MISSISSIPPI SUPREME COURT

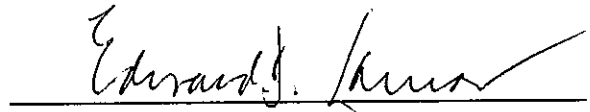
PEIRCE MCINTOSH	**APPELLANT**
V.	**CAUSE NO. 2006-CA-02136**
GAY REED MCINTOSH	**APPELLEE**
Brief	
CONSOLIDATED WITH:	
GAY REED MCINTOSH	**APPELLANT**
V.	**CAUSE NO. 2006-CA-01762**
PEIRCE MCINTOSH	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. Gay Reed McIntosh;
2. Peirce McIntosh;
3. Joel J. Henderson, Frank J. Dantone, and Edward D. Lamar of Henderson Dantone, P.A.;
4. John H. Daniels, III, Gaines S. Dyer and J. Rabun Jones, Jr. of Dyer, Dyer, Jones and Daniels; and
5. Honorable Marie Wilson, Washington County Chancery Court Judge.

Respectfully submitted, this, the 15th day of May, 2007.



Edward D. Lamar, MSB #1780

Henderson Dantone, P.A.
P. O. Box 778
Greenville, MS 38701
Telephone: (662) 378-3400
Facsimile: (662) 378-3413

TABLE OF CONTENTS

Certificate of Interested Persons..... i

Table of Contents..... iii

Table of Authorities..... iv

Statement of Issues..... 1

Statement of the Case..... 2

Statement of Facts..... 4

Summary of the Argument..... 9

Standard of Review..... 10

Argument:

I. Whether the lower Court abused its discretion in granting a stay of the Judgment rendered October 2, 2006..... 11

II. Whether the lower Court erred in failing to require Gay to post a supersedeas bond in order to secure a stay of the Judgment..... 11

III. Whether the lower Court had jurisdiction, after the rendition of Judgment, to reinstate its Order for Temporary Relief entered January 16, 2006..... 11

Conclusion..... 23

TABLE OF AUTHORITIES

Cases:

Aetna Insurance Company v. Robertson,
127 Miss. 440, 90 So. 120 (1921)..... 20, 21

Banks v. Banks, 511 So.2d 933 (Miss. 1987)..... 18

Bert Allen Toyota, Inc. v. Grasz, 947 So. 2d 358
(Miss. Ct. App. 2007)..... 21

Board of Trustees of the Jackson Public School District v. Knox,
638 So. 2d 1278 (Miss. 1994)..... 10, 21, 22

Campbell v. St. Tammany Parish School Board,
1999 U.S. Dist. Lexis 15570 (E.D. La. 1999)..... 16

In Re: Estate of Robert Taylor, Deceased, 539 So.2d. 1029
(Miss. 1989)..... 19

Hinson v. Hinson, 877 So. 2d 547 (Miss. Ct. App. 2004)..... 16

Ladner v. Ladner, 843 So. 2d 81, 83 (Miss. Ct. App. 2003)..... 21

Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981)..... 16

Mississippi Rules:

Rule 8, Miss. R. App. P..... 21

Rule 8(a), Miss. R. App. P..... 20

Rule 8(b), Miss. R. App. P..... 20

Rule 8(c), Miss. R. App. P..... 18

Rule 58, Miss. R. Civ. P..... 16

Rule 62, Miss. R. Civ. P..... 9, 18, 23

Rule 62(c), Miss. R. Civ. P..... 11, 15, 17, 20, 21

Rule 62(d), Miss. R. Civ. P..... 11, 13, 17, 20

Rule 8, Miss. S. Ct. R..... 19

Federal Rules:

Rule 8(a)(1)(C), F. R. App. P..... 16

Statement of Issues

Peirce has assigned as error the following three issues:

I. Whether the lower Court abused its discretion in granting a stay of the Judgment rendered October 2, 2006;

II. Whether the lower Court erred in failing to require Gay to post a supersedeas bond in order to secure a stay of the Judgment; and

III. Whether the lower Court had jurisdiction, after the rendition of Judgment, to reinstate its Order for Temporary Relief entered January 16, 2006.

Statement of the Case

On September 22, 2005, Gay Reed McIntosh (hereinafter "Gay") filed her Complaint for Separate Maintenance and Child Support (R.E. 7-11) from Peirce McIntosh (hereinafter "Peirce"), her husband of 27 years. Peirce answered denying her allegations and Counterclaimed for Divorce on October 27, 2005, alleging as his grounds for divorce habitual cruel and inhuman treatment, adultery, and, alternatively, irreconcilable differences (R.E. 12-15).

On January 18, 2006, Chancellor Marie Wilson, after conducting a hearing on December 13, 2005, granted temporary custody of their 16-year-old son, Jae, to Gay, awarded child support *pendente lite* to Gay in the form of $500.00 per month, payable $250.00 on the 15th and $250.00 on the 30th, and by requiring Peirce to pay the mortgage, insurance and taxes on the marital residence, the utilities, including television cable, and granting Gay use of the 1999 Jeep Cherokee, but denied her motion for separate maintenance *pendente lite* (R.E. 16-21) and pretermitted ruling on Gay's request for attorneys' fee and expenses.

Following a two-day evidentiary hearing held August 8 and 9, 2006, Chancellor Wilson, on October 2, 2006, dismissed Gay's Complaint for Separate Maintenance; granted Peirce's prayer for divorce on the ground of habitual cruel and inhuman treatment only; divided the marital assets; gave Gay custody of the couple's son, Jae, with reasonable visitation to Peirce; ordered Peirce to pay Gay child support of $1,00.00 per month; refused to

award Gay alimony in any form; and awarded her attorneys' fees in one-half (½) the amount the Court found fair and reasonable (R.E. 22-47).

Gay filed her Notice of Appeal on October 11, 2006 (Appeal No. 2006-CA-01762) and also her Motion to Stay the Enforcement of the Judgment and her request that the Order of January 18, 2006 continue in full force and effect (R.E. 48-52). On October 17, 2006, Peirce filed a Response in Opposition (R.E. 53-57). Chancellor Wilson, *sua sponte*, on November 1, 2006 modified the Judgment of October 2, 2006 (R.E. 58-59).

Peirce filed his Motion objecting to Modification of the Judgment, or for Reconsideration or Altering of Judgment on November 2, 2006 (R.E. 60-63).

On November 16, 2006, the lower Court issued a bench ruling declaring its Modification of the Judgment void and of no effect, denying Gay's Motion to Alter or Amend the Modification as moot, but staying the Judgment and reinstating the January 16, 2006 Order (R.E. 69-89).

The Court, by separate Orders rendered December 4, 2006, determined that it did not have jurisdiction to modify the Judgment, declared the Modification of Judgment entered November 1, 2006 void and of no effect; denied Gay's motion to rehear, open and amend the Judgment as modified as moot; and granted Gay's motion to stay the judgment and reinstated the Court's January 18, 2006 Order for Child Support *Pendente Lite* (R.E. 64-67).

Peirce filed his Notice of Appeal of the Court's December 4, 2006 Order granting the stay of the Judgment on December 18, 2006 (2006-CA-02136).

Statement of Facts

Unless otherwise specified, all references to the Record on Appeal (R.) or Transcript (T.) apply to Record on Appeal and transcript filed in Case No. 2006-CA-01762, Gay Reed McIntosh's Appeal, which has been consolidated with the Appeal.

Gay and Peirce McIntosh, aged 58 and 55, respectively, as of the date of Judgment, were married on June 10, 1978, and have a 16-year-old-son, Jae, who lives with Gay in Greenville, Mississippi and attends the 11th grade at St. Joseph High School (R.E. 078; R.9, T. II, p. 9-11, Plaintiff's Exhibit 3).

Gay has a Bachelor of Science degree in Social Sciences from the State University of New York (1995), received her Mississippi Teacher's Certificate in 2002 and has about six credit hours remaining to qualify to receive a Master's degree in Administration Supervision (T. IV, p. 330). Over the course of their marriage she has, except for the first five or six years of Jae's life (1990-95), worked as a social worker, dorm parent, tutor, bank accounts' processor at C&S Bank in Atlanta, Georgia; a teacher of Bible and reading at French Camp Academy, French Camp, Mississippi; a vocational rehabilitation counselor and retail salesperson in Pensacola, Florida; a juvenile detention counselor and workers' compensation counselor in Sterling, Kansas; a census taker for Cleveland and Bolivar County, Mississippi; a computer and reading skills teacher at the Cleveland, Mississippi Alternative School; and since August, 2002, as a high school English teacher, Yearbook Advisor and Academic

Decathlon Coach at West Bolivar High School in Rosedale, Mississippi (T. I, p. 114; T. II, pp. 34, 54-56; T. III, pp. 255-256).

Peirce has a Bachelor of Science degree from Sterling College in Sterling, Kansas (1979) and a graduate degree in educational administration from Georgia State College in Atlanta, Georgia (1981). He received his Administration Supervision Certificate in 1987 (T. II, pp. 2, 35). He was a Canadian Football League player with the Ottawa Roughriders (1979/80), has worked as a graduate assistant, a teacher, a coach, and school administrator, most recently from 2000 to 2006 as Principal of Gentry High School in Indianola, Mississippi, and from beginning in the summer of 2006 as Principal of Columbus High School in Columbus, Mississippi. He has also earned money by officiating at high school sporting events (T. II, pp. 17, 35).

During their 28 year marriage, Gay and Peirce have lived in Sterling, Kansas; Ottawa, Canada; Atlanta, Georgia; French Camp, Mississippi; Pensacola, Florida; Sterling, Kansas; Huntsville, Alabama; Cleveland, Mississippi; and Greenville, Mississippi (R.115, T. II, pp. 9-10, 12, 35, 54-56).

Peirce and Gay bought a home on Irish Lane (adjacent to St. Joseph High School) in Greenville in the fall of 2002 and they and Jae resided in this domicile together until Peirce moved out on April 22, 2005 (T. II, p. 9, 18, 95). During the seven months before he deserted Gay, the parties, at Peirce's insistence, did not have sexual relations.

Gay alleged that Peirce abandoned the marital home and refused to support her and Jae in the manner to which they were accustomed (R. 9-12). Peirce contended that he was "tired" of everything, including Gay's accusations that he was having an affair with Gentry High School's curriculum coordinator, Gloria Sample, which he denied.

In seeking a divorce Peirce alleged Gay committed adultery and was guilty of habitual cruel and inhuman treatment (R. 18-21). Gay denied both of these allegations and accused Peirce of coming into Court with unclean hands (R. 22-25).

After hearing the testimony of all parties, receiving exhibits into evidence and having weighed the credibility of the witnesses, Chancellor Marie Wilson found that while Gay had committed adultery, Peirce condoned her actions but she went on to find that Gay had been habitually cruel and inhuman in her treatment of Peirce and awarded Peirce a divorce on that ground, finding that Gay falsely accused Peirce of adultery, was financially irresponsible and deceitful, particularly in taking checks from Peirce's checkbook without telling him, exchanging items purchased with credit cards for cash, cashing some of Peirce's U. S. Savings Bonds, and, after Peirce left the marital home, opening two credit card accounts in Peirce's name without his knowledge or permission (R.E. 22-47).

Additionally, the Court determined that Gay had not met her burden of proof on her allegations of her entitlement to separate maintenance as the

Court found that she had caused or contributed to Peirce's leaving the marital home and as he did not abandon Gay and Jae without support as he continued to pay the mortgage on the Irish Lane home, some of the utilities and gave Jae "lunch money" (R.E. 22-47).

The Chancellor, in her findings of fact and conclusions of law, divided the marital assets (but failed to distinguish between regular and retirement mutual funds) and liabilities, divesting Peirce of his interest in the marital domicile and requiring Gay to pay the indebtedness it collateralized (R.E. 36-39); awarded Gay custody of Jae, ordered Peirce to pay child support of $1,000.00 per month (R.E. 42-44); held that Gay was not entitled to alimony in any form (R.E. 39-42), but did grant Gay the right to claim Jae as an exemption for tax purposes (R.E. 44-45); and did order Peirce to pay one-half of what the Court considered to be Gay's reasonable attorneys' fees and expenses (R.E. 45-47).

In her motion to stay the Judgment and to reinstate the January 16, 2006 Order for Temporary Support, Gay relied upon Rule 62, Miss. R. Civ. P., as the Court's Judgment commanded that the parties convey each's respective interests in real and/or personal property, including retirement accounts, to the other. When the lower Court realized that it had vested Gay with an interest a portion of Peirce's retirement accounts and that Gay would incur a penalty for a pre-59-½ year old's withdrawal and the chilling effect same would have on the "liquidity of the asset, the Court, initially, *sua sponte*, modified the Judgment (R.E. 58-59). Upon reflection, the lower Court held that it had no

jurisdiction to modify the Judgment, but granted Gay's Motion to Stay the Judgment (R.E. 64, 65) and put the parties in the position they were in prior to the evidentiary hearing by reinstating the Order of January 16, 2006 (R.E. 16-21).

Summary of the Argument

Gay contends that even when this Court views the Court's Order Staying the Judgment in light of the purposes of Rule 62, Miss. R. Civ. P., it will be convinced that the lower Court acted within its authority according to Rule 62, Miss. R. Civ. P., to Stay Enforcement of the Judgment and to Reinstate its Order of Temporary Child Support dated January 16, 2006, as it would have caused irreparable damage to Gay to have to sign over her interest in the real property and in her PERS retirement account ($8,400.00) (R.E. 38), especially in light of the fact that her likelihood of success on appeal were so sanguine, especially in light of the lower Court's own misgivings when it realized that it had failed to consider the tax effects and liquidity issues when it divested Peirce of all or part of the funds in one or more of his IRA accounts as Gay was younger than 59-½ years and would incur a penalty were she to have to withdraw sums to meet ordinary living expenses prior to reaching the age of 59-½ years (R.E. 38-39).

Additionally, as Peirce had control of many more of the assets for which the parties had worked during the course of their marriage, Gay, under the Judgment was commanded to transfer her interest in her PERS retirement account ($8,400.00) and to quitclaim any interest she had in the Monroe County property (32 acres of land), the Amory property (house and lot), and the Sunflower County property (two lots and recreational vehicle) to Peirce (R.E. 38).

Standard of Review

This Court will not overturn the lower Court unless this Court determines that the lower Court abused its discretion. ***Board of Trustees v. Knox***, 638 So. 2d 1278, 1281 (Miss. 1994).

Argument

I. Whether the lower Court abused its discretion in granting a stay of the Judgment rendered October 2, 2006.

II. Whether the lower Court erred in failing to require Gay to post a supersedeas bond in order to secure a stay of the Judgment; and

III. Whether the lower Court had jurisdiction, after the rendition of Judgment, to reinstate its Order for Temporary Relief entered January 16, 2006.

The lower Court had jurisdiction to rule on Gay's Motion to Stay the Execution of the Judgment and to reinstate the provisions of the January 16, 2006 Order pursuant to Rule 62(c) or (d), Miss. R. Civ. P., as portions of the judgment were tantamount to mandatory injunctions, i.e. requiring parties to convey all of each party's interest in either a piece of real property or in personal property such as a retirement fund, a mutual fund or a certificate of deposit to the other as part and parcel of the division of the marital estate.

The most succinct statement of the lower Court's rationale for the granting of the stay and reinstatement of the January 6, 2006 Order is found on pages 75-77 of Appellant Peirce McIntosh's Record Excerpts in which the lower Court states as follows:

> . . .I would like to take up this issue of the stay because clearly the record shows, no matter how we slice this cake, that the Court does not believe that its Judgment in this case was a fair judgment with regard to the division of the assets of the parties. It's not a secret, obviously, it's well documented at this point, that the Court did not believe its Judgment to be fair.
>
> . . .

> Well, here's how I'm looking at it. She's asking that the whole Judgment be stayed - that would include the divorce and everything - the Judgment be stayed at this point until the Appeal goes through because. . . she thinks there are serious errors and, if the Judgment is not stayed, then we have retirement accounts that have to be liquidated - I'm not sure what all there's going to be penalties attached, the whole nine yards. Add that to the fact that the Court - here correct - when it rendered it's initial decision, thought it was a fair and equitable distribution. But upon, and I don't know why the Court missed that during the trial, but, for whatever reasons, upon discovering that these were retirement accounts, which is different from cash accounts, which is what the Court thought they were, that kind of changes the nature of the division and I don't see how you can get around that fact. It does change the nature of it. It forces. . . Mrs. McIntosh to cash in on retirement accounts at a penalty, at the same time that Mr. McIntosh has access to over $50,000.00 that is not tied up in retirement accounts.
>
> So what I'm saying, and I've said all that, to say this, so that, if that is correct, if my thinking, reasoning on that is correct, and that distribution was not fair, then it seems reasonable to grant a stay.

Then on pages 83-84 and 86 of the Appellant Peirce McIntosh's Record Excerpts the lower Court, in its ruling of November 16, 2006, summarizes its rationale for granting the stay as follows:

> It seems to me that pursuant to Rule 62(d) that I can grant the stay upon appeal in light of the fact that the Court believes that it was incorrect in its division of the assets in that it did not take into account the accounts that were retirement accounts versus those that were not. The Court believes that, in making an equitable distribution of the parties' assets, the type of account involved is important and it is a part of the equitable distribution and the Court does not believe that,

> as a result of its distribution, that it was equitable or fair.
>
> . . .
>
> Given that, the Court is going to grant the stay.
>
> . . .
>
> What the Court is trying to do, however, is in the interest of justice, fairness, and equity, the Court does believe a stay needs to be granted and the Court is granting a stay pursuant to Rule 62(d). I do not want these accounts. . .cashed in at this point, because clearly, when you look at the nature of the accounts, the division would be different, which I think would be the fair division is the one that the Court gave in its modified Order which the Court has already ruled [it] did not have the authority to give.
>
> . . .
>
> So, given that, I don't warrant - I have to stay it. I don't see any way around staying the execution of the Order because I don't want to see these accounts opened up or sold or whatever you do to get into them. So, to that extent, the Court is granting a stay.

Perhaps the clearest statement from the Court is contained on page 86 of the Appellant Peirce McIntosh's Record Excerpts where the Court states as follows:

> Under these circumstances, if that's the case and I stayed the Judgment with regard to the financial distribution, then we're kind of leaving Mrs. McIntosh out there to hang and dry because now she doesn't have access to that which I thought she would have access to because I didn't realize they were retirement accounts. So, she doesn't have that at all. All she actually ends up with is $1,000.00 on the child support. That is not a fair result at all. By the time - no - by the time we get through the appeal, and they are moving very quickly, but, even with that, within that time frame, do you know how much can be lost? Given the 8.05's, I recall the 8.05's

> and the income and Mrs. McIntosh makes a good income, but I don't think that is a correct assessment either. At least that's not the intent of this Court. You may be very well correct and may be. . .I apologize if this is all the Court's fault for not realizing those were retirement accounts, but I can't go with that. No. Then the next thing we know, we've got she and the child out of the house. Then they don't have a home. I can't go with that.

And, finally, at pages 87, 88 of the Appellant Peirce McIntosh's Record Excerpts, the Court states:

> I admit that this seems to me to be one big mess at this point and I apologize to the appellate Court, as well as to counsel here. I don't know what happened here, but I do know that I am staying it because I don't feel that judgment was equitable in terms of the division of the assets. I cannot go along with your suggestion because it kind of leaves her in a very bad position based on the 8.05's and the debts that have to be dealt with, particularly the house note.
>
> . . .
>
> I've stayed the Judgment. That does, to me, essentially, return them to whatever the last Order is. I think that does that. I don't see where else we can go with it.
>
> . . .
>
> I've got to grant the stay because the division is not equitable.
>
> . . .
>
> If that doesn't do it, if the stay means that this Judgment doesn't go into effect, then the only thing that would be in effect would be the last Order. So that's what is in effect. Appellant Peirce McIntosh's Record Excerpts, pp. 87, 88.

Therefore, the lower Court went through the requirements set out in the Comment to Rule 62(c), M. R. Civ. P., those requirements which parallel the rationale for granting a temporary restraining order, namely the likelihood of success, on appeal; whether Gay would suffer irreparable injury if the lower Court overruled the motion for the stay which was set forth and even recognized by the lower Court in its bench ruling of November 16, 2006 when the lower Court stated that it had failed to take into consideration whether a particular mutual fund was a retirement fund or just a regular investment account, and if the former, what penalties Gay would incur when she attempted to use those funds to pay the mortgage on the residence or the taxes or the insurance or to pay for normal everyday expenses; whether Peirce would not suffer any substantial harm were the stay granted as he would maintain control over the vast majority of liquid assets; and whether the public interest would be affected by the Court's ruling as this is purely a private matter.

Once the Court determined that it would have a serious detrimental effect upon Gay were it to overrule the motion to stay the Judgment, the lower Court was faced with a situation in which it would be inequitable to require Gay to shoulder the responsibilities of the mortgage, insurance and taxes on the Irish Lane property, pay for Jae's private school tuition, and run her household, using only her salary, together with the $1,000.00 per month child support which the final Judgment commanded Peirce to pay. Therefore, realizing that Gay was likely to be successful on appeal on the question of the equitable distribution of the marital estate, the lower Court correctly stayed the

Judgment and reinstated the Court's January 16, 2006 Order as one merely to provide for the support of the minor child of the parties, Jae McIntosh, by requiring Peirce to pay the mortgage, insurance and taxes and certain utilities and to pay child support of $500.00 per month.

The use of those four criteria in evaluating a motion to stay the judgment has been used by U.S. Senior District Judge Morey L. Sear of the U.S. District Court for the Eastern District of Louisiana in the case styled ***Campbell v. St. Tammany Parish School Board***, 1999 U.S. Dist. Lexis 15570 (E.D. La. 1999) when he analogized the standards to those used by the Fifth Circuit in evaluating a motion for stay of a judgment for injunctive relief brought under Rule 8(a)(1)(C), F. R. App. P., in the case styled ***Ruiz v. Estelle***, 650 F.2d 555, 565 (5th Cir. 1981).

Peirce relies upon the case of ***Hinson v. Hinson***, 877 So. 2d 547 (Miss. Ct. App. 2004) to establish that in order for a Court's ruling to be appealable, it must be reduced to a final judgment which complies with Rule 58, Miss. R. Civ. P., in that it shall be a "separate document which bears the title of 'Judgment'" and that while a Chancellor's bench ruling is susceptible to modification before it is placed in final documentary form and classified by the Chancellor as a Judgment, the bench ruling without "the requisite finality" is neither final nor appealable. ***Hinson v. Hinson***, *supra.*, at 548. There is no question in this case that the Court rendered Judgment because prior to addressing the parties and counsel in open Court and tendering to counsel a file-stamped copy of the Judgment, the Court had the original entered by the Chancery Clerk who

placed it of record in the docket and placed the Clerk's stamp with the date of October 2, 2006 on the front page of the Judgment.

Neither is there any question that, pursuant to Rule 62(d), Miss. R. Civ. P., the lower Court has jurisdiction to rule upon a motion to stay the execution of the judgment.

While this is not your plain vanilla money judgment case with an application to the Circuit Court to stay the execution of the judgment conditioned upon posting of a supersedeas bond in the amount of 125% of the money judgment, it did have what Gay contends is tantamount to mandatory injunction language requiring her to give up her interest in her PERS retirement account and to give up whatever interest she may have had in the recreational vehicle, the 32 acres of land in Monroe County, Mississippi, the house and lot in Amory, Mississippi, and the two lots in Indianola, Mississippi. Additionally, she was, according to the Judgment, going to be the recipient of several of Peirce's retirement accounts and because she had not yet reached the age of 59-½, had she been forced by her circumstances to liquidate those sums, she would have incurred a penalty, the consideration of which had not been part of the lower Court's decision-making in rendering Judgment on the issue of the equitable division of the marital estate. As the lower Court's Judgment is in the nature of a mandatory injunction, Gay was required to satisfy those four Rule 62(c) criteria and the lower Court, in its sound discretion, found that her Motion was well taken and sustained same realizing the likelihood of Gay's success on appeal, on at least, the equitable distribution

issue, placed the parties (from the monetary support of the minor child) in the footing they were in prior to the evidentiary hearing on Gay's Complaint for Separate Maintenance and Peirce's Counter-Claim for Divorce.

Peirce also relies on the 1987 decision of the Mississippi Supreme Court styled ***Banks v. Banks***, 511 So. 2d 933 (Miss. 1987), to illustrate when a Judgment is final and presumably the termination of the action, but ***Banks v. Banks***, *supra.*, makes no mention of the powers of the lower Court pursuant to Rule 62, Miss. R. Civ. P., to stay the execution of a valid, final Judgment which it has previously entered. That is the question which is before the Court in Peirce's appeal, i.e., whether the lower Court abused its discretion when it stayed the entry of Judgment and placed the parties in the position (as far as the support of the minor child was concerned) as they were before the evidentiary hearing.

It is clear that the lower Court did not require the giving of security by Gay in order to stay the execution of the Judgment and that decision carries with it the lower Court's implicit evaluation of the four criteria the lower Court uses to evaluate a motion for a TRO or a preliminary injunction.

Gay also understands that, pursuant to Rule 8(c), Miss. R. App. P., that Peirce could have filed a motion in this Court to vacate the stay. Rather, he has, by direct appeal, contended that the lower Court erred when it granted the stay.

The Mississippi Supreme Court in its decision styled ***In Re: Estate of Robert Taylor, Deceased***, 539 So. 2d. 1029 (Miss. 1989), gives an insight into staying the execution of a judgment when the Court, speaking through Justice Prather, stated:

> The procedure by which an unsuccessful litigant seeks a stay of the execution of a judgment appealed from is a supersedeas. The granting of a supersedeas commands the staying of a proceeding at law and prohibits the enforcement of the trial court's judgment pending review. To secure such a stay of proceedings, it is necessary that the litigant secure a sufficient bond in the amount set by the Trial Judge.
>
> . . .
>
> The amount of a supersedeas bond should be sufficient to protect the appellee in his judgment; therefore, it should insure the payment of the Judgment and interest, and any waste that could occur pending the appeal.
>
> . . .
>
> The bond is the typical means of giving the appellee security. However, the Court may approve security in the form of cash or property. The Judgment may be secured in other ways such as the Court's taking possession of personal property or otherwise providing for a method to ensure payment of the appellee's judgment.
>
> In this state, the controlling guideline in determination of the form, amount, and procedure for supersedeas bonds is Mississippi Supreme Court Rule 8, effective January 1, 1988, and governing all proceedings and appeals and other proceedings subsequently brought such as this motion. ***In Re: Estate of Robert Taylor, Deceased***, *supra.*, at 1031. (Emphasis added.)

Of extreme importance is the last sentence of Rule 8(a), Miss. R. App. P., which states as follows:

> In the event the clerk declines to approve the bond, or the clerk's approval is contested, or the appellant seeks a stay on any basis other than compliance with this subdivision, the requirements of Rule 8(b) apply.

As this is not a case which was amenable to a supersedeas bond as Peirce had most of the assets to be divided, as the type of assets to be divided created the potential prejudice of penalty and lack of liquidity as far as Gay's use of these funds was concerned, Gay complied with the provisions of Rule 8(b), Miss. R. App. P, and Rule 62(c) and (d), Miss. R. Civ. P., in bringing her Motion to stay the execution of the Judgment initially in the trial Court. As Rule 8(b) states in pertinent part:

> Application for a stay of the judgment. . .pending Appeal or for. . .restoring. . .an injunction during the pendency of an appeal must ordinarily be made in the first instance to the trial Court. The Court shall require the giving of security by the Appellant in such form and in such sum as the Court deems proper. . .the ruling of the trial Court on the motion shall be reviewable by the Court.

Gay contends that the lower Court acted within its discretion in not only staying execution of the Judgment, but also in reinstating its January 16, 2006 Order and thereby carried out the principle of the supersedeas as set forth by the Mississippi Supreme Court in ***Aetna Insurance Company v. Robertson***, 127 Miss. 440, 90 So. 120 (1921), when it stated:

> The law requiring security by bond for appeals for supersedeas rests upon the just principle that the successful litigant shall be saved harmless

> from loss and secured in the fruits of his victory. This is all that should be required of the losing litigant who desires that his case be reviewed on appeal and that the status quo be maintained until a final decision is rendered in the cause. 127 Miss at 142, 444-7, 90 So. at 120-122.

Most recently, the Mississippi Court of Appeals in ***Bert Allen Toyota, Inc. v. Grasz***, 947 So. 2d 358 (Miss. Ct. App. 2007), held that the Chancery Court, in a situation such as the one in this case in which its *sua sponte* post-trial order had been vacated and an appeal had been perfected, did have jurisdiction to "determine the issues concerning a stay of the final Judgment, bond and enforcement of the Judgment, [but] the Chancellor was without jurisdiction to broaden, amend, modify, vacate, clarify, or rehear the final Judgment", citing ***Ladner v. Ladner***, 843 So. 2d 81, 83 (Miss. Ct. App. 2003). Therefore, the lower Court's decision reinstating the January 6, 2006 Order must be seen as the lower Court's equitable version of supersedeas, maintaining the status quo as it existed before the evidentiary hearing, to await a decision on appeal. ***Bert Allen Toyota, Inc. v. Grasz***, *supra.*, at 362-63.

The Mississippi Supreme Court in the case of ***Board of Trustees of the Jackson Public School District v. Knox***, 638 So. 2d 1278 (Miss. 1994), held that where the lower Court awards relief which is "in the nature of an injunction or an injunctive-type remedy" the proper cast for a court reviewing a motion to stay is found in Rule 8, Miss. R. App. P., and Rule 62(c), Miss. R. Civ. P., and included in its opinion portions of the Comment to Rule 62 which not only stated that the court's decision upon application for a stay is addressed to

the court's sound discretion, but set forth the four-pronged test of success on the merits, i.e., irreparable injury to the movant, no substantial harm to the judgment creditor, and no harm to the public interest. The Court also stated that "if the Court is satisfied that these considerations or other relevant considerations indicate that an injunction should be stayed pending appeal, the stay will be granted." ***Board of Trustees of the Jackson Public School District v. Knox***, *supra.*, at 1280, 1281.

Conclusion

Appellee Gay Reed McIntosh contends that the lower Court did not commit error in its interpretation of Rule 62, Miss. R. Civ. P., in staying the Judgment and in reinstating the Order of January 16, 2006. The lower Court felt that without the stay being in place, Gay Reed McIntosh would suffer irreparable harm and that were the Judgment stayed, then the marital assets would be preserved and that the January 16, 2006 Order for support would provide support for Jae McIntosh, the minor son of the parties, without placing an undue burden on Appellant Peirce McIntosh.

Therefore, Appellee Gay Reed McIntosh respectfully requests that this Court confirm the lower Court's Order staying the Judgment and reinstating the Order of January 16, 2006 until the Supreme Court of Mississippi issues its mandate on this consolidated Appeal.

Respectfully submitted, this the 15th day of May, 2007.

Edward D. Lamar, MSB [redacted]

HENDERSON DANTONE, P.A
P. O. Box 778
Greenville, MS 38702-0778
Telephone: (662) 378-3400
Facsimile: (662) 378-3413

CERTIFICATE OF SERVICE

I, Edward D. Lamar, one of the attorneys for Plaintiff, do hereby certify that I have this, the 15th day of May, 2007, caused to be mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing to:

John H. Daniels, III, Esq.
Dyer, Dyer, Jones & Daniels
P. O. Drawer 560
Greenville, MS 38702-0560

Honorable Marie Wilson
Washington County Chancery Court Judge
P. O. Box 1762
Greenville, MS 38702-1762

Edward D. Lamar