or an expert disclosure in lieu of the certificate, as required by §11-1-58 of the Mississippi Code of 1972 Ann. (Rev. 2007), and which complaint otherwise was in compliance with Rule 8 M.R.C.P., was not fatally defective warranting dismissal. *Id.* In its ruling, this Court essentially held that the legislature did not have authority to promulgate statutes which dictated to the judiciary what was required to be attached to pleadings filed in court. *Id.* at 138. This was different from what the legislature required a litigant to do prior to filing suit, and such pre-suit requirements were indeed necessary, as recognized by this Court. *Id.* at 138-139. However, in the instant case, the itemization and valuation of property in a replevin complaint, either in the complaint or by way of affidavit, are not pre-suit requirements. Therefore, this exception does not apply here.

Finally, although styled as a Petition to Intervene and a Declaration of Replevin, the action filed by Lisa Keys essentially was a motion for an order requesting that those items of personal property which she and her then husband, Robert, had voluntarily brought to Simpson County at the

request of the district attorney be released to her. (R. 101-102, 118). That property was already identified, itemized and valued. *Id.* Consequently, Lisa's request was not really in the nature of replevin. This property had not been wrongfully seized and was not being wrongfully held, as is generally the case in a replevin action. Rather, this property had been voluntarily turned over to the district attorney for use in that perjury trial. Furthermore, Lisa Keys was not asking that this property be seized and there was no need to post a bond. Lisa Keys was simply requesting the trial court to release it back to her custody. Under these circumstances, a replevin action was not even necessary, and the requirements of § 11-37-101 *et seq.* would not even apply.

(4) Conclusion

First and foremost, the subject property was valued in excess of $200.00 and was in the custody and control of the trial court because it was being held as evidence for use in the criminal proceeding against Albert Kea. As such, the trial court had jurisdiction over it. Therefore, based on its inherent authority, the trial court *sua sponte* notified those parties who expressed interest in this property, gave them an opportunity to be heard, and then decided who was entitled to possession of this property. This was well within the trial court's inherent authority over *in custodia legis* property.

Nothing really was needed to be filed by the parties in order to confer jurisdiction on the court and trigger this event from happening. However, if appropriate requests for relief were required, such were filed by State Farm and Lisa Keys. State Farm filed its Petition for Intervention and for Replevin of Certain Items (R. 063, *et seq.*) and Lisa Keys filed her Notice of Intent to Pursue Claim which requested in the prayer for relief that the court award possession to her of the items being held by the Simpson County Sheriff's Department. (R. 100). Even Lisa Keys' "Replevin"

action which was reactivated by the trial court was sufficient to confer jurisdiction on the court, and a failure to itemize and value the subject property by Lisa Keys was not fatally deficient for jurisdictional purposes under these circumstances.

For these reasons, the trial court had jurisdiction over this matter and the appropriate authority to act in the manner which it did.

II. Albert Kea's Assertion that the Trial Court Committed Reversible Error in Reviving Lisa's Petition for Replevin After Lisa had Dismissed her Claim and Where She Herself Argued that the Court Lacked Jurisdiction to Proceed Because the Petition was not Pending is Without Merit

This assignment of error can basically be divided into two parts. The first argument is that the trial court erred as a matter of law in reviving Lisa's previously dismissed claim *nunc pro tunc*. This argument essentially hinges on the assertion that the court lacked jurisdiction once this claim was dismissed. The second part of this assignment of error is apparently an argument that Lisa was estopped from going forward as if the trial court had jurisdiction when she previously argued that it did not have jurisdiction. These two parts will be discussed separately.

A. Estoppel

Albert asserts that to allow Lisa to argue that the trial court lacked jurisdiction because her "replevin" action had been dismissed in order to defeat State Farm's claim, and then to allow her to benefit from the contrary position in the case of Albert is unconscionable. (Appellant Brief at p. 18). Based on the authority cited in *Bailey v. Estate of Kemp*, 955 So. 2d 777, 782 (Miss. 2007), this is essentially an argument that Lisa should have been estopped from proceeding as if the trial court had jurisdiction when she had previously argued that it did not.

Bailey v. Kemp is both distinguishable and inapplicable. In *Bailey v. Kemp,* the Court applied

the doctrine of "quasi estoppel" to preclude a party from taking inconsistent positions with respect to a contract. 955 So. 2d at 779-83. Specifically, the plaintiffs in *Bailey* filed a breach of contract lawsuit and, among other things, on the one hand sought to gain the benefits of the contract, but on the other hand, sought to repudiate their obligations under the contract. *Id.* at 780-82. Reasoning that plaintiffs were estopped from seeking to avoid their obligations under the contract because they previously obtained benefits under the contract, the Court applied the doctrine of "quasi estoppel." *Id.* This was, in essence, defined by the Court as preventing a party from benefitting from a transaction/position and then taking an inconsistent position in order to avoid the corresponding obligations or effects thereof. *Id.*, citing *Bott v. J.F. Shea Co., Inc.*, 299 F.3d 508, 512 (5th Cir. 2002). That is not the situation which is presented here.

Although Lisa Keys did voluntarily dismiss her action for replevin and did initially argue that State Farm's Petition for Intervention and for Replevin of Certain Items could not be considered by the trial court because there was no action currently pending within which State Farm could intervene, (TT at 12-13), thereby requiring that the property be returned to Lisa since she was the person who brought the property to the court, the trial court disagreed. After that, she went forward and participated in the hearing. (TT at 16). The situation giving rise to estoppel in *Bailey v. Kemp* is different from the situation presented here.

Bailey is a contractual situation where one party first benefitted from the transaction/position at issue and then, taking an inconsistent position, sought to repudiate their obligations under the contract. The case *sub judice* is different. Here the issue argued involved the jurisdiction of the trial court, not a contract. Here, although Lisa Keys initially argued that the trial court lacked jurisdiction, she did not benefit from such a position, as the trial court rejected her argument and granted State

Farm's Petition. After that, all parties went forward with the presentation of evidence so that the trial court could resolve the issue of who was entitled to possession. An unsuccessful challenge to the jurisdiction of the court does not thereafter preclude a party from pursuing/defending against claims or offering evidence or testimony should the case proceed to trial. *See e.g. Estate of Jones v. Phillips ex rel Phillips*, 992 So. 2d 1131 (Miss. 2008). If it were otherwise, then a party could establish a lack of jurisdiction simply by so arguing; and there is no authority for that.

Not only does estoppel not apply here, but, more importantly, this issue was not raised at trial. Issues raised for the first time on appeal, as a general rule, are not to be considered. *See e.g. Jones v. Fluor Daniel Services Corp.*, 959 So. 2d 1044, 1048 (Miss. 2007); *Jones v. Laurel Family Clinic*, 37 So. 3d 665, 667 (Miss. Ct. App. 2010). This is certainly true with respect to arguments of estoppel. *Douglas v. Blackmon, et al.*, 759 So. 2d 1217 (Miss. 2000). Consequently, to the extent Albert Kea's Assignment of Error No. II espouses an argument that Lisa Keys was estopped from participating in the underlying trial once the trial court rejected her argument that no jurisdiction was present, that issue is inappropriate for review on appeal.

B. Jurisdictional Argument

The second portion of Albert Kea's Assignment of Error No. II questions the authority of the trial court to revive Lisa Keys' original Petition, with Albert asserting that the trial court had no jurisdiction to proceed once the case was dismissed. (Appellant Brief at p. 17). As discussed in great detail in Lisa Keys' response to the jurisdictional questions raised by Albert Kea's Assignment of Error No. I, the trial court certainly had jurisdiction over this matter and had proper authority to award possession of the subject pieces of property. Lisa Keys adopts the arguments made in her Brief with respect to Assignment of Error No. I and incorporates them herein.

Furthermore, a court has the power to enter a *nunc pro tunc* order as necessary for the obtainment of justice. *See e.g. McDaniel Bros. Const. v. Jordy,* 183 So. 2d 501, 507-508 (Miss. 1966).

Even if Lisa Keys' replevin action needed to be revived in order for the trial court to have jurisdiction over this matter, which Lisa Keys does not think was necessary given the trial court's inherent authority over *in custodia legis* property, Lisa's Notice of Intent to Pursue Claim either stated a new request for relief, i.e. to obtain possession of the subject property, or was tantamount to a request to revive her previously dismissed Petition.

For these reasons, Albert Kea's Assignment of Error No. II is without merit and the trial court's order should not be reversed.

III. Albert Kea's Assertion That the Trial Court Erred in Failing to Dismiss Lisa's Claim Because Her Sworn Filings in a Prior Bankruptcy Proceeding Precluded Her From Making Contradictory Claims in This Suit Is Without Merit.

A. General

Albert Kea asks this Court to reverse the ruling of the trial court on the grounds that the trial court erred in failing to dismiss Lisa's claim because her sworn filings in a prior bankruptcy proceeding precluded her from making allegedly contradictory claims in this lawsuit. However, the trial court was never asked to dismiss Lisa Keys' complaint based on these grounds. This assertion, which is one of estoppel, is being raised for the first time on appeal. This is inappropriate. Albert Kea is procedurally barred from arguing this on appeal. Moreover, as discussed in more detail below, even if such an estoppel argument is properly considered on appeal, an examination of the law and the facts demonstrates that it would not apply in this case.

B. Albert Kea Is Procedurally Barred from Arguing for the First Time on Appeal That Lisa Keys Should Have Been Estopped from Claiming this Property as Hers

In support of this assignment of error, Albert Kea claims that Lisa Keys lied in the bankruptcy petition which she and her husband, Robert Keys, filed in Texas on May 11, 2000, because they allegedly did not list the subject property. (Appellant Brief at pp. 18-20). As a result, Albert Kea claims that Lisa Keys is now estopped from claiming ownership of the property. *Id.* In support of this proposition, Albert Kea cites to three (3) cases: *Chandler v. Samford University,* 35 F.Supp.2d 861 (N. D. Ala. 1999); *Bailey v. Estate of Kemp*, 955 So. 2d 777 (Miss. 2007); and *Kirk v. Pope*, 973 So. 2d 981 (Miss. 2007). *Chandler* and *Kirk* involve situations where a bankruptcy debtor failed to list a legal cause of action on the applicable bankruptcy schedule, but then later went forward with prosecuting that legal claim for damages. Both cases held that the failure to list this legal cause of action on the bankruptcy schedule was tantamount to an admission that no such legal claim existed. As a result, the debtor was judicially estopped from later going forward with a lawsuit based on that legal claim for damages. As will be discussed more fully below, legal causes of action as assets of a bankruptcy estate are different from individual pieces of personal property, such as what is at issue in the instant case, and it is not at all clear that judicial estoppel would apply in the context argued by Albert. It is difficult to see how a failure to list items of personal property on a bankruptcy schedule would be tantamount to an admission that that the bankrupt debtor did not own that property, but a third party did, as Albert claims here. No such authority in support of this argument has been found.

The other case cited by Albert Kea, *Bailey*, which has been discussed in more detail previously, is a case involving issues of equitable estoppel/quasi estoppel as opposed to judicial

estoppel. 955 So. 2d at 782-83. These types of estoppel were applied by the Court to prevent one party to a contract from gaining the benefits from that contract and then seeking to repudiate the obligations under the contract. *Id.* at 782. This has no application to the case *sub judice.*

Notwithstanding these preliminary considerations, and even assuming to be true Albert's assertion that this property is not scheduled in the Keys' bankruptcy petition, of paramount significance here is the fact that Albert **never presented** this issue to the trial court. In fact, Albert never even raised this issue as an affirmative defense in his pleadings. (R. 11; 46). Although Albert did file a Motion to Dismiss which was argued to the trial court, this issue of estoppel was not one of the bases of the Motion. (R. 152; TT at 39-42). Thus, even assuming, *arguendo,* that estoppel might apply in this context, the trial court was never asked to rule on whether or not Lisa Keys was estopped from claiming ownership of these items of personal property *vis-a-vis* Albert Kea's claim of ownership. Not until now, on appeal, has this issue been presented for consideration.

It has long been recognized that issues raised for the first time on appeal will not be considered, and that an appellant is procedurally barred from raising an issue for the first time on appeal. *Fluor Daniel Services Corporation,* 959 So. 2d at 1048; *Laurel Family Clinic,* 37 So. 3d at 667. The rationale behind this is that a failure to present an issue to the trial court would prevent the trial court from being able to address this alleged error. *Id.* Therefore, except under limited circumstances, raising an issue for the first time on appeal without giving the trial court an opportunity to consider that issue will not be tolerated.

The case of *Douglas v. Blackmon, et al.,* 759 So. 2d 1217 (Miss. 2000) is significantly on point. *Douglas* involved issues of the propriety of notice under the Mississippi Tort Claims Act ("M.T.C.A.") § 11-46-11(1). Of significance herein, Douglas alleged for the first time on appeal that

the school district and insurer should be estopped from asserting that Douglas failed to comply with the notice requirements of the M.T.C.A. *Id.* at 1220. It has been said that "[T]his Court simply refuses to review any allegation of error which is unsupported by the record." *Id.* at 1220, citing *Vinson v. Johnson,* 493 So. 2d 947, 950 (Miss. 1986). Because this issue of estoppel was raised for the first time on appeal, the Court in *Douglas* held that the issue of whether or not the school district and its insurer were estopped from asserting that Douglas failed to comply with the applicable M.T.C.A. notice requirements was procedurally barred from consideration on appeal. *Id.* This is precisely the situation which is presented here. Albert Kea never asserted this claim of estoppel until now, on appeal. Thus, the trial court never had an opportunity to consider it. Under these circumstances, applying the reasoning used in *Douglas*, Albert Kea is procedurally barred from having this issue considered on appeal.

C. Any Such Estoppel Argument Raised by Albert Kea Is Without Merit

Even assuming for purposes of argument that Albert is not now procedurally barred from asserting this estoppel argument, close examination of the facts and the law reveals that the argument is without merit.

First, it is by no means clear that the subject property was not included in Robert and Lisa Keys' bankruptcy petition and schedules of assets filed on or about May 11, 2000, a copy of which is attached as Exhibit 14 in the underlying record, or otherwise made known to the trustee. Schedule B of that bankruptcy petition pertains to Personal Property, while Schedule C of the petition lists exempt property. While it is true that neither of these schedules specifically itemize each piece of the Keys' personal property, including that which is the subject of this litigation, that does not mean that these pieces of property are not included in the categories of property shown on these schedules.

Paragraph 4 of Schedule B categorically lists "[H]ousehold goods and furnishings, including audio, video, and computer equipment," showing an estimated **liquidation value** at that time of $4,500.00. Paragraph 5 of Schedule B categorically lists "Books, pictures, and other art objects, antiques, stamp, coin, record, tape compact disc, and other collection or collectibles," with a separate general description of books and pictures, and showing an estimated **liquidation value** of $500.00. Schedule C for exempt property, lists home furnishings, including family heirlooms, valued at $5000.00. Since Robert and Lisa Keys were residents of Texas at the time they filed bankruptcy, this exemption is based on § 42.002(a)(1) of Vernon's Texas Code Annotated.[6]

While this bankruptcy petition and attached schedule is part of the record on review, nothing else pertaining to Robert and Lisa Keys' 2000 bankruptcy is contained in this record. There is no evidence of what investigation the trustee did about the Keys' assets; or what information was provided at the § 341 meeting of creditors; or what went into the trustee's determination that this was a no asset case beyond property which was properly exempted or secured; or whether, assuming the property is not included in these schedules, the trustee would have done anything with this property considering its relatively insignificant value.

Judicial estoppel is supposed to be applied in order "to prevent a party from achieving unfair advantage by taking inconsistent positions in litigation." *Copiah County v. Oliver*, 2010 WL 3785534 (Miss. 2010). Importantly, this Court has said that: "[J]udicial estoppel is designed to protect the judicial system and applies where '**intentional self-contradiction** is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" *Id*, citing *Kirk v. Pope*, 973 So.2d at 991 (emphasis added). It is not at all clear that judicial estoppel would apply

[6] A copy of §§ 42.001 and 42.002 V.T.C.A. is attached as an addendum to this Brief.

in the context presented here such that Lisa Keys, should it be determined that she and her husband did not properly itemize these pieces of personal property on their bankruptcy schedule, would be judicially estopped from arguing that these pieces of personal property were hers and not Albert's, as Albert wishes this Court to believe. Nevertheless, even assuming, *arguendo,* that judicial estoppel can be applied in this context, the facts of this case do not support its application here.

Under Mississippi law, in order for judicial estoppel to apply, three (3) requirements must be proven.

> "(1) The party is judicially estopped only if its position is clearly inconsistent with the previous one;
>
> (2) The court must have accepted the previous position; and
>
> (3) The non-disclosure must not have been inadvertent."

Kirk, 973 So. 2d at 991 (Miss. 2007), citing *Superior Crewboats, Inc.*, 374 F.3d 330 at 335 (5th Cir. 2004); also see *Copiah County v. Oliver*, 2010 WL 3785534 (Miss. Sept. 30, 2010). However, there is nothing in the record of the subject case that would enable an answer in the affirmative to any of these requirements. In particular, there is nothing in the record demonstrating there was an "**intentional self-contradiction**" made by Lisa Keys.

The limited evidence on this issue consists of Robert and Lisa Keys' bankruptcy petition with attached schedules, and some limited testimony adduced at trial. That trial testimony shows that Lisa Keys, at best, **denied** that the subject property **was not** included on her bankruptcy schedules or, at worst, did not know whether the property was or was not included since her husband handled that. (TT at 69-70, 89-90). Later on, Lisa Keys did testify that this property was not listed on the bankruptcy schedules **as her assets**. (TT at 115). This, of course, is correct based on a cursory

review of Schedules B and C of the bankruptcy petition. Clearly these schedules give no indication which property of the estate was Roberts, which was Lisa's, which was jointly owned, or which was community property under Texas law. Just as Lisa Keys testified, none of these pieces of property were listed as hers. Furthermore, several of the subject pieces of property were purchased by Bob and would have been his, not Lisa's, at the time of the bankruptcy. (TT at 99-113). After his death in 2006, however, an estate was opened for Robert Keys and Lisa was awarded all of the items out of his estate. *Id.*

Therefore, based on the evidence before us, there is nothing to support Albert's argument that Lisa Keys' position of ownership of this subject property is clearly inconsistent with the position taken by her and her husband in their 2000 bankruptcy. This is distinctly different from the case of *Kirk v. Pope,* relied on by Albert, in large part because potential legal causes of action are expected to be listed with enough specificity to inform the trustee of the nature of the complete legal claim which the debtor has and to enable the trustee to determine whether there is a need to investigate further. *Tilly v. Anixter, Inc.*, 332 B.R. 501 (D. Conn. 2005); *also see In Re: Mohring,* 142 B.R. 389, 395 (E.D. Cal. 1992). Thus, the "mere omission of a claim in bankruptcy filings is tantamount to a representation that no such claim existed." *Kirk,* 973 So. 2d at 991, citing *Superior Crewboats, Inc.*, 374 F.3d at 335 (citing *Browning Mfg.*, 179 F.3d at 210). Based on this reasoning, the Court in *Kirk* went on to hold that "Kirk's failure to list the lawsuit represented that no such suit existed and is inconsistent with his subsequent pursuit of the claim." *Id.*

Physical pieces of property, however, are different. With respect to items of physical, personal property it has been noted that "there are no bright line rules for how much itemization and specificity is required." *See e.g., In re Mohring,* 142 B.R. 389, 395 (E.D. Cal. 1992); *John R.*

Kennel, 8A C.J.S. Bankruptcy § 349 (Supp. 2010). The burden has been described as "reasonable particularization under the circumstances," recognizing that "it would be silly to require a debtor to itemize every dish and fork, but every bankrupt must do enough itemizing to enable the trustee to determine whether to investigate further." *In re Mohring*, 142 B.R. at 395. The Fifth Circuit likewise has held that reasonableness under the circumstances applies. *In the matter of Tomasek*, 2006 WL 925536 (5th. Cir. 2006).

Looking at the bankruptcy petition of Robert and Lisa Keys through the looking glass of whether there was "reasonable particularization under the circumstances," it is helpful to first examine the context of the decision in *In re Mohring*. The debtor in *In re Mohring* used a generic listing of household goods as a claimed exemption. In particular, the debtor's claimed exemption was "household goods and furnishings" valued collectively at $1,000, referencing California Code of Civil Procedure § 703.140. *In re Mohring*, 142 B.R. at 391. However, the court decided that this was inadequate, holding that a generic listing of household goods for purposes of claiming an exemption was ambiguous and had to be construed against the debtor. *In re Mohring*, 142 B.R. at 395. Significantly, this decision was based on the California State Exemption Statutes which permitted an exemption of $200.00 per each item of household goods for an unlimited number of items. *In re Mohring*, 142 B.R. at 395. The court in *In re Mohring* held: "[I]n short, when the State's exemptions are on a per item basis, detailed itemization is required." *Id.*

In the instant case, however, the Keys' exemptions were based on the Texas statutes. In this regard, the Texas household goods' exemption is different from the one in California. It is much more general, and generically states: "[H]ome furnishings, including family heirlooms." §42.002(a)(1) V.T.C.A. Indeed, the law in Texas is that a debtor may generally list home furnishings

as claimed exemptions, just as Robert and Lisa Keys did on their schedules, but once a party objects to the claimed exemptions, then the debtor must specifically itemize. *In re R. D. Wright,* 99 B.R. 339, 341 (N.D. Texas 1989). There being no evidence of a creditor filing an objection to the Keys' exemption claim, their general description was adequate; and there is no evidence that their bankruptcy petition did not properly cover the property which is at issue here. Thus, Albert Kea cannot satisfy the first requirement needed for judicial estoppel to apply.

The second requirement which Albert must establish in order for judicial estoppel to apply is that the court must have accepted the previous position. For reasons similar to those discussed above, since it is by no means clear that the subject property was not included in the Keys' bankruptcy petition, there is no evidence that the bankruptcy court was operating under the belief that the subject property was not included in the bankruptcy estate. Accordingly, Albert Kea cannot satisfy the second requirement needed for judicial estoppel to apply.

The third and final requirement for judicial estoppel to apply is that the non-disclosure must not have been inadvertent. In this regard, it has been held that "[A] debtor's non-disclosure is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Kirk v. Pope*, 973 So. 2d at 991, quoting *Browning Mfg.*, 179 F.3d at 210; *see also Mississippi Power and Light Co. v. Cook,* 832 So. 2d 474, 482 (Miss. 2002), holding that "the representation must be false, or must have the effect of misleading the other party to his inquiry . . . " *Id.* As previously noted, this is essentially an "intentional self-contradiction." *Copiah County v. Oliver, supra.*

In the instant case, even if we assume that the subject property was not included in the Keys' bankruptcy petition, there is **absolutely no evidence** that Lisa Keys knew that the bankruptcy

petition failed to include their subject property; nor is there any evidence that she had a motive for concealing it and intentionally did so. Lisa's husband, Bob, was the one who handled the bankruptcy matter, as Lisa testified in the trial. (TT at 69-70). Moreover, this subject property was really of relatively insignificant value, as evidenced by the receipts which were marked into evidence.[7] (Exs. 12, 15-24). Therefore, little would be gained by concealing their existence from the trustee, assuming that was even done. Thus, there was no motive to conceal this property. Finally, the evidence before us certainly does not show that Lisa Keys made any willfully false representations in the bankruptcy proceeding and engaged in an intentional self-contradiction, as the law requires in order for judicial estoppel to apply. Therefore, Albert Kea has not, and cannot, prove the requirements needed in order to establish that judicial estoppel is appropriate here, even if it is applicable in this context.

Additionally, even if the subject property was not listed by the Keys in their bankruptcy proceeding, that certainly would not allow it to vest to Albert Kea, as Albert wishes this Court to believe. (Appellant Brief at p. 20). Property of the debtor becomes property of the bankruptcy estate upon filing of the petition in bankruptcy, whether that property is scheduled or not. 11 U.S.C. § 541; § 554(d); *see also In re Coastline Care, Inc.*, 299 B.R. 373, 377 (E.D.N.C. 2003); *Pruitt v. Hancock Medical Center,* 942 So. 2d 797, 802 (Miss. 2006). If the subject property belonging to Bob and Lisa Keys at the time they filed for bankruptcy was not adequately scheduled or otherwise made known to the trustee, then that property is vested in the Keys' bankruptcy estate, and the Keys' bankruptcy trustee must determine whether it is appropriate for the property to be disposed of or abandoned to

[7] It should also be noted that one piece of property, the Nurse Bunnykins figurine, was purchased after the Keys' bankruptcy. Therefore, it would not have been included in the Keys' 2000 bankruptcy anyway, and, cannot be subject to Albert Kea's estoppel argument. (TT at 109-110; Ex. 20).

Lisa Keys. It certainly would not automatically belong to Albert Kea.

Finally, but of no little significance, if there is an issue of whether the subject property was included in the Keys' bankruptcy petition and schedules so that it was abandoned to them upon discharge, that should be an issue more appropriately to be decided by the Keys' bankruptcy court, as it would retain jurisdiction over the Keys' bankruptcy estate even after that estate is closed. *Travelers Indem. Co. v. Bailey,* . . .U.S. . . .129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009); *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.),* 118 F. 3d 1056 (5th Cir. 1997).

For these reasons, Albert Kea's request that this Court reverse the ruling of the trial court based on this Assignment of Error No. III and award the subject property to Albert Kea should be denied, and the trial court's decision affirmed.

IV. Appellant's Alleged "Equitable Interest" Is Waived and Procedurally Barred From Consideration on Appeal

A. This Issue Was Not Raised in the Trial Court and is Procedurally Barred

Albert Kea alleges for the first time on appeal that the trial court committed error with respect to a matter that was not raised by him in the trial court. It is, however, an elementary principle of Mississippi law that matters not raised in the trial court and instead raised for the first time on appeal are regarded as waived and are not to be considered by appellate courts.[8] *Laurel Family Clinic, P.A.*, 37 So. 3d at 667. In this case, Albert Kea now claims for the first time on appeal that he had an

[8] Mississippi appellate courts have consistently admonished that allowing litigants to raise matters for the first time on appeal "would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review." *Henricks v. Henricks,* 32 So. 3d 1202, 1205-06 (Miss. Ct. App. 2010), *citing, Williams v. Skelton,* 6 So. 3d 428, 430 (Miss. 2009).

equitable interest in the subject property, and that the trial court committed error in failing to adjudicate his alleged equitable interest. This contention stems from a gratuitous statement made by the trial court in its ruling. The trial court stated that, although it may very well be that Albert Kea had an "equitable interest" in the property, this was not a chancery court. (TT at 137). The trial court then concluded that Lisa Keys had met her burden of proof and was entitled to possession of the subject property.

This alleged equitable interest, however, was never presented to the trial court for consideration either pre-trial, during trial, or through any post-trial motions. Mississippi law is clear that Albert Kea's failure to raise this matter in the trial court, renders the matter procedurally barred and waived. *See also e.g. Cooper Tire & Rubber Co. v. Striplin*, 652 So. 2d 1102, 1104 (Miss. 1995)(where alleged "equitable claim" raised for first time on appeal, issue is waived and not to be considered); *Gooden v. Village of Woodgreen Homeowners Assoc.*, 662 So. 2d 1064, 1076 (Miss. 1995)(party procedurally barred from raising a defense for the first time on appeal); *Henricks v. Henricks,* 32 So. 3d 1202, 1205-06 (Miss. Ct. App. 2009)(issue not raised in trial court is barred on appeal);*Evans v. Evans*, 912 So. 2d 184, 187 (Miss. Ct. App. 2005)(spouse's alleged claim that she was entitled to equitable distribution of certain property waived because not raised in trial court). For this reason, this Assignment of Error raised by Albert Kea has been waived and is procedurally barred from consideration on appeal.

B. No Citation to Legal Authority

Even if Albert Kea's alleged "equitable interest" was to be considered by this Court, Albert Kea cites to no legal authority or case law to establish that he had an equitable interest in the subject property, which even if the trial court would have considered it, would have entitled him to

possession of some of this property. Mississippi case law is well established in that a party's failure to cite to legal authority to support a claim or argument procedurally bars such issue from being considered on appeal. *See e.g. In the Matter of Adoption of a Minor Child,* 931 So. 2d 566, 578 (Miss. 2006); *Carter v. Miss. Dept. Of Corr.*, 860 So. 2d 1187, 1193 (Miss. 2003).

For these reasons, this Assignment of Error raised by Albert Kea is procedurally barred from consideration on appeal.

V. Albert Kea's Assertion That the Evidence Does Not Support the Trial Court's Award of the Property to Lisa Is Without Merit

A. Albert Kea's Claim of Discovery Abuse by Lisa Keys Should Be Disregarded

Before moving into a discussion of the substantive issues of this Assignment of Error, attention needs to be given to comments made by Albert Kea in Footnote 13 (Appellant's Brief at p. 23) and the portion of his Brief which talks about discovery issues with Lisa Keys. (Appellant Brief at pp. 22-23). Although Albert Kea does not state a separate assignment of error on the part of the trial court in failing to exclude Lisa's testimony and/or dismiss her claims because of alleged discovery violations, he does express an intention to urge this Court to reverse the trial court's decision because of this. (Fn.13, p. 23 of Appellant's Brief). However, except under well defined circumstances which are not applicable here, issues not raised as an assignment of error are not to be considered by the appellate court. *Read v. Southern Pine Elec. Power Assoc.*, 515 So. 2d 916 (Miss. 1987). For that reason, Lisa Keys asks this Court to disregard Albert's expression of his intent and to not consider his allegation of alleged discovery violations when considering those issues which are properly before this Court.

It should also be noted that when discovery violations have been considered this Court has

held that "dismissal with prejudice is a drastic and harsh punishment that should be reserved for the most extreme and egregious situations, usually where clear delay and lesser sanctions are present." *Beck v. Sapet,* 937 So. 2d 945, 951 (Miss. 2006). Certainly nothing that egregious occurred in the case *sub judice* which would have warranted such a dismissal even if it was properly before this Court for consideration.

B. Substantial, Credible and Reasonable Evidence Supports the Trial Court's Decision That Lisa Keys Was Entitled to Possession of this Property

It is well recognized that the scope of review on appeal of a trial judge's findings of fact are limited. *UHS – Qualicare, Inc. v. Gulfcoast Community Hospital, Inc.,* 525 So. 2d 746, 753 (Miss. 1987). In fact, the appellate court "will not disturb a trial judge's finding of fact where there is in the record substantial evidence supporting the same." *Id.* It also has been said that "the findings of fact of a trial court should be and must be accepted unless they are manifestly wrong." *Id.* These things combined result in a "clearly erroneous standard of review." *Id.* at 754. Consequently, a trial judge's findings of fact will only be reversed if they are determined to be clearly erroneous. In order for this to be determined, the appellate court, when looking at all of the evidence, must be "left with a definite and firm conviction that a mistake has been made." *Id.* at 754. Conversely, a trial judge's findings of fact "will not be reversed on appeal where they are supported by substantial, credible and reasonable evidence." *Phillips v. Mississippi Dept. of Public Safety*, 978 So. 2d 656 (Miss. 2008).

Applying these standards to the case *sub judice* confirms that the trial court's decision was not clearly erroneous and is supported by substantial, credible and reasonable evidence.[9] Therefore,

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[9] Although the Statement of the Case portion of Albert Kea's Brief of Appellant contains a variety of statements, very few of them are supported by the record which is before this Court on this appeal. Many of these statements, however, are taken from evidence presented in the criminal case against Albert Kea for perjury, with cites applicable to that record being referenced as C.P or T. (Appellant's Brief at p. 1, fn.1).

it should not be reversed.

It is undisputed that the subject property was brought to Simpson County by Robert and Lisa Keys at the request of the District Attorney of Simpson County, to be used as evidence in a perjury trial which the state was prosecuting against Albert Kea.[10] (TT at 101-102). Prior to then, this property was in the Keys' townhouse in Colorado. *Id.* When Bob and Lisa Keys brought the subject property from Colorado to Mississippi for use in the perjury trial, they also brought receipts showing ownership of many of those items. (TT at 118). There was no issue as to who owned the subject property at the time of Albert Kea's perjury trial. (TT at 118). When these items of property were delivered to the Sheriff of Simpson County by Robert and Lisa Keys, the Sheriff prepared an inventory of those items along with a valuation for each item. (TT at 136; Ex. 37). After Robert's death in 2006, an estate was opened on behalf of Robert in Colorado. (TT at 100). Significantly, Albert Kea filed a claim for property with the estate which was denied, and all of the property in Robert Keys' estate was awarded to Lisa. (TT at 100).

Of these 24 items of personal property, 4 were awarded to State Farm.[11]

At the underlying trial, Lisa testified about ownership of the remaining 20 pieces of property,

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Anything contained in the record of the criminal case against Albert Kea should not be considered for purposes of this appeal. In that regard, Lisa Keys has filed separately a Motion to Strike all such references. Many other "statements" are nothing more than inappropriate innuendo and rank speculation. For purposes of this appeal, only the evidence which is contained in this record should be considered.

[10] Although Robert is the one who physically brought this property to Mississippi, the property was theirs and was in their possession. (TT at 99-113)

[11] The four items which were awarded to State Farm were items for which State Farm had paid a loss claim previously submitted by Robert Keys and his wife at the time, Amy Keys. (R. 081, *et seq.*; R. 099; R. 083-84; R. 097-98; TT at 20-21, 49). Lisa Keys was not involved in that claim and State Farm was not seeking possession of property for which Lisa Keys had previously made a claim. (TT at 20-21). Consequently, any suggestion or implication raised by Albert Kea that Lisa Keys was involved in submitting a "fraudulent" claim to State Farm is unfounded.

and produced receipts for 15 of those items. (*See* p. 6 of the Statement of the Case for reference to pages of trial testimony exhibit numbers of these items of personal property.) All of this together constitutes substantial, credible and reasonable evidence supporting the trial court's decision that Lisa Keys was entitled to possession of this property.

Next it is incumbent on us to examine the evidence put forth by Albert. Albert's proof essentially consisted of his testimony that he gave Bob money to purchase items for him when Bob was overseas, and that Bob gave Albert the items along with a receipt. (TT at 121-122). Albert also testified that the items on the Sheriff's inventory list were his. (TT at 125). Copies of some receipts in Albert's possession were introduced into evidence, though these receipts typically were in Bob or Lisa Keys' name. (TT at 126-127; Exs. 25-34). Additionally, Albert produced a letter ostensibly written by Robert dated July 19, 2002, which Albert argues is proof in support of his position. (Appellant's Brief at p. 14; 22-23; Ex. 36). However, when examining these things in detail, it is clear that Albert's position is without merit.

First, Albert is critical of the receipts which Lisa offered into evidence for those specific items, claiming that it is by no means clear that the receipts are for the items which she claimed. (Appellant Brief at p. 22). However, this is not proof of anything. It is nothing more than argument, and there was **no evidence** offered contradicting Lisa's testimony concerning this. Another criticism offered by Albert is that there was no receipt for the watch which Albert testified was a family heirloom. (Appellant Brief at p. 22). Of course, this was a family heirloom not only of Albert's family, but also of Robert's. Moreover, this family heirloom was from approximately 1901. (TT at 24). Consequently, you would not expect Lisa or Robert to have a receipt for a family heirloom of this age. What we do know is that this watch had been in Robert's and Lisa's possession before

he and Lisa voluntarily turned over these pieces of property to the Simpson County Sheriff's Department for use in the perjury trial against Albert. (TT at 101-102). There certainly is no evidence that the watch belonged to anyone other than Robert at that time. Following Robert's death, Lisa was entitled to possession of all of his property, which would include this piece of property. (TT at 101).

Next, Albert spent significant time focusing on an unsworn letter ostensibly signed by Robert dated July 19, 2002. (Ex. 36). However, it is difficult to see how this unsworn letter is of any benefit to Albert in corroborating his assertions. As we know, Albert's fire occurred in 1998. *Kea v. State*, 986 So. 2d 358, 359 (Miss. Ct. App. 2008). This letter, written in 2002, merely says that Bob a/k/a Robert is going to help Albert replace items which he lost in this fire. (Ex. 36). It is already well established that Albert had previously claimed that the subject items of property were lost in the fire when the truth of the matter is that they were not. Therefore, it is obvious that the items of property referenced in this letter which Robert is intending to replace can only be items other than the subject property, i.e., those items of Albert's that actually were lost in the fire.

Albert also takes comfort in that portion of the letter which states that Robert "can replace your Moorcroft, Wedgewood, and your Royal Doulton collection from England, and your Waterford Kennedy bowl from Ireland, and your Mosaic from Rome." (Ex. 36; Appellant Brief at p. 22). What Albert apparently is asserting is that the Moorcroft collection – Florian ware vase and the Mosaic picture listed on the Simpson County Sheriff's Department Property Release Form (Ex. 37) must be what is referenced by Robert in this 2002 letter when he offers to replace Albert's Moorcroft collection and his Mosaic from Rome. (Appellant's Brief at p. 22). Ignoring for the moment those reasons previously articulated as to why this letter does not support Albert's assertions, let us

examine this argument by Albert in more detail.

Unless it can be established that there is only one Moorcroft vase in the entire universe, and that the reference in this 2002 letter to the "Moorcroft collection" was specifically directed to this one unique vase which is part of the subject property, there is absolutely no way to reasonably conclude that this reference contained in the 2002 letter can even remotely support Albert's contention that the Moorcroft vase which is part of the subject property was his rightful possession. The gap between Albert's argument and the credible evidence is far too wide. The same is true of the "Mosaic from Rome" referenced in this 2002 letter. There is absolutely no reasonable basis to conclude that the "Mosaic from Rome" referenced in this letter is one and the same item as the "Mosaic picture" listed on the sheriff's department inventory. Of even greater significance, the Mosaic picture listed on the sheriff's department inventory was found to be property to which State Farm was entitled to possession. (TT at 94-95; R. 181). Thus, it is not even part of this appeal and any discussion of it is completely without relevance.[12]

Next, Albert finds comfort in that portion of the 2002 letter which states that "Lisa does not want her mother to know that we sold you the clocks & the Schnever pictures before the fire. . ." (Ex. 36; Appellant Brief at p. 22). To claim that the "Schnever" pictures referenced in this 2002 letter are the same pictures which Bob and Lisa brought to the Simpson County Sheriff's Department listed as "David Schneur" lithographs requires yet another illogical quantum leap. Surely there are not just three such pictures in the world by David Schneur or Schnever, assuming they are one and the same person. At least there is no evidence at all to suggest that these pictures are the same, only

[12] Significantly, Albert is not appealing the trial court's award of possession of these 4 items of property to State Farm, thereby conceding by acquiescence that Robert did indeed own these items of property at the time he submitted the claim to State Farm which State Farm subsequently paid.

Albert's rank speculation about this. Additionally, if these three David Schneur lithographs are one and the same as the "Schnever pictures" referenced in this unsworn 2002 letter, then one would expect for Albert to have a bill of sale if indeed these were sold to him. However, no such bill of sale was introduced into evidence by Albert and Albert admitted that he had none. (TT at 125). Therefore, one must conclude that no such bill of sale exists and that these pieces of property were not sold to Albert.

Albert also talks about some of the receipts which he had and which were attached as exhibits. In addition to the Schneur prints, Italian Mosaic and the Moorcroft vase which were previously discussed, there are references to a walrus tusk and tooth. However, these too are items which were awarded to State Farm. (TT at 94-95; R. 181). Therefore, they have no relevance for purposes of this appeal. There also is a reference to a receipt for clocks. (Appellant Brief at p. 23). However, there is no indication that the clocks for which Albert had receipts are the same clock as is on the Sheriff's list.

Now that we have examined what Albert did introduce into evidence in support of his position, let us turn our attention to what he did not introduce. Keep in mind that Albert's claim is based on his contention that he gave Bob and Lisa money to purchase these items for him while Bob and Lisa were overseas. (TT at 121-122). However, Albert did not introduce into evidence any cancelled checks, money orders, cashier's checks, or any other form of documentary proof substantiating this contention. Moreover, Albert did not introduce into evidence any bills of sale, assignments or transfers from Bob and Lisa to him pertaining to any of these items of property. In fact, he admitted that he did not have anything like that. (TT at 125). In short, Albert did not introduce into evidence any documentary evidence supporting his contention. Furthermore, Lisa

testified unequivocally that her husband never executed any documents nor gave any of these items to Albert and that none of this subject property was at Albert's house that burned. (TT at 113). Lisa also testified that Albert did not give them money to purchase these items. (TT at 114).

In an attempt to attack Lisa's credibility, Albert also argues that Lisa either lied in this underlying trial about having these items in 2000 when they filed bankruptcy, or she lied in her bankruptcy petition about not having them. (Appellant Brief at p. 23). However, as discussed in more detail in response to Albert's Assignment of Error No. III, the credible evidence simply does not support this.

On the other hand, Albert's credibility is exceedingly questionable. First, Albert previously had claimed that these items of personal property were destroyed in his house fire that occurred in 1998. Obviously, they were not. As a result, Albert was indicted for perjury.[13] Second, the first time Albert came up with this "theory" that Bob had taken these items from his house prior to the fire was in his perjury trial in 2006. (TT at 128-129). He did not say this during his 2004 trial against Entergy where he claimed this property had been destroyed in that fire. *Id.* Third, other than copies of some receipts which Albert had, but which showed that the property was purchased by Bob and/or Lisa, Albert produced absolutely no documentary evidence whatsoever to substantiate his contention that he gave money to Bob and Lisa to purchase these items for him while they were overseas and that they did so and then transferred the property to him. Fourth, Albert is not contesting the award of 4 pieces of property by the trial court to State Farm based on a claim

[13] Although Albert was convicted of perjury, that conviction was overturned based on an error with the jury instructions and an error with the admission of one item of evidence. *Kea v. State, supra.* Consequently, his conviction was reversed and remanded for a new trial. His conviction was not reversed, however, based on a finding that the verdict was against the overwhelming weight of the evidence.

submitted by Bob even though Albert had contended that this was his property and not Bob's, thereby conceding by acquiescence that Bob did indeed own that property. This concession raises further questions about the credibility of Albert's claim that the remaining pieces of property are his and not Lisa's. Also, when asked to describe several of these items of property which he claimed were his, Albert could not. (TT at 129-130). These things combined raise considerable suspicion about Albert's credibility, and the legitimacy of his claims of ownership.

In making determinations of fact, this Court has said that "it is the responsibility of the Circuit Judge, when sitting as the trier of fact, to determine the credibility of witnesses, and his conclusions will not be disturbed if they are found to be supported by substantial, credible, and reasonable evidence." *Ervin v. Delta Regional Medical Center*, 2010 WL 2280601 (Miss. Ct. App. June 8, 2010); *see also UHS – Qualicare, Inc.*, 525 So. 2d at 754. Clearly when looking at the record, the trial judge did indeed assess the credibility of the witnesses, considered the evidence, and reached his conclusions accordingly. Moreover, there is nothing manifestly wrong about his decision; nor when viewing the evidence can one be "left with a definite and firm conviction that a mistake has been made," as is required before the trial court's findings can be reversed. *UHS – Qualicare, Inc.*, 525 So. 2d at 754. Therefore, the trial court's decision to award the remaining 20 items of personal property being held by the Sheriff's Department of Simpson County to Lisa Keys is based on substantial, credible and reasonable evidence, and the trial court's decision should not be reversed.

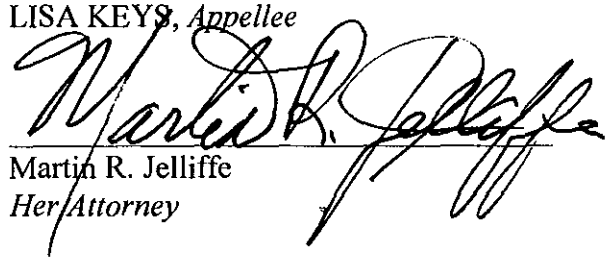
CONCLUSION

All of Albert's assignments of error are either procedurally barred and/or without merit. The trial court had jurisdiction to evaluate the evidence and testimony presented to it for consideration

on the issue of who was entitled to possession of the subject ***in custodia legis*** property and had the jurisdiction and authority to award possession of these pieces of property to Lisa Keys. Furthermore, that decision was supported by substantial, credible and reasonable evidence. Therefore, the trial court's decision should be affirmed.

RESPECTFULLY SUBMITTED, this the 15th day of November, 2010.

LISA KEYS, *Appellee*

BY: 

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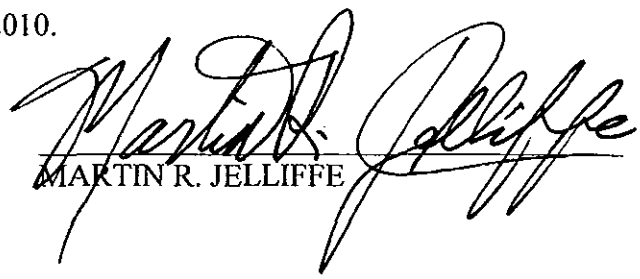
CERTIFICATE OF FILING

I, Martin R. Jelliffe, do hereby certify that I have this day caused to be hand-delivered the original and 3 true and correct paper copies of the Brief of Appellee, Lisa Keys to the following:

Honorable Kathy Gillis
Supreme Court Clerk
Mississippi Supreme Court
Carroll Gartin Justice Bldg.
450 High St.
Jackson, MS 39201

THIS, the 15th day of November, 2010.



MARTIN R. JELLIFFE

CERTIFICATE OF SERVICE

I, Martin R. Jelliffe, do hereby certify that I have this day caused to be served via U. S. Mail a true and correct copy of the above and foregoing document to:

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Judge of the Simpson County Circuit Court
P. O. Box 545
Raleigh, MS 39153

THIS the 15th day of November, 2010.

MARTIN R. JELLIFFE

C
West's Annotated Mississippi Code Currentness
The Constitution of the State of Mississippi
Article 6. Judiciary
Section 156. Jurisdiction of circuit court

The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law.

Current through the 2010 Regular and 1st Extraordinary Sessions

END OF DOCUMENT

C
West's Annotated Mississippi Code Currentness
Title 9. Courts
Chapter 7. Circuit Courts
Jurisdiction, Powers and Authority
→ **§ 9-7-81. Jurisdiction in general**

The circuit court shall have original jurisdiction in all actions when the principal of the amount in controversy exceeds two hundred dollars, and of all other actions and causes, matters and things arising under the constitution and laws of this state which are not exclusively cognizable in some other court, and such appellate jurisdiction as prescribed by law. Such court shall have power to hear and determine all prosecutions in the name of the state for treason, felonies, crimes, and misdemeanors, except such as may be exclusively cognizable before some other court; and said court shall have all the powers belonging to a court of oyer and terminer and general jail delivery, and may do and perform all other acts properly pertaining to a circuit court of law.

Current through the 2010 Regular and 1st Extraordinary Sessions

END OF DOCUMENT

C
West's Annotated Mississippi Code Currentness
Title 11. Civil Practice and Procedure
Chapter 37. Replevin
→ **§ 11-37-101. Commencement of replevin**

If any person, his agent or attorney, shall file a complaint under oath setting forth:

(a) A description of any personal property;

(b) The value thereof, giving the value of each separate article and the value of the total of all articles;

(c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;

(d) That the property is in the possession of the defendant; and

(e) That the defendant wrongfully took and detains or wrongfully detains the same; and shall present such pleadings to a justice of the Supreme Court, a judge of the circuit court, a chancellor, a county judge, a justice court judge or other duly elected judge, such justice or judge may issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said complaint, upon the plaintiff posting a good and valid replevin bond in favor of the defendant, for double the value of the property as alleged in the complaint, conditioned to pay any damages which may arise from the wrongful seizure of said property by the plaintiff. The said writ shall be directed to the sheriff or other lawful officer, returnable as a summons before the proper circuit or county court where the value of the property, as alleged in the complaint, exceeds the jurisdictional amount of the justice court, or to the circuit or county court or the proper justice court if the value shall not exceed such amount. The complaint along with the order of the court, the writ of replevin with the officer's return thereon, and the bond of the plaintiff shall be filed in the proper court at once. Writs of replevin may be made returnable to the proper court of another county where the property may be found.

CREDIT(S)

Laws 1975, Ch. 508, § 1; Laws 1990, Ch. 344, § 1, eff. July 1, 1990.

Current through the 2010 Regular and 1st Extraordinary Sessions

END OF DOCUMENT

(Added Pub. L. 109–8, title II, §229(a), Apr. 20, 2005, 119 Stat. 71.)

EFFECTIVE DATE

Section effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as an Effective Date of 2005 Amendment note under section 101 of this title.

SUBCHAPTER III—THE ESTATE

§541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the

total contributions permitted under section 529(b)(7) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the

debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2594; Pub. L. 98–353, title III, §§363(a), 456, July 10, 1984, 98 Stat. 363, 376; Pub. L. 101–508, title III, §3007(a)(2), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 102–486, title XXX, §3017(b), Oct. 24, 1992, 106 Stat. 3130; Pub. L. 103–394, title II, §§208(b), 223, Oct. 22, 1994, 108 Stat. 4124, 4129; Pub. L. 109–8, title II, §225(a), title III, §323, title XII, §§1212, 1221(c), 1230, Apr. 20, 2005, 119 Stat. 65, 97, 194, 196, 201.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 541(a)(7) is new. The provision clarifies that any interest in property that the estate acquires after the commencement of the case is property of the estate; for example, if the estate enters into a contract, after the commencement of the case, such a contract would be property of the estate. The addition of this provision by the House amendment merely clarifies that section 541(a) is an all-embracing definition which includes charges on property, such as liens held by the debtor on property of a third party, or beneficial rights and interests that the debtor may have in property of another. However, only the debtor's interest in such property becomes property of the estate. If the debtor holds bare legal title or holds property in trust for another, only those rights which the debtor would have otherwise had emanating from such interest pass to the estate under section 541. Neither this section nor section 545 will affect various statutory provisions that give a creditor a lien that is valid both inside and outside bankruptcy against a bona fide purchaser of property from the debtor, or that creates a trust fund for the benefit of creditors meeting similar criteria. See Packers and Stockyards Act §206, 7 U.S.C. 196 (1976).

Section 541(c)(2) follows the position taken in the House bill and rejects the position taken in the Senate amendment with respect to income limitations on a spend-thrift trust.

Section 541(d) of the House amendment is derived from section 541(e) of the Senate amendment and reiterates the general principle that where the debtor holds bare legal title without any equitable interest, that the estate acquires bare legal title without any equitable interest in the property. The purpose of section 541(d) as applied to the secondary mortgage market is identical to the purpose of section 541(e) of the Senate amendment and section 541(d) will accomplish the same result as would have been accomplished by section 541(e). Even if a mortgage seller retains for purposes of servicing legal title to mortgages or interests in mortgages sold in the secondary mortgage market, the trustee would be required by section 541(d) to turn over the mortgages or interests in mortgages to the purchaser of those mortgages.

The seller of mortgages in the secondary mortgage market will often retain the original mortgage notes and related documents and the seller will not endorse the notes to reflect the sale to the purchaser. Similarly, the purchaser will often not record the purchaser's ownership of the mortgages or interests in mortgages under State recording statutes. These facts are irrelevant and the seller's retention of the mortgage documents and the purchaser's decision not to record do not change the trustee's obligation to turn the mortgages or interests in mortgages over to the purchaser. The application of section 541(d) to secondary mortgage market transactions will not be affected by the terms of the servicing agreement between the mortgage servicer and the purchaser of the mortgages. Under section 541(d), the trustee is required to recognize the purchaser's title to the mortgages or interests in mortgages and to turn this property over to the purchaser. It makes no difference whether the servicer and the purchaser characterize their relationship as one of trust, agency, or independent contractor.

The purpose of section 541(d) as applied to the secondary mortgage market is therefore to make certain that secondary mortgage market sales as they are currently structured are not subject to challenge by bankruptcy trustees and that purchasers of mortgages will be able to obtain the mortgages or interests in mortgages which they have purchased from trustees without the trustees asserting that a sale of mortgages is a loan from the purchaser to the seller.

Thus, as section 541(a)(1) clearly states, the estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. To the extent such an interest is limited in the hands of the debtor, it is equally limited in the hands of the estate except to the extent that defenses which are personal against the debtor are not effective against the estate.

Property of the estate: The Senate amendment provided that property of the estate does not include amounts held by the debtor as trustee and any taxes withheld or collected from others before the commencement of the case. The House amendment removes these two provisions. As to property held by the debtor as a trustee, the House amendment provides that property of the estate will include whatever interest the debtor held in the property at the commencement of the case. Thus, where the debtor held only legal title to the property and the beneficial interest in that property belongs to another, such as exists in the case of property held in trust, the property of the estate includes the legal title, but not the beneficial interest in the property.

As to withheld taxes, the House amendment deletes the rule in the Senate bill as unnecessary since property of the estate does not include the beneficial interest in property held by the debtor as a trustee. Under the Internal Revenue Code of 1954 (section 7501) [26 U.S.C. 7501], the amounts of withheld taxes are held to be a special fund in trust for the United States. Where the Internal Revenue Service can demonstrate that the amounts of taxes withheld are still in the possession of the debtor at the commencement of the case, then if a trust is created, those amounts are not property of the estate. Compare *In re Shakesteers Coffee Shops*, 546 F.2d 821 (9th Cir. 1976) with *In re Glynn Wholesale Building Materials, Inc.* (S.D. Ga. 1978) and *In re Progress Tech Colleges, Inc.*, 42 Aftr 2d 78–5573 (S.D. Ohio 1977).

Where it is not possible for the Internal Revenue Service to demonstrate that the amounts of taxes withheld are still in the possession of the debtor at the commencement of the case, present law generally includes amounts of withheld taxes as property of the estate. See, e.g., *United States v. Randall*, 401 U.S. 513 (1973) [91 S. Ct. 991, 28 L.Ed.2d 273] and *In re Tamasha Town and Country Club*, 483 F.2d 1377 (9th Cir. 1973). Nonetheless, a serious problem exists where "trust fund taxes" withheld from others are held to be property of the estate where the withheld amounts are commingled with other assets of the debtor. The courts should permit the use of reasonable assumptions under which the Internal Revenue Service, and other tax authorities, can demonstrate that amounts of withheld taxes are still in the possession of the debtor at the commencement of the case. For example, where the debtor had commingled that amount of withheld taxes in his general checking account, it might be reasonable to assume that any remaining amounts in that account on the

commencement of the case are the withheld taxes. In addition, Congress may consider future amendments to the Internal Revenue Code [title 26] making clear that amounts of withheld taxes are held by the debtor in a trust relationship and, consequently, that such amounts are not property of the estate.

SENATE REPORT NO. 95-989

This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6) [section 110(a)(6) of former title 11]), and all other forms of property currently specified in section 70a of the Bankruptcy Act § 70a [section 110(a) of former title 11], as well as property recovered by the trustee under section 542 of proposed title 11, if the property recovered was merely out of the possession of the debtor, yet remained "property of the debtor." The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or lease-hold interest, for example. The result of *Segal v. Rochelle*, 382 U.S. 375 (1966), is followed, and the right to a refund is property of the estate.

Though this paragraph will include choses in action and claims by the debtor against others, it is not intended to expand the debtor's rights against others more than they exist at the commencement of the case. For example, if the debtor has a claim that is barred at the time of the commencement of the case by the statute of limitations, then the trustee would not be able to pursue that claim, because he too would be barred. He could take no greater rights than the debtor himself had. But see proposed 11 U.S.C. 108, which would permit the trustee a tolling of the statute of limitations if it had not run before the date of the filing of the petition.

Paragraph (1) has the effect of overruling *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903), because it includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. 522, and the court will have jurisdiction to determine what property may be exempted and what remains as property of the estate. The broad jurisdictional grant in proposed 28 U.S.C. 1334 would have the effect of overruling *Lockwood* independently of the change made by this provision.

Paragraph (1) also has the effect of overruling *Lines v. Frederick*, 400 U.S. 18 (1970).

Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed. This section and proposed 11 U.S.C. 545 also will not affect various statutory provisions that give a creditor of the debtor a lien that is valid outside as well as inside bankruptcy, or that creates a trust fund for the benefit of a creditor of the debtor. See Packers and Stockyards Act § 206, 7 U.S.C. 196.

Bankruptcy Act § 8 [section 26 of former title 11] has been deleted as unnecessary. Once the estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue in rem with respect to property of the state, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts.

The estate also includes the interests of the debtor and the debtor's spouse in community property, subject to certain limitations; property that the trustee recovers under the avoiding powers; property that the debtor acquires by bequest, devise, inheritance, a property settlement agreement with the debtor's spouse, or as the beneficiary of a life insurance policy within 180 days after the petition; and proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earning from services performed by an individual debtor after the commencement of the case. Proceeds here is not used in a confining sense, as defined in the Uniform Commercial Code, but is intended to be a broad term to encompass all proceeds of property of the estate. The conversion in form of property of the estate does not change its character as property of the estate.

Subsection (b) excludes from property of the estate any power, such as a power of appointment, that the debtor may exercise solely for the benefit of an entity other than the debtor. This changes present law which excludes powers solely benefiting other persons but not other entities.

Subsection (c) invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become property of the estate. The provisions invalidated are those that restrict or condition transfer of the debtor's interest, and those that are conditioned on the insolvency or financial condition of the debtor, on the commencement of a bankruptcy case, or on the appointment of a custodian of the debtor's property. Paragraph (2) of subsection (c), however, preserves restrictions on a transfer of a spendthrift trust that the restriction is enforceable nonbankruptcy law to the extent of the income reasonably necessary for the support of a debtor and his dependents.

Subsection (d) [enacted as (e)], derived from section 70c of the Bankruptcy Act [section 110(c) of former title 11], gives the estate the benefit of all defenses available to the debtor as against an entity other than the estate, including such defenses as statutes of limitations, statutes of frauds, usury, and other personal defenses, and makes waiver by the debtor after the commencement of the case ineffective to bind the estate.

Section 541(e) [enacted as (d)] confirms the current status under the Bankruptcy Act [former title 11] of bona fide secondary mortgage market transactions as the purchase and sale of assets. Mortgages or interests in mortgages sold in the secondary market should not be considered as part of the debtor's estate. To permit the efficient servicing of mortgages or interests in mortgages the seller often retains the original mortgage notes and related documents, and the purchaser records under State recording statutes the purchaser's ownership of the mortgages or interests in mortgages purchased. Section 541(e) makes clear that the seller's retention of the mortgage documents and the purchaser's decision not to record do not impair the asset sale character of secondary mortgage market transactions. The committee notes that in secondary mortgage market transactions the parties may characterize their relationship as one of trust, agency, or independent contractor. The characterization adopted by the parties should not affect the statutes in bankruptcy on bona fide secondary mortgage market purchases and sales.

REFERENCES IN TEXT

The Higher Education Act of 1965, referred to in subsec. (b)(3), is Pub. L. 89-329, Nov. 8, 1965, 79 Stat. 1219, as amended, which is classified principally to chapter 28 (§ 1001 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 20 and Tables.

The Internal Revenue Code of 1986, referred to in subsecs. (b)(5) to (7) and (f), is classified generally to Title 26, Internal Revenue Code.

The Employee Retirement Income Security Act of 1974, referred to in subsec. (b)(7)(A)(i)(I), (B)(i)(I), is Pub. L. 93–406, Sept. 2, 1974, 88 Stat. 829, as amended. Title I of the Act is classified generally to subchapter I (§ 1001 et seq.) of chapter 18 of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 29 and Tables.

AMENDMENTS

2005—Subsec. (b)(4). Pub. L. 109–8, § 225(a)(1)(A), struck out "or" at end.

Subsec. (b)(4)(B)(ii). Pub. L. 109–8, § 1212, inserted "365 or" before "542".

Subsec. (b)(5), (6). Pub. L. 109–8, § 225(a)(1)(C), added pars. (5) and (6). Former par. (5) redesignated (9).

Subsec. (b)(7). Pub. L. 109–8, § 323, added par. (7).

Subsec. (b)(8). Pub. L. 109–8, § 1230, added par. (8).

Subsec. (b)(9). Pub. L. 109–8, § 225(a)(1)(B), redesignated par. (5) as (9).

Subsec. (e). Pub. L. 109–8, § 225(a)(2), added subsec. (e).

Subsec. (f). Pub. L. 109–8, § 1221(c), added subsec. (f).

1994—Subsec. (b)(4). Pub. L. 103–394, § 208(b), designated existing provisions of subpar. (A) as cl. (i) of subpar. (A), redesignated subpar. (B) as cl. (ii) of subpar. (A), substituted "the interest referred to in clause (i)" for "such interest", substituted "; or" for period at end of cl. (ii), and added subpar. (B).

Pub. L. 103–394, § 223(2), which directed the amendment of subsec. (b)(4) by striking out period at end and inserting "; or", was executed by inserting "or" after semicolon at end of subsec. (b)(4)(B)(ii), as added by Pub. L. 103–394, § 208(b)(3), to reflect the probable intent of Congress.

Subsec. (b)(5). Pub. L. 103–394, § 223, added par. (5).

1992—Subsec. (b). Pub. L. 102–486 added par. (4) and closing provisions.

1990—Subsec. (b)(3). Pub. L. 101–508 added par. (3).

1984—Subsec. (a). Pub. L. 98–353, § 456(a)(1), (2), struck out "under" after "under" and inserted "and by whomever held" after "located".

Subsec. (a)(3). Pub. L. 98–353, § 456(a)(3), inserted "329(b), 363(n),".

Subsec. (a)(5). Pub. L. 98–353, § 456(a)(4), substituted "Any" for "An".

Subsec. (a)(6). Pub. L. 98–353, § 456(a)(5), substituted "or profits" for "and profits".

Subsec. (b). Pub. L. 98–353, § 363(a), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "Property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor."

Subsec. (c)(1). Pub. L. 98–353, § 456(b)(1), inserted "in an agreement, transfer, instrument, or applicable nonbankruptcy law".

Subsec. (c)(1)(B). Pub. L. 98–353, § 456(b)(2), substituted "taking" for "the taking", and inserted "before such commencement" after "custodian".

Subsec. (d). Pub. L. 98–353, § 456(c), inserted "(1) or (2)" after "(a)".

Subsec. (e). Pub. L. 98–353, § 456(d), struck out subsec. (e) which read as follows: "The estate shall have the benefit of any defense available to the debtor as against an entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate."

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1221(c) of Pub. L. 109–8 applicable to cases pending under this title on Apr. 20, 2005, or filed under this title on or after Apr. 20, 2005, with certain exceptions, see section 1221(d) of Pub. L. 109–8, set out as a note under section 363 of this title.

Amendment by sections 225(a), 323, 1212, and 1230 of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–486 effective Oct. 24, 1992, but not applicable with respect to cases commenced under this title before Oct. 24, 1992, see section 3017(c) of Pub. L. 102–486, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

ADJUSTMENT OF DOLLAR AMOUNTS

For adjustment of dollar amounts specified in subsec. (b)(5)(C), (6)(C) of this section by the Judicial Conference of the United States, see note set out under section 104 of this title.

§ 542. Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an at-

TITLE 11--BANKRUPTCY

CHAPTER 5--CREDITORS, THE DEBTOR, AND THE ESTATE

SUBCHAPTER III--THE ESTATE

Sec. 554. Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2603; Pub. L. 98-353, title III, Sec. 468, July 10, 1984, 98 Stat. 380; Pub. L. 99-554, title II, Sec. 283(p), Oct. 27, 1986, 100 Stat. 3118.)

Westlaw

V.T.C.A., Property Code § 42.001 Page 1

C

Effective: September 1, 2007

Vernon's Texas Statutes and Codes Annotated Currentness
Property Code (Refs & Annos)
Title 5. Exempt Property and Liens
Subtitle A. Property Exempt from Creditors' Claims
Chapter 42. Personal Property
§ 42.001. Personal Property Exemption

(a) Personal property, as described in Section 42.002, is exempt from garnishment, attachment, execution, or other seizure if:

(1) the property is provided for a family and has an aggregate fair market value of not more than $60,000, exclusive of the amount of any liens, security interests, or other charges encumbering the property; or

(2) the property is owned by a single adult, who is not a member of a family, and has an aggregate fair market value of not more than $30,000, exclusive of the amount of any liens, security interests, or other charges encumbering the property.

(b) The following personal property is exempt from seizure and is not included in the aggregate limitations prescribed by Subsection (a):

(1) current wages for personal services, except for the enforcement of court-ordered child support payments;

(2) professionally prescribed health aids of a debtor or a dependent of a debtor;

(3) alimony, support, or separate maintenance received or to be received by the debtor for the support of the debtor or a dependent of the debtor; and

(4) a religious bible or other book containing sacred writings of a religion that is seized by a creditor other than a lessor of real property who is exercising the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons the real property.

(c) Except as provided by Subsection (b)(4), this section does not prevent seizure by a secured creditor with a contractual landlord's lien or other security in the property to be seized.

(d) Unpaid commissions for personal services not to exceed 25 percent of the aggregate limitations prescribed by Subsection (a) are exempt from seizure and are included in the aggregate.

(e) A religious bible or other book described by Subsection (b)(4) that is seized by a lessor of real property in the exercise of the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for the real property or abandons the real property may not be included in the aggregate limitations prescribed by Subsection (a).

CREDIT(S)

Acts 1983, 68th Leg., p. 3522, ch. 576, § 1, eff. Jan. 1, 1984. Amended by Acts 1991, 72nd Leg., ch. 175, § 1, eff. May 24, 1991; Acts 1997, 75th Leg., ch. 1046, § 1, eff. Sept. 1, 1997; Acts 2007, 80th Leg., ch. 444, § 1, eff. Sept. 1, 2007.

Current through the end of the 2009 Regular and First Called Sessions of the 81st Legislature

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Effective: July 1, 2001

Vernon's Texas Statutes and Codes Annotated Currentness
Property Code (Refs & Annos)
Title 5. Exempt Property and Liens
Subtitle A. Property Exempt from Creditors' Claims
Chapter 42. Personal Property
§ 42.002. Personal Property

(a) The following personal property is exempt under Section 42.001(a):

(1) home furnishings, including family heirlooms;

(2) provisions for consumption;

(3) farming or ranching vehicles and implements;

(4) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;

(5) wearing apparel;

(6) jewelry not to exceed 25 percent of the aggregate limitations prescribed by Section 42.001(a);

(7) two firearms;

(8) athletic and sporting equipment, including bicycles;

(9) a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;

(10) the following animals and forage on hand for their consumption:

(A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each;

(B) 12 head of cattle;

(C) 60 head of other types of livestock; and

(D) 120 fowl; and

(11) household pets.

(b) Personal property, unless precluded from being encumbered by other law, may be encumbered by a security interest under Subchapter B, Chapter 9, Business & Commerce Code, or Subchapter F, Chapter 501, Transportation Code, [FN1] or by a lien fixed by other law, and the security interest or lien may not be avoided on the ground that the property is exempt under this chapter.

CREDIT(S)

Acts 1983, 68th Leg., p. 3522, ch. 576, § 1, eff. Jan. 1, 1984. Amended by Acts 1991, 72nd Leg., ch. 175, § 1, eff. May 24, 1991; Acts 1993, 73rd Leg., ch. 216, § 1, eff. May, 17, 1993; Acts 1997, 75th Leg., ch. 165, § 30.245, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 414, § 2.36, eff. July 1, 2001; Acts 1999, 76th Leg., ch. 846, § 1, eff. Aug. 30, 1999.

[FN1] V.T.C.A., Transportation Code § 501.111 et seq.

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