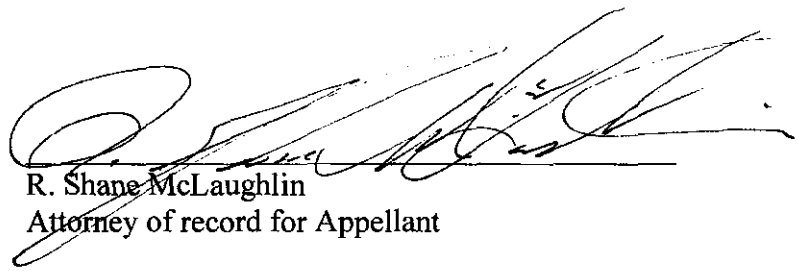
2010-CA-00375 T

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Michael Turner, Appellant
2. Jane Turner, Appellee
3. Jonathan Martin, counsel for Appellee
4. R. Shane McLaughlin, counsel for Appellant
5. Nicole H. McLaughlin, counsel for Appellant



R. Shane McLaughlin
Attorney of record for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

While counsel for Appellant would welcome the opportunity to present this case orally, counsel does not believe oral argument would be helpful to the Court in light of the straightforward nature of the issues in this case.

STATEMENT OF THE ISSUES

1. Whether the Final Decree of Divorce should have been set-aside since Michael Turner did not receive notice of trial.
2. Whether, in any event, there was sufficient evidence introduced to grant a divorce based on habitual drunkenness.
3. Whether the Chancellor erred by allowing Michael Turner visitation with his child solely at the discretion of Jane Turner.
4. Whether the Chancellor erred in dividing the marital property and apportioning marital debts.
5. Whether the Chancellor erred in awarding Jane Turner attorneys' fees where there was no evidence introduced to support the award.

STATEMENT OF THE CASE

Jane Turner filed a Complaint for Divorce on March 23, 2005. (R. p. 005). Michael Turner filed an Answer and Counter-Complaint on April 15, 2005. (R. p. 011).

The Court entered a Temporary Order on March 10, 2006. (R. p. 049). By Order entered on November 12, 2009, Michael Turner's trial counsel was allowed leave to withdraw and the trial was rescheduled. (R. p. 125). Trial was held in Michael Turner's absence on December 8, 2009, and the Court entered a Final Decree for Divorce. (R. p. 126-28). On December 17, 2009, Michael Turner filed a Motion for a New Trial, to Set Aside Final Decree for Divorce, or Alternatively to Alter or Amend Judgment. (R. p. 131). The post-trial motion was heard on February 2, 2010. (See T. p. 96). The Court denied Michael Turner's Motion by Order entered on February 5, 2010. (R. p. 137-38).

Michael Turner timely perfected this appeal. (R. p. 140).

STATEMENT OF FACTS

Michael Turner ("Michael") and Jane Turner ("Jane") were married on February 2, 1996. (R. p. 006). The Parties had one child, Cameron Turner, born on April 22, 1996. (T. p. 85).

Jane filed a Complaint for Divorce against Michael alleging as grounds habitual cruel and inhuman treatment, habitual drunkenness or alternatively irreconcilable differences. (R. p. 006). Michael, through counsel, filed an Answer denying that Jane was entitled to a divorce. (R. p. 012).

During most of the proceedings in the Trial Court Michael was represented by attorney Jak Smith. (*See, e.g.,* R. p. 049-051, 053). Smith represented Turner at a hearing on temporary features in the litigation. (*See* T. p. 1). During the temporary hearing both Jane and Michael testified. (T. p. 3, 34). At the conclusion of the hearing the Court awarded temporary custody of the minor child, Cameron Turner, to Jane and allowed Michael visitation under the "Farese Schedule." (T. p. 70). The Court also awarded Jane temporary use and possession of the marital home. (T. p. 72).

After the entry of the Temporary Order, Attorney Smith sought and was granted leave to withdraw from his representation of Michael on November 12, 2009. (R. p. 125). The Order entered on November 12, 2009, provided, in pertinent part, as follows:

> 1. Over the objection of Plaintiff, the Hon. Jak M. Smith, counsel for Defendant, is hereby allowed to withdraw as counsel of record for Michael Turner. The Court finds that counsel has demonstrated good cause for his withdrawal and that no undue prejudice to Defendant will result. Defendant shall have ten (10) days from the date of this Order to secure new Counsel.
>
> 2. Further, this matter is hereby reset for trial on the merits on the December 8th 2009 at 9:30 a.m. at the Prentiss County Chancery Building located in Booneville, MS.

(R. p. 125).

Michael Turner was present in Court on November 12, 2009. (T. p. 102). Attorney Smith told Michael that he was going to withdraw from the representation. (T. p. 103). Smith also told Michael that he would help him find another lawyer to represent him and he would contact him later about this. (T. p. 103-04). Michael understood that Smith would contact him in January or February 2010. (T. p. 104). Attorney Smith did not, however, tell Michael that his case was going to be reset for trial on December 8, 2009. (T. p. 104).

The trial on the merits went forward in this case on December 8, 2009, in Michael's absence. (*See, e.g.,* T. p. 79). Jane and one other witness testified at the very brief trial. (T. p. 79, 90). Jane testified that Michael would drink beer and take prescription drugs everyday and that he often would not eat all day. (T. p. 81). Jane testified that Michael would pass out in the home regularly.[1] (T. p. 81). Jane's testimony regarding Michael's alleged drinking was scant and did not provide any details as to the duration of the alleged drinking, any negative effect on her or the deterioration of the marriage. (*See, e.g.,* p. 81, 83).

At the conclusion of the trial the Chancellor granted Jane a divorce based on her allegation of habitual drunkenness. (R. p. 126). The Chancellor awarded physical and legal custody of the minor child to Jane, allowing Michael only "visitation with the Parties' minor child as agreed upon between the parties and at the discretion of Plaintiff." (R. p. 127). The Chancellor awarded the marital home to Jane and divested Michael of title to the property. The Chancellor also awarded Plaintiff attorneys' fees in the amount of $1,500. (R. p. 128).

Michael Turner had not appeared at the December 8, 2009, trial because he never knew it was scheduled for that day, or any other day. (R. p. 104-06). Attorney Smith had not given Michael a copy of the Order which allowed him to withdraw and set the trial date nor did he tell

[1] At the previous temporary hearing, Michael had denied habitual drunkenness and testified that he suffered from narcolepsy, a sleeping disorder. (*See* T. p. 61). Michael explained that he had suffered from narcolepsy all his life and he sometimes fell asleep when eating. (*Id.*).

Michael about the resetting. (R. p. 105). Michael had been represented in the case continuously since it had been filed prior to Smith's withdrawal, and had appeared in Court several times before Smith withdrew. (T. p. 102). Michael had never missed a Court date until the trial on December 8, 2009. (T. p. 102).

At a post-trial hearing in this case, the Parties stipulated to attorney Jak Smith's testimony regarding this crucial issue. The Parties stipulated that Jak Smith would testify that he had no memory of giving Michael a copy of the November 12, 2009, Order which allowed his withdrawal and set a trial for December 8, 2009. (T. p. 97). Also, Smith's office document management system showed that his office had not mailed a copy of the November 12, 2009, Order to Michael. (T. p. 98). Attorney Smith likewise recalled that, on November 12, 2009, he told Michael that he would assist him in locating another lawyer to represent him. (T. p. 98). The Chancellor accepted the Parties' stipulation as to Attorney Jak Smith's testimony. (T. p. 99).

Michael Turner, testifying on his post-trial motion, similarly testified as follows:

> Q: Mr. Turner, this is very important. On November 12, 2009, did Mr. Smith tell you that your case had already been reset for trial?
>
> A: No, sir.
>
> Q: Did Mr. Smith inform you that your case was set for trial for December 8, 2009, at the Prentiss County Chancery Building in Booneville, Mississippi?
>
> A: No, sir.
>
> * * *
>
> Q: Mr. Turner, on your oath today, did you know anything about the December 8, 2009 trial date prior to December 8, 2009?
>
> A: Definitely not, sir.

(T. p. 104, 107).

Michael's father, Douglas Turner, also testified at a hearing on Michael's post-trial motion. (T. p. 119). Douglas Turner testified that he learned that Michael had missed his Court date and called to ask him why he had not gone to Court. (T. p. 119). Michael was shocked his case had gone to trial without his knowledge and told his father that he had not known about the Court date. (T. p. 120).

Michael requested the Court to set aside the Final Decree to allow him to be heard on the merits of his case. (*See* T. p. 109). Michael testified that he should have a specific visitation schedule since the Court's Judgment essentially deprived him of all visitation with his son. (T. p. 108). The Judgment left Michael's visitation exclusively at the discretion of Jane, who had an acrimonious personal relationship with Michael. (T. p. 108). Also, Michael testified that he had paid for the marital home and should have been entitled to some of the equity from the home. (T. p. 109). Michael further testified that there were several debts accumulated during the marriage which were not apportioned in the Court's Final Decree. (T. p. 110).

Despite the uncontraverted testimony that Michael had not received notice of the trial, and regarding the other infirmities with the Final Decree, the Chancellor denied any relief to Michael. (T. p. 136). In so ruling, the Court stated:

> [T]he Court does not find that this Defendant has made or presented to this Court a good reason for not making the appearance for the hearing of this case on December 8, 2009. Accordingly, the Court finds that the motion to set aside the decree be and the same is hereby denied.

(R. p. 136). The Court concluded that Michael's request for a new trial was thus moot, and denied Michael's motion in its entirety. (T. p. 138; R. p. 137).

STANDARD OF REVIEW

In domestic relations cases, a Chancellor's findings are not reversed "unless those findings are clearly erroneous or an erroneous legal standard was applied." *Sproles v. Sproles*,

782 So. 2d 742, 746 (Miss. 2001). That is, factual issues are reviewed only for manifest error. *Sproles*, 782 So. 2d at 746. However, issues of law are reviewed *de novo*. *Oswalt v. Oswalt*, 981 So. 2d 993, 995 (Miss. Ct. App. 2007).

SUMMARY OF THE ARGUMENTS

Michael Turner never received notice of the trial in this case and was never properly served with the Order setting trial under Mississippi Rule of Civil Procedure 5. When Michael's trial counsel withdrew from the representation Michael was never informed that his trial was simultaneously reset for approximately one (1) month later. Although Michael became *pro se* as of the moment the Chancellor signed the Order allowing his trial counsel to withdraw, Michael was not mailed or delivered a copy of the Order setting the trial as required by Rule 5(b). Because Michael had no notice of the trial date he was not afforded with an opportunity to be heard. The Chancellor's decision should be reversed and a new trial should be ordered.

Regardless of the lack of notice, the Judgment should also be reversed in several other respects. First of all, there was woefully insufficient evidence to support a divorce based on habitual drunkenness. There was no evidence as to the amount of Michael's alleged drinking, the duration of the drinking, whether the alleged drinking was ongoing at the time of trial or even whether the drinking caused any negative impact on the marriage. Such evidence was required to support a divorce on this ground. Accordingly, should the Court reach this issue, the Chancellor's decision should be reversed and rendered.

Next, the Chancellor erred in allowing Michael visitation solely at the discretion of Jane Turner. This visitation is grossly unworkable and deprives Michael of reasonable visitation with his child. This visitation falls far short of the minimum required by Mississippi law.

The Chancellor also erred in dividing the marital property and failing to apportion any marital debts. Although Michael paid for the marital home, which was the Parties' most significant asset, he received none of the equity in the home. The Chancellor ignored significant debts incurred during the marriage.

Finally, the Chancellor erred by awarding Jane attorneys' fees. There was no evidence that Jane was unable to pay her attorneys' fees. In fact, the record reflects that Jane was financially able to pay her own attorneys' fees.

ARGUMENT I.

THE CHANCELLOR ERRED BY NOT SETTING ASIDE THE FINAL DECREE SINCE MICHAEL DID NOT RECEIVE NOTICE OF THE TRIAL.

Due process requires that a party be given adequate notice of Court proceedings. *See Vincent v. Griffin*, 872 So. 2d 676, 678 (Miss. 2004). A Defendant is entitled to notice of his trial. *Cf. Thames v. Smith Ins. Agency*, 710 So. 2d 1213, 1214 (Miss. 1998) (finding that Court did not err in denying new trial because defendants had received sufficient notice of trial). In order to affirm a Trial Court's judgment there must be some evidence in the record to refute a claim of lack of notice. *See In the Interest of N.W.*, 978 So. 2d 649, 654 (Miss. 2008). In *N.W.*, the Court stated that "the lack of proof in the record concerning notice to the father at these various hearings . . . causes us to conclude that this case must be remanded." *N.W.*, 978 So. 2d at 654.

It is undisputed on the record in this case that Michael Turner was not given notice of the December 8, 2009, trial date. Michael had appeared and defended his interests in this case, and had never missed a Court appearance. When his trial attorney, Jak Smith, withdrew he was not

informed that the case was set for trial less than one (1) month in the future. Not one shred of evidence refutes Michael's contentions that he did not receive notice of the trial setting.

Further, Michael was never properly served with the Order setting the December 8, 2009, trial pursuant to Mississippi Rule of Civil Procedure 5. All documents subsequent to the original complaint must be served on all parties to an action pursuant to Rule 5. MISS. R. CIV. P. 5(a). Rule 5 provides as follows regarding service:

> Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party himself is ordered by the court. ***Service upon the attorney or upon a party shall be made by delivering a copy to him; or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no on one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.*** Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

MISS. R. CIV. P. 5(b)(1) (emphasis added).

In this case, it is undisputed that the Order which allowed attorney Smith's withdrawal and set a new trial date was never served on Michael Turner. Jane could have satisfied Rule 5 simply by mailing a copy of the Order to Michael at his last known address, or personally delivering a copy of the Order to Michael. However, no one even attempted to give Michael a copy of the Order which would inform him of his trial date.

In addressing this issue, the Chancellor found it dispositive that attorney Smith had himself received a copy of the Order. (T. p. 133). However, as of the moment the Chancellor

signed the Order allowing attorney Smith's withdrawal, Smith was no longer Michael's attorney of record. Rather, when the Order was signed, Michael was a party *pro se*. Pursuant to Rule 5, the November 12, 2009, Order should have been served on Michael under the provisions of Rule 5(b)(1). Service upon Jak Smith could no longer be sufficient since Order had itself removed Smith as Michael's counsel. That is, since Smith was no longer Michael's counsel of record, mere service upon him was insufficient under Rule 5.

The Order setting the trial in this case was not served on Michael under Rule 5, and Michael had no notice whatsoever of the trial. Accordingly, the Chancellor should have set the Final Judgment aside and ordered a new trial. The Chancellor's decision should be reversed in this regard.

ARGUMENT II.

THERE WAS INSUFFICIENT EVIDENCE FOR A DIVORCE BASED ON HABITUAL DRUNKENESS.

A judgment by default may not be granted in a divorce matter. MISS. CODE ANN. § 93-5-7. Rather, a party seeking a divorce must prove entitlement to a divorce even in the absence of a defense by the other spouse. *Lindsey v. Lindsey*, 818 So. 2d 1191, 1194 (Miss. 2002). The complaining spouse's burden of proof does not become lighter merely because the other spouse does not defend against the allegations. *See Rawson v. Buta*, 609 So. 2d 426, 430 (Miss. 1992). Rather, the spouse must nevertheless present evidence sufficient to prove the grounds for divorce. *See Rawson*, 609 So. 2d at 430.

There must be at least some causal connection between the alleged grounds for divorce and the parties' separation in order for a divorce to be granted. *See Culver v. Culver*, 383 So. 2d 817, 817-18 (Miss. 1980) (insufficient evidence of habitual drunkenness based on spouse's daily consumption of beer where no negative effects established); *Fisher v. Fisher*, 771 So. 2d 364,

367 (Miss. 2000). *See also Sproles v. Sproles*, 782 So. 2d 742, 748 (Miss. 2001) (noting there was sufficient evidence that husband's cruel treatment and habitual drunkenness was the cause of the dissolution of the marriage). Professor Bell's treatise notes as follows regarding the proof necessary to justify a divorce based on habitual drunkenness:

> By analogy to the closely-related ground of habitual drug use, a plaintiff should prove that the defendant was habitually, or frequently, drunk that the drinking adversely affected the marriage, and that the habit continued at the time of the divorce trial.

Deborah H. Bell, BELL ON MISSISSIPPI FAMILY LAW § 4.02(6) (1st Ed. 2005).

In this case, despite Michael's absence from trial and inability to defend himself, Jane offered almost no evidence to support her claim of habitual drunkenness. Jane claimed that Michael drank beer everyday and did not eat until late in the day. Jane claimed that Michael would "pass out" in the home. However, Jane also offered that she understood Michael had quit drinking. The record does not reflect whether Michael was even drinking at the time of the parties' separation. Jane offered no evidence as to the details of the extent of the alleged drinking, how long the alleged drinking had continued, or the effect, if any, the drinking had on the marriage. Jane never even claimed that Michael's drinking had caused the dissolution of the parties' marriage.

Jane's bare allegations that Michael drank beer frequently, without more, were insufficient to justify a divorce under Mississippi law. There was insufficient evidence presented for a divorce on grounds of habitual drunkenness. The Chancellor's decision should be reversed and rendered in this regard.

ARGUMENT III.

THE CHANCELLOR ERRED BY DEPRIVING MICHAEL OF REASONABLE VISITATION WITH HIS CHILD.

The Mississippi Courts have stated:

> The best interests of the minor child should be the paramount consideration when establishing any visitation provision, while respecting the rights of the non-custodial parent and the objective of creating an environment conducive to developing as close and loving a relationship as possible between parent and child.

Chalk v. Lentz, 744 So. 2d 789, 792 (Miss. Ct. App. 1999). A non-custodial parent is entitled to reasonable visitation with the child sufficient to foster as normal as possible a parent-child relationship. *Cox v. Moulds*, 490 So. 2d 866, 870 (Miss. 1986). The goal of visitation to a non-custodial parent is to create an "environment conducive to developing as close and loving a relationship as possible between parent and child." *Chalk v. Lentz*, 744 So. 2d 789, 792 (Miss. Ct. App. 1999). A non-custodial parent is generally entitled to "liberal" visitation. *Messer v. Messer*, 850 So. 2d 161, 167 (Miss. Ct. App. 2003). Liberal visitation is generally two weekends per month and four to five weeks of summer visitation, plus some holiday visitation. *Messer*, 850 So. 2d at 167; *Fields v. Fields*, 830 So. 2d 1266, 1269 (Miss. Ct. App. 2002).

In this case, the Chancellor did not award Michael any specific visitation. Rather, the Chancellor just allowed visitation as the Parties might agree, and importantly, at the *sole discretion of Jane*. This amounts to Michael being allowed no visitation at all. The Record establishes, and this case verifies, that Michael and Jane have an acrimonious relationship. For Michael's visitation with his son to be limited to Jane's whims amounts to no enforceable right to visitation whatsoever.

The visitation the Chancellor awarded upon the final hearing was in stark contrast to the visitation awarded after the temporary hearing in this case. Following the temporary hearing the

Court allowed Michael standard "Farese" visitation.[2] However, when Michael was unrepresented and absent from trial he received significantly less visitation although the proof was no different that that before the Court at the temporary hearing. There is no basis in the record for Michael to have been deprived of all visitation, other than at the discretion of Jane.

At a minimum, the visitation awarded in this case does not even approach the standard of liberal visitation for a non-custodial parent. There is nothing in the Record which would suggest that restricting Michael's visitation to Jane's discretion is in the child's best interests. Accordingly, the Chancellor's decision should be reversed and remanded in this regard.

ARGUMENT IV.

THE CHANCELLOR ERRED IN DISTRIBUTING THE MARITAL ASSETS AND NOT APPORTIONING THE MARITAL DEBT.

The equitable distribution analysis involves the following steps: 1) classifying assets as either marital or separate; 2) valuation of the assets; 3) division of marital property equitably; 4) awarding alimony as needed following the division of marital assets. *See, e.g., Ferguson v. Ferguson*, 639 So. 2d 921, 925 (Miss. 1994). The Supreme Court in *Ferguson* held that Chancery Courts should look to the following factors in making an equitable division:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
   a. Direct or indirect economic contribution to the acquisition of the property;
   b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and
   c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.

[2] The "Farese" visitation schedule is a model of visitation generally consisting of two weekends per month, alternating holidays and four weeks of summer visitation. *Horn v. Horn*, 909 So. 2d 1151, 1161 (Miss. Ct. App. 2005).

2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
3. The market value and the emotional value of the assets subject to distribution.
4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;
5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution
6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
8. Any other factor which in equity should be considered.

Ferguson, 639 So. 2d at 928 (Miss. 1994). Equitable division does not necessarily mean an equal division. *Gray v. Gray*, 745 So. 2d 234, 239 (Miss. 1999).

Debt incurred during the marriage, for marital purposes, should likewise be apportioned as part of the property distribution. *See Prescott v. Prescott*, 736 So. 2d 409, 418 (Miss. Ct. App. 1999); *Shoffner v. Shoffner*, 909 So. 2d 1245, 1251 (Miss. Ct. App. 2005); *Larue v. Larue*, 969 So. 2d 99, 108 (Miss. Ct. App. 2007).

In this case, the Parties' marital home was the only significant marital property. (*See* Ex. 2). According to Michael's Rule 8.05 Statement introduced into evidence, there was approximately $57,000 in equity in the marital home as of December 2005. (*Id.*). The Chancellor awarded the marital home to Jane and divested Michael of title to the home. The Chancellor did not award Michael any portion of the equity in the marital home. The Chancellor did not discuss any of the *Ferguson* factors in fashioning the award. The Chancellor's property distribution was manifestly inequitable in this regard and was an abuse of discretion. Accordingly, the Chancellor's decision should be reversed.

Similarly, the Chancellor erred by ignoring significant debt incurred during the marriage. A substantial amount of marital debt was listed on Michael's Rule 8.05 Statement. (Ex. 2). Likewise, Michael testified there was substantial marital debt incurred that was not apportioned by the Court. (T. p. 110).

The Chancellor erred by disregarding the marital debt, thereby in effect saddling Michael with all of the marital debt and none of the marital assets.

Accordingly, on this basis as well, the Chancellor's decision should be reversed.

ARGUMENMT V.

THE CHANCELLOR ERRED IN AWARDING ATTORNEYS' FEES.

The decision to award attorneys' fees is vested in the discretion of the Chancellor. *Smith v. Smith*, 614 So. 2d 394, 398 (Miss. 1993). However, there must be at least some evidence that the party seeking attorneys' fees is unable to pay their own attorneys' fees. *Hankins v. Hankins*, 729 So. 2d 1283, 1285 (Miss. 1999). The Mississippi Supreme Court has stated that "[w]e follow the general rule that where 'a party is financially able to pay her attorney, an award of attorney's fees is not appropriate.'" *Smith*, 614 So. 2d at 398 (quoting, in part, *Martin v. Martin*, 566 So. 2d 704, 705 (Miss. 1990)). Where there is no evidence of the spouse's inability to pay her own attorneys' fees, an award of attorneys' fess must be reversed. *Cheatham v. Cheatham*, 537 So. 2d 435, 440 (Miss. 1988). *See also Nichols v. Nichols*, 254 So. 2d 726, 727 (Miss. 1971) (holding "[s]ince the wife is not without funds and is capable of paying her own attorney's fees, the chancellor's order requiring the appellant to pay the attorney's fees of the wife is reversed.").

In this case, Jane never even suggested that she was unable to pay her own attorneys' fees. In fact, Jane testified that she had ***already paid*** her attorneys' fees in the amount of $1,500

as of the trial of this case. (T. p. 87). Jane turned the standard on its head by claiming entitlement to attorneys' fees merely because she believed that Michael had the ability to pay her attorneys' fees. (T. p. 87). It does not matter whether Michael had the means to pay Jane's attorneys' fees; rather, Jane had the burden to show that she was unable to pay her own attorneys' fees.

Jane introduced no evidence whatsoever that she was unable to pay her own attorneys' fees. In fact, her own testimony shows that she was able to pay her attorneys' fees.

Because there was no evidence of an inability to pay her attorneys' fees, the Chancellor's decision to award Jane attorneys' fees should be reversed.

CONCLUSION

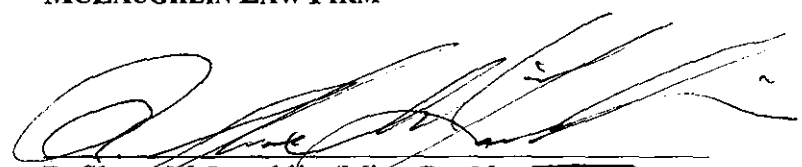
Michael Turner did not receive notice of his trial in this case and was never properly served with the Order setting the trial while he was unrepresented. The Trial Court's decision should be set aside and Michael should be afforded an opportunity to be heard on the merits.

Alternatively, notwithstanding the lack of notice of the trial, a host of reversible errors were committed at trial. There was insufficient evidence of habitual drunkenness to warrant a divorce. Further, the Chancellor's award of visitation was an abuse of discretion. Michael was denied any equitable distribution from the marital estate. Finally, there is insufficient evidence to support an award of Jane's attorney fees.

Accordingly, for each of the foregoing reasons, the decision of the Chancery Court should be reversed.

RESPECTFULLY SUBMITTED, this the 28th day of October, 2010.

MCLAUGHLIN LAW FIRM

By: 

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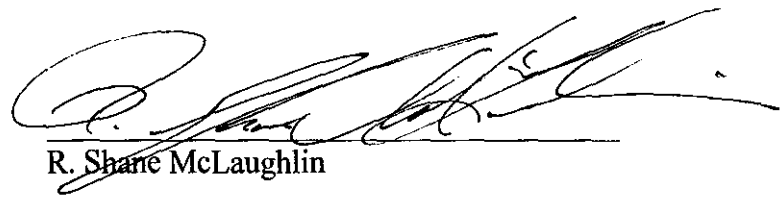
CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Jonathan W. Martin
Law Office of Jonathan W. Martin, P.A.
P.O. Box 6
Tupelo, MS 38802-0006

Hon. Talmadge D. Littlejohn
Chancellor
Post Office Box 869
New Albany, Mississippi 38652

This the 20th day of October, 2010.



R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 25th day of October, 2010.

R. Shane McLaughlin