MISSISSIPPI SUPREME COURT

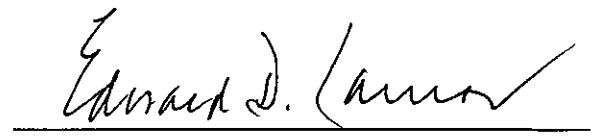
GAY REED MCINTOSH	**APPELLANT**
V.	**CAUSE NO. 2006-CA-01762**
PEIRCE MCINTOSH	**APPELLEE**
CONSOLIDATED WITH	
PEIRCE MCINTOSH	**APPELLANT**
V.	**CAUSE NO. 2006-CA-02136**
GAY REED MCINTOSH	**APPELLEE**

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 16th day of April, 2007.



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Statement of Issues

Gay assigns as error the following five issues:

I. Whether the lower Court erred in awarding Peirce a divorce on the ground of habitual cruel and inhuman treatment;

II. Whether the lower Court erred in dismissing Gay's Complaint for Separate Maintenance;

III. Assuming *arguendo* that the lower Court did not err in granting Peirce a divorce, whether the lower Court erred in failing to consider Peirce's mandatory contribution to the Public Employees' Retirement System of Mississippi (PERS), his voluntary contributions to the deferred compensation plan (SBA-MDC TP), together estimated at $120,000.00, and in failing to delineate and to factor into its division which of the parties' assets were maintained in retirement accounts and which were in non-retirement acounts when it divided the marital estate;

IV. Assuming *arguendo* that the lower Court did not err in granting Peirce a divorce, whether the lower Court erred in denying Gay an award of periodic or lump sum or rehabilitative alimony; and

V. Whether the lower Court erred when it awarded Gay only one-half of what it considered to be her reasonable attorneys' fees and expenses.

Statement of the Case

On September 22, 2005, Gay Reed McIntosh (hereinafter "Gay") filed her Complaint for Separate Maintenance and Child Support (R. 9-13) and a motion for temporary relief (R. 14-17) 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. 18-21). On December 1, 2005, Gay answered Peirce's Counterclaim, denying his allegations (R. 22-25).

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. 030-035; R. 26-31) 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. 004-029; R. 32-57).

Gay filed her Notice of Appeal (R.E. 047-048) on October 11, 2006 (Appeal No. 2006-CA-1762) 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. 60-64). On October 17, 2006, Peirce filed a Response in Opposition. Chancellor Wilson, *sua sponte*, on November 1, 2006 modified the Judgment of October 2, 2006 (R.E. 049-050; R. 75-76).

Peirce filed his Motion objecting to Modification of the Judgment, or for Reconsideration or Altering of Judgment on November 2, 2006 (R. 77-80). Gay filed her Response on November 8, 2006 (R. 81-83). On November 9, 2006, Gay filed her motion to rehear, open and amend the Judgment of October 2, 2006, as modified by the Court on November 1, 2006 (R. 84-115). Peirce renewed his Motion for Reconsideration of the Judgment as Modified on November 10, 2006 (R. 116-117).

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. 056-059; R.124-126).

Peirce filed his Notice of Appeal of the Court's December 4, 2006 Order granting the stay of the Judgment on December 18, 2006 (Appeal No. 2006-CA-2136) (R.117).

Statement of Facts

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. Yet some sixteen days after he moved out,

Gay, having located their recreational vehicle at Delta Village Trailer Park on U. S. Highway 82 between Greenville and Leland, approached the door of the vehicle at about 11:30 p.m. on Mother's Day, May 8, 2005, overheard Peirce and Gloria, his paramour, talking and videotaped her vehicle parked next to his at the trailer lot (T. III, pp. 292-299; T. V, pp. 457-465).

Even with this corroboration of his infidelity in hand, Gay resumed sexual relations with Peirce at his mother's home in Amory, Mississippi over the Memorial Day Weekend (T . III, pp. 285-286) and continued sleeping with him when they attended an reading conference held in Biloxi, Mississippi during the second week of June (T. III, p. 287). Also, during that conference Gay, with Karen Marino who was a long-time friend of hers and Peirce's listening to another receiver in the hotel room, telephoned Gloria at Gentry High School and told her she was aware that she and Peirce were having an affair (T. III, pp. 232, 237-238). Gay and Peirce also had sexual relations while they were attending a family reunion in New Orleans over the 2005 Fourth of July weekend (T. II, p. 19). Since that time, Peirce and Gay have not had sexual relations. One or two days later Peirce admitted to Karen that he was having an affair (T. III, p. 230).

On or about the evening of November 22, 2005, Gay went to Peirce's RV, which at some point after Mother's Day he had towed from Delta Village and to land he rented in Sunflower County, several miles northwest of Indianola, Mississippi. When she approached, she heard Peirce and the voice of a woman

she believed was Gloria Sample. After knocking on the door and receiving no response, she left the premises, drove a hundred yards or so down the road and parked. She was later questioned by Sunflower County Deputy Sheriff Doug Grantham, who had been dispatched to Peirce's RV by a report of someone creating a disturbance. While Deputy Sheriff Grantham was standing with Gay, they saw a black woman run down Peirce's driveway, hop in a car located on State Highway 448 and leave the area (T. III, pp. 197-212; T. IV, pp. 316-328). Gay has been ready to welcome Peirce home (T. II, p. 64).

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. 005, 010-014; R. 33, 38-42).

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. 006-007; R.34, 35).

The Chancellor, in her findings of fact and conclusions of law, divided the marital assets and liabilities, divesting Peirce of his interest in the marital domicile and requiring Gay to pay the indebtedness it collateralized (R.E. 014-021; R.42-49); awarded Gay custody of Jae, ordered Peirce to pay child support of $1,000.00 per month; held that Gay was not entitled to alimony in any form (R.E. 021-024; R.49-52), but did grant Gay the right to claim Jae as an exemption for tax purposes (R.E. 026-027; R.54-55); and did order Peirce to pay one-half of what the Court considered to be Gay's reasonable attorneys' fees and expenses (R.E. 027-029; R.55-57).

Summary of the Argument

Gay contends that even when this Court views all findings of fact in the light most favorable to Peirce, it will be convinced that Peirce did not prove, beyond a preponderance of the creditable evidence, that Gay was habitually cruel and inhuman toward him. Also, Gay contends that this Court should also reverse the lower Court as it erred when it held that Gay had not satisfied the two prongs of the proof necessary to have the lower Court sustain her Complaint for Separate Maintenance.

Assuming *arguendo* that the lower Court was correct in granting Peirce a divorce, then Gay contends that the lower Court erred in failing to consider Peirce's PERS and deferred compensation accounts when it divided the marital assets and also 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 prior to reaching 59-½ years.

Also, Gay contends that even though the majority of the factors used by the lower Court in determining whether she should have been awarded periodic or lump sum or rehabilitative alimony were in her favor, the lower Court refused to award her alimony of any kind.

Finally, Gay contends that whether or not this Court reverses on one or more of the preceding issues, it should reverse the lower Court and require the lower Court to award Gay one hundred per cent (100%) of the attorneys' fees which it determined were fair and reasonable.

Standard of Review

This Court will not overturn the lower Court unless the latter's findings of fact were manifestly wrong or were not based on substantial evidence. ***Daigle v. Daigle***, 626 So.2d 140, 144 (Miss. 1993). Neither will this Court disturb the lower Court's conclusions of law unless they are shown based on an incorrect legal standard. ***Johnson v. Johnson***, 650 So.2d 1281, 1285 (Miss. 1994).

Argument

I. Whether the lower Court erred in awarding Peirce a divorce on the ground of habitual cruel and inhuman treatment.

The case most on point on the ground for divorce about which the Chancellor erred when she granted Peirce's counterclaim is ***Marble v. Marble***, 457 So.2d 1342 (Miss. 1984). In that case, late Chief Judge Neville Patterson found that a husband who, after ten years of marriage, departed the family residence and had not since cohabited with his wife, did not prove that his wife's behavior constituted habitual cruel and inhuman treatment. ***Marble***, *supra.*, at 1343.

Peirce, like John Marble, told Chancellor Wilson that the marriage had become intolerable for him and that he could not return to Gay under any circumstances (T. II, pp. 95, 115; T. III, p. 195). Gay, on the other hand, wanted Peirce back (T. II, p. 64; T. III, p. 195) and even condoned Peirce's desertion of the family by having sexual relations with him at his mother's house in Amory, Mississippi some five weeks after he left (T. III, p. 285) and some three weeks after she saw his alleged paramour's vehicle parked next to his RV at the Delta Village Trailer Park (T. III, pp. 292-299; T. V., pp. 457-465); and by having sex with him as they attended an educational conference on the Mississippi Gulf Coast in June, 2005, and, in New Orleans, Louisiana, in July, 2005 (T. II, pp. 19, 285, 287). However, upon their return from New Orleans after the family reunion, Peirce did not return to the marital home (T. III, p. 287).

Late Chief Judge Patterson stated, quoting from ***Burnett v. Burnett***, 271 So.2d 90, 93 (Miss. 1972):

> "While some believe "habitual cruel and inhuman treatment" **"covers a multitude of marital sins and is the easiest road to freedom from the marital bonds," . . . they do not realize the nature, gravity, or duration of the cruelty required to warrant a divorce**. . .not such as merely to render the continuance of cohabitation undesirable, or unpleasant, but so gross, unfeeling, and brutal as to render further cohabitation impossible, except at the risk of life, limb, or health on [Peirce's] part, and that such risk must be real rather than imaginary merely, and must be clearly established by the proof." (Emphasis added.)

In Chief Judge Patterson's laconic dissection of the facts, he, himself a former Chancellor, found that while the parties were not compatible; that Rebecca Marble's religious views differed from her husband's; that she was not as "fastidious" a housekeeper or as "demonstrative" in love as John Marble wished; and that John was "genuinely unhappy"; he had not proved this dissatisfaction was caused by any cruel or inhuman treatment on Rebecca's part. ***Ibid.***

Probably the most incomprehensible finding of fact which the Court made is No. 10 (R.33) in which the Court found that "during their entire 28 year marriage, Gay has been untruthful, deceitful and financially unreliable." Peirce testified that once she began teaching full-time at West Bolivar High School in school year 2002-2003, the problems with money were diminished because she had her own separate source of funds (T. IV., pp. 451-452). Additionally, the uncontroverted testimony was that prior to 2002 and during

the first 20+ years of their marriage, if Gay did not have sufficient money at the last week or so of the month to buy groceries or personal items or things for Jae, she had to "borrow" the money from Peirce and then repay him out of the funds she earned at the beginning of the next month (T. III, p. 282; T. IV, p. 364). Clearly, it appears from the record that Peirce was the one who took advantage of the disparity of the earning power and how it affected the parties' relationship prior to August, 2002.

Additionally, it was Peirce who, when the parties bought the marital residence on Irish Lane in Greenville, Mississippi, had the property titled in *his name only* even though the lender required Gay to execute the Deed of Trust (R.E. 119, 122-123; T. III, p. 274; Plaintiff's Exhibits 16 & 21).

Finally, "incredible" is the only word adequately describing Peirce's explanation for not filing income tax returns from 1995 through 2005. He said that he believed he would not owe the government any money because any taxes he owed were being deducted from his paycheck and, therefore, he didn't need to file a return (T. II, p. 103).

Not only did Peirce and Gay not file income tax returns for the last 10 years, Peirce admitted that they had not filed returns or paid income taxes for several years in the late 1980's (T. II, p. 103). It was uncontroverted that Gay gave Peirce responsibility for paying all the bills in 1988 when she and Peirce left Pensacola, Florida, and went back to Kansas (T. II, p. 58).

Looking back on the proof, 1990 and 1991 proved to be crucial and critical years for Gay and Peirce McIntosh. Jae was an infant. Gay told Peirce

that the child she had given birth to before they started dating, had not, in reality, died, but had survived and had been adopted (T. II, p. 112). According to Pierce, their sex life was not any good and he decided to leave Gay and Jae in Kansas and take a job at Alabama A&M (T. II, p. 104). After having been separated for several months, Gay took Jae and moved to Peirce's parents' home in Amory, Mississippi. With a newborn in tow and not having a job, Gay cashed in several of Peirce's Series E U. S. Savings Bonds in order to buy food and diapers and also in order later to move to a hotel in Alabama to be near to her husband (T. II, p. 104). However, to their credit Gay and Peirce weathered that stormy period in their marriage and lived together almost fifteen years before Peirce became "tired" and left Gay and their teenage son on April 22, 2005.

Also, in 1995, when Gay and Peirce sold the house they purchased when they lived in Pensacola, Florida, between 1983 and 1988, Peirce took the equity and bought a Certificate of Deposit in *his name* and Jae's at the State Bank in Cleveland, Mississippi, rather than buying one with him and Gay as joint owners (T. II, p. 25). Peirce's testimony is that the certificate of deposit at State Bank is now worth approximately $51,000.00, has a current interest rate of 3.5% and matures sometime this year (T. II, p. 80).

From the years 2002-2004, Peirce filed dummy time sheets for Gay and, using her social security number, indicated that she was an employee of an entity servicing a $1.5 million educational grant, when, in fact, the paychecks issued by the party utilizing grant funds were cashed by Peirce and used for

his purposes (T. III, pp. 183-193 & 274).

Also on the financial front, Peirce admitted that from December, 2004, through June, 2006, his ING mutual fund account dropped in value almost $27,000.00 from December 31, 2004 to $15,000.00-$16,000.00 in his amended 8.05 received as Plaintiff's Exhibit 12 (T. III, pp. 181-183) for he admitted that he withdrew $6,000.00 to pay his second attorney and an additional $4,000.00 to catch up on some bills (T. III, p. 183). The record did not reveal how much he paid his first counsel.

Finally, even in this proceeding, Peirce was either careless or was attempting to play "fast and loose" with the Court by failing to list his SBA Deferred Compensation account even though he listed the deduction from his gross salary on the Form 8.05 he submitted at the final hearing (R.E. 099, 104; Plaintiff's Exhibit 12).

By Peirce's own admission, his primary complaint against Gay, her inability to have the family live within its means financially, had been resolved in August, 2002, when she became employed as an English Teacher at West Bolivar High School (T. II, p. 113, l. 21; T. V., pp. 451-452). However, by August, 2002, Peirce was entering his third year as Principal at Gentry High School, Indianola, Mississippi; had re-hired Gloria Sample away from the Greenwood School District in the summer of 2000 to be his school's curriculum coordinator; and they had already had two years of daily contact in the workplace (T. III, pp. 417-418). Gay referred to her as Gentry School Principal No. 2 (T. II, p.278). Unfortunately, August, 2002, also meant that

Peirce had been suffering from Type II Diabetes for three years as he was diagnosed with it in 1999 (T. III, pp. 366, 444). But Peirce's testimony on that point is also telling as he admitted that at the time he left the marital home in April, 2005, his diabetes treatment regimen was in pill form, but that since then his doctor had prescribed injectable insulin in an effort to control his elevated and fluctuating blood glucose levels (T. III, p. 444).

The opinion of late Judge Michael Sullivan in ***Kergosien v. Kergosien***, 471 So.2d 1206 (Miss. 1985), is also instructive for it not only summarizes the 1984-1985 decisions of the Mississippi Supreme Court which addressed proof of the ground of habitual cruel and inhuman treatment, ***Marble,*** *supra.* and ***Gallaspy v. Gallaspy***, 459 So.2d 283 (Miss. 1984); but it reaffirmed the substantive requirements of the statutory ground of habitual cruel and inhuman treatment as a ground for divorce. In ***Kergosien***, the Supreme Court was confronted with a factual situation much like the one in the case at bar including allegations of inappropriate handling of money to the point that utility disconnect notices were sent and that the husband required bills to be sent to him at the office. In some instances, the wife's behavior was even more egregious than the proof in this case showed as it was alleged that in the 18th year of their marriage, the wife left the residence for six days during the Christmas holidays and in the 19th year of their marriage, while dining at a restaurant, she up and left the husband forcing him to ride home with the priest whom they had invited out to supper. Additionally, the wife locked the husband out of the house causing him to break the door down to gain entry.

Kergosien, *supra.*, at 1208. There was also testimony that the wife slapped her daughter, told her son to leave home as she hated him and threw his belongings out into the yard. Additionally, there was testimony that the husband and wife argued in front of the children. In that case, the husband left home a week before the parties' 19th anniversary and refused to return. ***Ibid.***

Even though Chancellor Wilson may have felt Gay and Peirce's marriage was dead and that she was, in late Judge Sullivan's words, "throwing sand over the cadaver of the marriage", this Court must reverse as Peirce has not proved the ground of habitual cruel and inhuman treatment. While, like ***Kergosien***, there is proof in the record of incompatibility and occasional acts of deceit on Gay's part, there is no proof of Gay's mismanagement of funds as Peirce admits that since 1988 he had the responsibility for paying the bills and since August, 2002, the money problems have disappeared as Gay was taking care of her own personal needs and those of Jae using monies from the paycheck which she earned teaching high school English in Rosedale.

Peirce's contentions that Gay refused to attend school functions was also a ruse when one considers the realities of the daily commutes each made. Since they moved to Greenville in October, 2002 through April 22, 2005, Peirce traveled to Gentry High School in Indianola, Mississippi, a distance of at least 25 miles one way, every work day. For school years 2002-2003 and through 2004-2005, Jae walked basically next door to go to St. Joseph High School. Beginning with school year 2005-2006, St. Joseph High School moved to VFW

Road some 2 to 3 miles south of their residence on Irish Lane. Every school day since they moved to Greenville in October, 2002, Gay traveled the 35 miles or so one way to Rosedale, Mississippi to teach at West Bolivar High School, returning home each night to run her household and care for Peirce and Jae. She continues to make that commute every school day.

Likewise, Peirce's contention that Gay would not go to church with him may be evidence of incompatibility, but it does not rise to the level of habitual cruel and inhuman treatment, particularly as Peirce admitted that Gay "led Jae to the Lord"; was present at his baptism at Peirce's church; and, as she testified, Gay led family devotions, particularly on Sunday afternoons after she prepared a traditional Sunday dinner. Peirce's allegations on those points are merely "red herrings".

Fifteen years after the Mississippi Supreme Court's decisions in ***Marble, Gallaspy*** and ***Kergosien***, the Mississippi Court of Appeals in ***Crenshaw v. Crenshaw***, 767 So.2d 272 (Miss. Ct. App. 2000) affirmed the lower Court's dismissal of the husband's complaint for divorce on the ground of habitual cruel and inhuman treatment and granted the wife's counterclaim for separate maintenance, finding that the husband of that ten year marriage failed to prove his entitlement to a divorce. Former Court of Appeals Judge Leslie Southwick, set out the historical development of proof necessary to establish that ground for divorce employing not only the ***Marble***, ***Kergosien***, and ***Gallaspy*** decisions from the mid-1980s, but also cited the Mississippi Supreme Court's 1993 decision of ***Daigle v. Daigle***, 626 So.2d 140, 144 (Miss. 1993), as one which

reaffirmed the requirements that, in order for Peirce to be successful, Gay either must have endangered his life, limb, or health or created in him a realistic fear of such danger or her conduct must have been so unnatural and infamous as to make the marriage revolting to Peirce, rendering it impossible for him to discharge the duties of the marriage. Judge Southwick went further to set out the other end of the spectrum, a parameter given by the ***Daigle*** Court which stated that, for Peirce to prevail, Gay's alleged conduct must be "something more than unkindness or rudeness or mere incompatibility or loss of affection." ***Daigle***, *supra.*, at 144 (quoting former Judge McRae's decision in ***Smith v. Smith***, 614 So.2d 394, 396 (Miss. 1993)). ***Crenshaw,*** *supra.*, at 275.

Judge Southwick distinguished the facts in ***Crenshaw*** from those in the "home shopping channel" case of ***Richard v. Richard***, 711 So.2d 884, 887-888 (Miss. 1998), a case relied upon by Chancellor Wilson in reaching her Judgment. Interestingly, as in ***Richard***, there also was a period of several months before Mr. Crenshaw's departure which the parties called "unpleasant" and which included a month of no sexual relations. In the case at bar, the parties admitted that prior to April, 2005, they had not, at Peirce's request, had sexual relations since September, 2004, a period of seven months. Therefore, Peirce can not use the lack of coital activity during the months immediately preceding his departure as either a basis for or a justification of him leaving the marital home in April, 2005. As Judge Southwick stated in the ***Crenshaw*** case, "habitual cruel and inhuman treatment is not the ***catch-all category*** to permit a divorce when a marriage is suffering difficulties." ***Crenshaw,*** *supra.*,

at 276 (Emphasis added.).

Three months after former Judge Southwick's decision in ***Crenshaw***, *supra.*, the Mississippi Supreme Court, in an *en banc* decision authored by Judge Kay Cobb, held that Lealve Fisher had proved, beyond a preponderance of the credible evidence, that Earnest Fisher, to whom she had been married for 28 years, was habitually cruel and inhuman as for 4 or 5 years prior to their final separation, they slept in separate bedrooms; as Earnest would stay out late at night; would shove his way into the house when Lealve tried to refuse him entry; as both parties locked their bedrooms; and as they had an altercation late one night which ended with Earnest knocking Lealve to the floor and kicking her. ***Fisher v. Fisher***, 771 So.2d 364 (Miss. 2000). Judge Cobb, relying on ***Richard***, *supra.* and ***Daigle***, *supra.*, stated that the Court's inquiry to determine whether the grounds had been proved should have a "dual focus" on both Earnest's conduct and the "impact" which it had upon Lealve. She stated succinctly that what must be proved was:

> . . . habitual or continuous behavior over a period of time, **close in proximity to the separation or continuing after the separation occurs** . . . which 'endangers life, limb, or health or creates a reasonable apprehension of such danger" rendering the relationship unsafe for the party seeking relief or, in the alternative, to be so unnatural or infamous as to make the marriage revolting to the offended spouse and render it impossible for that spouse to discharge the duties of the marriage, thus destroying the basis for its continuance. ***Fisher***, *supra.*, at 367, 368. (Emphasis added.)

Clearly, the facts in the case at bar do not approach those of ***Fisher,*** *supra.,* and are not even as egregious as those of ***Potts v. Potts***, 700 So.2d 321 (Miss. 1997), an appeal heard three years before ***Fisher*** by a Mississippi Supreme Court panel made up of late Presiding Judge Sullivan and former Judges Pittman and Banks, who determined that Mrs. Potts had not proved the ground of habitual cruel and inhuman treatment, even though, after a 28-year marriage, Mr. Potts would sleep in the spare bedroom or on the couch as Mrs. Potts was not sexually attentive to him and that his actions "played hard" on her nerves and hurt her emotionally. Former Judge Banks summed up the Court's thinking as follows:

> "**Without belittling Mrs. Potts' unhappiness with her marriage**, we hold that **the trial court was manifestly in error or, alternatively, has applied an incorrect legal standard** in concluding that Mrs. Potts was subjected to habitual cruel and inhuman treatment insofar as Mr. Potts would move out of their bedroom and would return when he was ready to have sex with her, culminating in the July, 1993, incident when he grabbed her. Both parties testified that **Mr. Potts never forced Mrs. Potts to have sexual relations**, and **Mrs. Potts testified that she did not seek any type of treatment for bad nerves** that resulted from his unpleasant behavior. Mr. Potts never hit her or harmed her beyond what has been described **although Mrs. Potts is evidently ready to end her marriage**, and while we have no wish to force her to remain, **we cannot hold that her husband's conceited conduct comes within the meaning of "habitual cruel and inhuman treatment"** as has been interpreted by this Court. Since the Chancery Court cited no other ground for divorce, we are compelled to **reverse** and **vacate** that decree." ***Potts,*** *supra.,* at 323, 324. (Emphasis added.)

Suffice it to say that Chancellor Wilson's reliance on ***Richard***, *supra.*, is misplaced as it is factually distinguishable from the case at bar as Gay was the party who initiated this action by filing her Complaint for Separate Maintenance. Unlike Deborah Richard, Gay did appear in Court both at the hearing seeking temporary relief and at the final evidentiary hearing. Also unlike Deborah Richard, Gay, rather than sitting in front of the television watching QVC all day long, has throughout the marriage, and particularly since August, 2002, provided financial assistance and stability for the marriage by working as a high school English teacher, yearbook sponsor and Academic Decathlon coach (T. II, p. 115).

Gay contends that Peirce did not prove by a preponderance of the credible evidence that his health was endangered by Gay's actions or, that it was reasonable for Peirce to fear that his health was in danger because of something that Gay did. Neither did Peirce prove that Gay's acts were unnatural or infamous as to make the idea of being married to her revolting to him and make it impossible for this strapping, former CFL defensive lineman to perform his marital duties. ***Daigle***, *supra.*, at 144 (citing ***Gardner v. Gardner***, 618 So.2d 108, 113-114 (Miss. 1993)). Additionally, Peirce did not prove that Gay's acts were "systematic and continuous". ***Ibid.*** Finally, Peirce did not prove that there was a causal connection between Gay's alleged maltreatment of Peirce and his decision to leave the marital home. ***Ibid.***, (citing ***Fournet v. Fournet***, 481 So.2d 326, 328 (Miss. 1985)).

Gay contends that the lower Court erred in finding that there was evidence of anything other than "incompatibility" or, at several times in the marriage, loss of affection, but those were not of her doing, namely Peirce's leaving Gay and infant son, Jae, in Kansas for a coaching job in Alabama in 1990 and Peirce's decision in September, 2004 to stop having sex, the existence of which were not tantamount to habitual cruel and inhuman treatment. ***Ibid.,*** (citing ***Smith v. Smith***, 614 So.2d 394, 396 (Miss. 1993), which in turn quoted ***Wires v. Wires***, 297 So.2d 900, 902 (Miss. 1974)).

Turning to the issue of adultery the lower Court in its Judgment (R.E. 004-029; R. 32-57) clearly found several facts erroneously, particularly Finding No. 11 (R.E. 005; R. 33) in which the Court found that both Gay and Peirce, by their own admissions, had committed adultery during the course of the 28 year marriage. There was no evidence in the record concerning any alleged adultery by Gay, much less an admission on her part of committing adultery.

There is no question that Peirce came into Court with unclean hands as the most probative evidence leads to the conclusion that Peirce had a history of illicit sexual behavior as he admitted to having committed adultery when, in response to one of the Court's questions at that the December, 2005 hearing on Gay's Motion for Separate Maintenance *Pendente Lite* and Child Support *Pendente Lite*, he stated, "I've sinned against her, I've sinned against God, I've sinned against him [Jae] but I don't want back in that situation." (T. II, p. 115). Also, Peirce's then counsel, Renia Howard, stated to the Chancellor not once, but twice, that her client had committed adultery and that he just wanted the

Court to grant Gay a divorce and then consider the issues of equitable distribution, child support and alimony (R.E. 134; T. II, p. 6, ll. 4-5 &14-15). At the evidentiary hearing in August, 2006, Peirce attempted to redeem himself by denying that he had committed adultery (T. IV, pp. 441-442).

While the record on appeal and the transcript in the case are replete with acts or incidents, both before and after he deserted Gay and Jae, which tested Gay's resolve to stay married to Peirce, throughout she has forgiven him and wanted him to come back home. The complaints which Peirce expressed as things of which he had grown "tired" resembled much more closely the "constant bickering and lack of intimacy" found by the Mississippi Supreme Court in 1993 to be insufficient to show cruel and inhuman treatment. ***Smith***, *supra.*, at 396.

Gay contends that when the lower Court opined that the standard is "**any conduct engaged in over a long period of time without reasonable cause as (sic) endangers health** or creates a reasonable apprehension of danger thereto, thereby rendering the continuance of the marital relation unsafe for the unoffending spouse is habitual cruel and inhuman treatment", it mis-stated the law, even though the Chancellor used the ***Daigle/Smith*** qualifier, i.e., conduct being "more than incompatibility, lack of affection, rudeness or unkindness" (R. 38-39), ***Shorter v. Shorter***, 740 So.2d 352 (Miss. Ct. App. 1999), ***Daigle***, *supra.*, at 144 (quoting ***Smith***, *supra.*, at 396) (Emphasis added).

The Chancellor held that "Gay's persistent lying and deceitfulness about their finances, and being financial (sic) irresponsibility (sic) for 27 years, as well as her failure to attend church with him and their son, or to attend social functions with him related to his job, all without good cause, amount[ed] to more than incompatibility, lack of affection, rudeness or unkindness" (R. 39). The Chancellor mis-spoke in her Judgment when she referred to Peirce's alleged paramour as Gloria Gamble, rather than Gloria Sample (R. 39).

Before they married in 1978, Gay told Peirce that she had a baby who had died and that she couldn't have any more children. In 1990, after 12 years of marriage and some 16 years ago, Gay told Peirce that the child whom she had birthed before they dated was alive and had been placed for adoption.

While these parties have crossed the South and the Midwest living in at least five states and Canada during their 28 year marriage, the Chancellor did mis-speak in her findings when she found that the parties had lived in Starkville, Mississippi as the events recounted in that part of the Judgment actually happened in Cleveland, Mississippi, when, in the mid to late 1990s, Peirce was a graduate assistant and coach at Delta State University. Gay admitted that during their stint at DSU, one month Peirce gave her $240.00 to pay the rent, that she did not pay the rent, and that she didn't tell Peirce that she had not paid it. However, Gay's failure to pay the rent was not the cause of them having to move out of the married student housing as Peirce, after having a falling-out with the head football coach, had been fired and as Gay was no longer enrolled as a student. DSU forced them and Jae to move out of married

student housing.

Even more importantly, Peirce admitted that his problems with Gay's handling of money ceased once she was an English teacher at West Bolivar High School beginning in school year 2002-2003. Coincidently, only then did Peirce buy the house on Irish Lane in Greenville, having title vested solely in himself, but requiring Gay to sign the Deed of Trust.

Peirce's testimony concerning problems with Gay's dealing with the financial matters between the late 1980s and August, 2002 is incredible as he admitted that, because she did not tell him that she had not filed their joint income tax return in 1987 or thereabout, he had taken over paying the bills in 1988, eighteen years before he filed his Counterclaim.

When they lived in Florida between 1983 and 1988, Gay admitted she took Peirce's credit card to buy items to auction at a school-sponsored raffle connected with his job, charged the items and when some of them failed to sell, returned them and tried to get cash.

In 1990, sixteen years before the divorce hearing, she and Baby Jae, after being abandoned by Peirce in Kansas, moved in with his parents in Amory, Mississippi while Peirce "re-located" to Alabama and cashed some of Peirce's savings' bonds to buy food, diapers and other supplies for herself and Jae as she was unemployed. Not content to let her husband of twelve years "steal away", she took Jae and, using Peirce's savings' bonds' monies, moved to Alabama and rented a motel room so that all three of them could be together again as they had been in Kansas.

Compounding the incredibility of these parties' financial irresponsibility, they did not file joint income tax returns from 1995 through 2005. Gay contends that their failure to pay income taxes or file returns was a joint responsibility and evidence of same was irrelevant on the question of Gay's alleged habitual cruel and inhuman treatment of Peirce.

In her Judgment (R.E. 013; R. 41, second full paragraph), the Court found that Gay didn't attend church with Peirce and Jae. However, the creditable evidence was that she did lead devotions at home, particularly after Sunday lunch. She read the Bible and had family devotions. She was the person who led Jae to his confession of faith. She attended his baptism.

Peirce presented no competent evidence that either his physical or mental health had been affected. He did not offer any proof from either Dr. Brock of Cleveland, his personal internal medicine physician who prescribed for him not only medicine for his Type II Diabetes but also Viagra and Cialis for his erectile dysfunction. Neither did Peirce call expert endocrinologist to give expert opinion testimony that Peirce's diabetes had been caused by or aggravated by any of Gay's alleged acts. The testimony of his baby sister, Adrian Haynes, and of Gwen Milton, his administrative assistant, was either incompetent to corroborate his allegations that his physical and mental health may have been caused or aggravated by their alleged incompatibility or should have been given very little weight.

Therefore, as the lower Court erred in finding and holding that Peirce had established the ground of habitual cruel and inhuman treatment, this Court should reverse the lower Court and order that the Judgment of Divorce be dismissed.

II. Whether the lower Court erred in dismissing Gay's Complaint for Separate Maintenance.

As the Mississippi Supreme Court has stated, "[i]t is well-established that '[a] decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other.'" ***Lynch v. Lynch***, 616 So.2d 294, 296 (Miss. 1993). The two-pronged test is whether the (a) separation without fault on the part of the wife and whether (b) willful abandonment of the wife by the husband was accompanied by a refusal to support her. ***Id.*** Moreover, under Mississippi law, the wife need not be totally blameless in order to for the Court to allow an award of separate maintenance, but her (mis)conduct must not have materially contributed to the separation. ***Id.***, *as cited in* ***Shorter***, *supra.*

The opinion of late Chief Judge Patterson in ***Marble***, *supra.*, is also instructive on this issue as it discusses the principle that "a wife is not entitled to separate maintenance where her conduct has materially contributed to the separation." ***Marble***, *supra.*, at 1343. While Gay contends that she was not at fault for the separation, even should this Court find that there was proof in the record to substantiate that point, then, under ***Marble*** , Gay would still be entitled to separate maintenance unless the proof was present on the issue of causation because she stated more than once that she would welcome Peirce's return unconditionally, unlike Rebecca Marble who conditioned her offer to have her husband return on him undergoing psychological counseling. ***Ibid.***

The late Judge Sullivan's opinion in ***Kergosien***, *supra.*, is also helpful on this issue as it evaluates the two prongs of proof, separation without fault on Gay's part and Peirce's willful abandonment of Gay with refusal to support her. ***Kergosien***, *supra.*, at 1211. There is no proof in the record that Gay acted like the wife in ***Cox v. Cox***, 279 So.2d 612 (Miss. 1973), as she has not "berated her husband" or "belittled his manhood", or "threatened his livelihood". Peirce, himself, admitted that the allegation that he was having an affair which she made in 1991, some 16 years ago, may have had some validity and that her recent allegations that he was having an affair with Gloria Sample did not phase him (T. IV, p. 439) Neither is there proof in the record that Gay acted like the wife in ***Rodgers v. Rodgers***, 349 So.2d 540 (Miss. 1977), who stabbed her husband after an altercation, "maintained a male companion" and made the statement that "she could no longer live with her husband". Former Judge Southwick in ***Crenshaw***, *supra.*, at 276, also addressed this issue as he affirmed the lower Court's award of separate maintenance and, citing ***Lynch***, *supra.*, stated cogently as follows:

> Mr. Crenshaw argues that his wife should not receive separate maintenance because she is not without fault in their separation. **If this means that she fell short of perfection, that is true of us all.** If it means that **she was guilty of extreme or cruel behavior toward her husband**, we've already agreed with the Chancellor that the **evidence of that was absent**.

As the Supreme Court stated, a "wife need not be totally blameless to allow an award of separate maintenance." ***Lynch***, *supra.*, at 296, but "her

misconduct must not have materially contributed to the separation." Gay, like Mrs. Crenshaw, testified that she was willing for Peirce to return home, and that she loved him despite how much he hurt her by having an affair with another woman.

Her attitude did not register with the Chancellor as Gay contends that the lower Court erred when it found that the parties had only engaged in sexual intercourse on two occasions after April 22, 2005, the date of the separation, as the most probative evidence in the record, particularly Peirce's lack of credibility, is Gay's testimony refreshed by her pocket calendar that they were intimate at Peirce's home in Amory, Mississippi over Memorial Day Weekend, 2005, that they were intimate for several days in the early part of June, 2005, while they were on the Mississippi Gulf Coast at an reading conference and that they were also intimate for several days while they were at a family reunion in New Orleans, Louisiana, during the latter part of June and the early part of July, 2005 (T. III, pp. 286-287).

While Gay contends that her conduct did not materially contribute to Peirce's leaving in April, 2005, Peirce admitted to the trial Court that he just "got tired" (T. II, p. 115).

Clearly, the lower Court erred in denying Gay an award of separate maintenance and child support for their son, Jae, who is currently completing his junior year at St. Joseph High School. Therefore, Gay requests this Court to reverse and render Judgment requiring Peirce pay an amount of separate maintenance until they are reconciled, together with requiring Peirce to pay

Gay a sum of child support for Jae in an reasonable amount, including tuition and fees at St. Joseph High School, and to require Peirce to reimburse Gay for the medical expenses she and Jae incur which are not covered by Gay's group insurance plan or Peirce's dental insurance plan as the proof in the record is replete with information with which this Court can fashion an award as Peirce's earning capacity is 2-1/2 to 3 times as great as Gay's; as he receives income from serving as Principal of Columbus High School, through his sports' officiating work, and through his liquid non-retirement investments, cutting timber on his acreage or improved property. Additionally, the record sets out the reasonable needs of Gay and Jae, together with the necessary living expenses of Peirce, the estimated sum of delinquent income taxes that each one should expect to pay.

III. Assuming *arguendo* that the lower Court did not err in granting Peirce a divorce, whether the lower Court erred in failing to consider Peirce's mandatory contribution to the Public Employees' Retirement System of Mississippi (PERS), his voluntary contributions to the deferred compensation plan (SBA-MDC TP), together estimated at $120,000.00, and in failing to delineate and to factor into its division which of the parties' assets were maintained in retirement accounts and which were in non-retirement accounts when it divided the marital estate.

In the case styled ***Ferguson v. Ferguson***, 639 So.2d 921, 928 (Miss. 1994), this Court set out the factors to be considered by the lower Court in arriving at its decision on the equitable division of the marital estate. Those factors are:

(a) the respective parties' direct or indirect contribution to the accumulation of the property;

(b) the respective parties' contribution to the stability and harmony of the marital and family relationships measured by the quality or quantity of time spent on family duties and duration of the marriage;

(c) the respective parties' contribution to the education, training and other accomplishments bearing on the earning power of the spouse who accumulated the majority of the assets;

(d) whether either spouse has expanded, withdrawn or otherwise disposed of marital assets in any prior distribution of assets or by agreement, decree, or otherwise;

(e) the market value and emotional value of the assets;

(f) the value of the assets not ordinarily subject to such distribution, such as property brought to the marriage by the parties, or property acquired via inheritance, or in or by those gifts to an individual spouse;

(g) tax and other economic consequences and contractual or legal consequences to third parties of the proposed distribution;

(h) the extent to which property division may be utilized to eliminate future periodic payments as potential sources of future friction between the parties;

(i) the needs of the parties for financial security with due regard to the termination of assets, income and earning capacity; and

(j) any other factor which in equity should be considered.

Ferguson, *supra.*, at 921, 928.

Nine years later, this Court put a gloss on equitable division, lump sum or periodic alimony payments and mutual obligations of child support in the case of ***Lauro v. Lauro***, 847 So.2d 843, 848-849 (Miss. 2003), when it stated that all property division, lump sum or periodic alimony payments, and mutual obligation for child support should be considered together and that while "alimony and equitable distribution are distinct concepts, . . .together they command the entire field of financial settlement of divorce. Therefore, where one expands, the other must recede." ***Lauro***, *supra.*, at 849 (quoting ***Ferguson***, *supra.*, at 929).

The lower Court, in its Findings of Fact, (R.E. 020-021; R. 48, 49) left out and thus failed to consider the Public Employees' Retirement System of Mississippi (PERS) account of Peirce McIntosh, the mandatory deductions for which ($477.82 per month) he listed on the 8.05 form received into evidence at the August, 2006 hearing (R.E. 099; Exhibit 12, p. 2), but which account he failed to list as one of his assets in either Section "E" or "G" of that same 8.05 form.

Also, in its Judgment when listing the parties' assets, the lower Court left out entirely any consideration of Peirce's voluntary retirement account (SBA-MDCPT) Deferred Compensation Plan (R.E. 020-021; R. 48-49, 91) even though he showed the deduction of $1,100.00 per month from his gross salary as voluntary retirement on his Form 8.05) (R.E. 099; Plaintiff's Exhibit 12, p. 2). Yet, the lower Court considered Gay's PERS retirement account which she testified contained approximately $8,400.00 and divested her of it, giving those monies to Peirce (T. II, p. 290).

The lower Court, as it recognized in both its statement from the Bench in the hearing on Gay's Motion to Stay the Judgment, the transcript of which is part of the Record on Appeal in the appeal which is consolidated with this one (***Peirce McIntosh v. Gay Reed McIntosh***, No. 2006-CA-02136) (R.E. 051-055; T., p. 20-24) and, which, for convenience's sake, has been made part of the Record Excerpts filed herewith, and, in its Order Modifying the Judgment, which the lower Court later declared void as it held that it was without jurisdiction to enter it (R.E. 056; R. 125), also erred as it, when dividing the marital assets, failed to make a determination as to which of Peirce's and Gay's investment accounts were retirement accounts and which were liquid, taxable investment accounts. Differentiating between those two types of investment accounts was crucial in order that the lower Court could distribute monies from Peirce's control to Gay with which she could pay her and Jae's every day household expenses such as the mortgage, utilities, food, and clothing without the fear of incurring a ten per cent (10%) penalty for withdrawing retirement

account funds before she reached age 59-1/2.

When beginning to review each of the ***Ferguson,*** *supra.*, factors, one sees that the respective earnings of the parties since 2002, when their gross salaries are taken together, based upon not only their testimony, but also Peirce's Social Security Statement (R.E. 085, Plaintiff's Exhibit 7) have averaged between $90,000.00 and $120,000.00. It is also clear that since school year 2002/2003, the parties have been on much better financial footing than they were in the 1980s and 1990s. Another factor that is evident from reviewing the Social Security Statement of Peirce is that the importance of any income Gay could bring to the marriage was much greater in the 1980s and for most of the 1990s than in later years as Peirce's gross salary did not exceed $50,000.00 until tax year 1997 or after he had been at Gentry High School for a year or two.

Additionally, as is clear from each party's 8.05 Form, once Peirce was able to use Gay's earnings from West Bolivar High School in his budgeting scheme, he was free to deduct voluntarily $1,100.00 or $1,200.00 as additional retirement monies from his gross salary and to place same in his deferred compensation account (SBA-MDC PT) (R.E. 092; Plaintiff's Exhibit 8). Also, with the infusion of Gay's salary which began in August, 2002, Peirce felt comfortable enough to purchase the house in Greenville, which was presumably the first house they had owned and lived in at the same time since they left Florida in the late 1980s. Therefore, concerning factors (a), (b), and (c), the record reflects that the relative contribution of each party equals one

another.

When considering factor (d), it is evident from his testimony that Peirce had withdrawn monies from one of his investment accounts, probably the ING account, as in Gay's initial Form 8.05 (R.E. 092, Plaintiff's Exhibit 8), the value of that account was listed as $40,420.00 whereas Peirce's amended Form 8.05 (R.E. 104; Plaintiff's Exhibit 12), in which for the first time he listed the ING account, showed a balance of between $15,000.00 and $16,000.00. He stated that he paid some $16,000.00 in delinquent income taxes, paid his second and present attorney, John H. Daniels, III, the sum of $6,000.00, together with paying some other bills.

As far as factor (e), the market value and the emotional value of the parties' assets, is concerned, Gay contends that the lower Court followed the proof as far as it concerned the market value of the marital residence on Irish Lane, the house in Amory which Peirce is allowing his nephew to purchase "on time", the two lots in Indianola and the 32 acres outside of Amory. As far as the emotional value of the assets, the record is clear that Gay is strongly attached to her Irish Lane home and to her 25th anniversary ring valued at $4,000.00 which Peirce gave her.

The lower Court correctly decided that these parties did not have any assets other than ones they had acquired during the marriage and that there were no items specifically given to one party or the other by family members or by inheritance.

The next factor, being the tax consequences to third parties of the proposed distribution, is inapplicable.

Factor (h), the extent to which the property distribution may eliminate future periodic payments and, thus, remove future source(s) of friction, is one of very little importance in this matter as the lower Court gave custody of Jae to Gay and required Peirce to pay periodic child support payments to Gay at least until the time that Jae reaches age 21.

Factor (i), the needs of the parties for financial security, is certainly one which favored Gay as her income is about one-third that of Peirce's and as she does not have the number of years of work-life expectancy which he has. Also, considering what information there was in the record about her past earnings, it is inconceivable that her accrued Social Security benefits when she retires, would come near to equaling Peirce's. Therefore, this factor is one that this Court should definitely consider in its determination of how the assets should be distributed in order to make ample provision for the older spouse, particularly when she does not have the earning capacity of Peirce.

Of course, this Court should review the record to see if there are other things to be taken into consideration in light of these circumstances. The lower Court failed properly to evaluate the unique manner in which Peirce financed major family purchases by encumbering the only substantial family asset which the parties had, the Certificate of Deposit at the Cleveland State Bank, which was the product of money they received as equity from the 1995 sale of their Pensacola, Florida home. He used it as collateral for the purchase of his

Yukon, Gay's Jeep Cherokee, the Pioneer RV and the two vacant lots in Indianola.

After entering its Judgment, the lower Court recognized that it had initially failed to consider that the majority of Peirce's assets were either in retirement accounts or in real property which was encumbered as collateral for the purchase of other improved real property (the 32 acres as collateral for the house on May Street in Amory) or was encumbered to serve as collateral for the purchase of personal property (the two lots in Indianola serving as collateral for the purchase of the Pioneer Recreational Vehicle). Of course, the marital residence served as collateral for repayment of the funds with which it was purchased. This Court should reverse and remand under ***Ferguson***, *supra.*, as the lower Court approached the question of alimony only after distributing the assets and liabilities on a 50/50 basis, a decision flawed by both the Chancellor's failure to consider Peirce's PERS and SBA Deferred Compensation accounts (brought about by Peirce's failure to put the Court on notice of their existence other than obliquely through his admission that sums were being deducted each month from his gross salary) and as the Chancellor's failed to differentiate between regular and retirement investment accounts.

IV. Assuming *arguendo* that the lower Court did not err in granting Peirce a divorce, whether the lower Court erred in denying Gay an award of periodic, lump sum or rehabilitative alimony.

While the lower Court's decision to refrain from awarding Gay alimony in any form was one within its broad discretion, this Court has reversed when that holding has been found to be not only against the overwhelming weight of the evidence, but also so overly oppressive, unjust or grossly inadequate as to be an abuse of discretion. ***Monroe v. Monroe***, 745 So.2d 249, 252 (Miss. 1999).

Considering that the lower Courts were, under ***Ferguson***, asked to distribute the marital assets on a equitable basis before reaching the question of alimony, as the lower Court clearly failed to include two substantial retirement accounts belonging to Peirce, the PERS retirement fund to which he contributed mandatorily and the SBA-Deferred Compensation account into which he voluntarily placed funds out of his gross salary, and as the lower Court failed to distinguish Peirce's retirement and non-retirement accounts, it is clear that the lower Court made its decision about alimony without first classifying and defining the marital assets. Gay contends that the refusal to award alimony was patently grossly inadequate and against the weight of the evidence and, therefore, this Court should reverse and remand in order that an accurate picture of the parties' marital assets will be made available to the Court before deciding whether Gay should be entitled to alimony and, if so, what type and in what amount. Jeffrey Jackson and Mary Miller, eds., 4

Encyclopedia of Mississipi Law, Deborah H. Bell, "Divorce and Domestic Relations", Section 28:31, p. 237.

Gay also contends that the lower Court failed to consider the relevant factors found in ***Brabham v. Brabham***, 226 Miss. 165, 84 So.2d 147 (Miss. 1955) and ***Armstrong v. Armstrong***, 618 So.2d 1278 (Miss. 1993). Particularly, the Court disregarded the substantial disparity of Gay's earning capacity compared with that of Peirce ($32,420.00 for Gay in 2006-2007 school year and $92,000.00 for Peirce for 2006-2007 school year). Additionally, the Court did not give sufficient emphasis to their long marriage of 28 years or to the fact that from time to time over the length of the marriage, Gay had contributed financially, particularly, since she went full-time into the classroom in school year 2002-2003. Additionally, Gay contributed in the rearing of the party's son, Jae, who at the time of the Court's judgment was 16 years old.

The evidence is clear that Gay was unable to meet her and Jae's reasonable living expenses since Peirce left the marital home in April, 2005, even with the Court-ordered temporary support entered in January, 2006. Clearly, Gay is entitled to both rehabilitative and periodic alimony.

As set out in ***Armstrong***, *supra.*, at 1280, the factors to be used in determining whether a party is entitled an award of alimony include:

(1) the income and expenses of the parties;

(2) the health and earning capacities of the parties;

(3) the needs of each party;

(4) the obligation and assets of each party;

(5) the length of the marriage;

(6) the presence of minor children in the home which may require one or both of the parties to pay a person to provide childcare;

(7) the age of the parties;

(8) the standard of living of the parties both during the marriage and since Peirce left the marital home in April, 2005;

(9) the tax consequences of the spousal support order;

(10) fault or misconduct;

(11) wasteful dissipation of assets of either party; or

(12) any other factor deemed to be just and equitable, whether considered individually or in overall combination.

Hoggatt v. Hoggatt, 766 So.2d 9 (Miss. Ct. App. 2000).

Neither is the Chancellor required to put special weight on one consideration over the other. ***Moore v. Moore***, 803 So.2d 1214 (Miss. Ct. App. 2001).

As the lower Court used a 50/50 split of the assets and liabilities, flawed and incomplete as it was, even to the point of divesting Gay of her own PERS retirement account's funds of $8,400.00, she contends that she should prevail on Armstrong factors (1) through (8), with Peirce arguably winning on factors (9) and (10) as factor (11) was inapplicable. Therefore, Gay contends that the lower Court erred in failing to award her, particularly in light of the parties' 28 year marriage and her age of 58, an award of both rehabilitative and periodic alimony or, in the alternative, an award of lump sum alimony, in a sum at least

equal to the value of the Cleveland State Bank Certificate of Deposit payable monthly in installments over ten (10) years, a payment schedule which would lessen the tax consequences for Peirce.

V. Whether the lower Court erred when it awarded Gay only one-half of what it considered to be her reasonable attorneys' fees and expenses.

While Gay contends that the lower Court was acting within its broad discretion when it determined the amount of reasonable attorneys' fees, the authority for which was set out in by this Court forty years ago in ***Klumb v. Klumb***, 194 So.2d 221, 225 (Miss. 1967), and reinforced ten years later in the case of ***McKee v. McKee***, 418 So.2d 764, 767 (Miss. 1982), she contends that the lower Court erred by awarding her only one-half of the reasonable attorneys' fee and one-half of the incurred expenses.

Gay contends that she demonstrated the requisite need to justify an award of one hundred percent (100%) of the reasonable attorneys' fees and expenses. ***Creekmore v. Creekmore***, 651 So.2d 513, 520 (Miss. 1995). The lower Court recognized in its Judgment that Gay testified at trial that she was unable to pay her attorneys' fees and had not in fact paid any fees since she retained her counsel. The lower Court also recognized that Gay has "a small amount of extra money" remaining after she paid her reasonable and necessary expenses (R.E. 028; R. 56).

Gay contends that "assuming *arguendo*, the lower Court did not err in holding that Peirce was entitled to a divorce, the distribution of the marital assets outlined by the lower Court vested limited amounts of liquid assets in her which would have placed upon her the paying of the mortgage, utilities, insurance, food, private school tuition and other household expenses out of her

take home pay, together with the $1,000.00 per month in child support which the lower Court awarded. The lower Court erred in not awarding her one hundred per cent (100%) of both the reasonable attorneys' fee determined by the Court, $6,011.26, and the expenses she incurred, $829.52. ***East v. East***, 2000 WL 760940 (Miss. Ct. App. June 13, 2000).

Also, Gay contends that the lower Court failed to explain adequately its rationale for reducing the award of attorneys' fees by one-half. The only reason the lower Court gave in its Judgment was that when the Court "consider[ed]. . . all of the facts given in this case regarding the issue of attorney (sic) fees", such a reduction in the award was warranted (R.E. 028-029; R. 56, 57). If by that statement the lower Court was limiting the facts to those only concerning attorneys' fees, then those facts are extremely limited as the entire proof concerning that issue covered only a few pages of transcript (T. III, pp. 326-328). However, if the lower Court was stating that its award to Gay was based on all of the facts elicited by the parties in the case as a whole, then Gay contends that it was error for the lower Court to penalize her on this question because it held that she was at fault as alleged by Peirce or, in the alternative, as she had failed to sustain her burden of proof on her Complaint for Separate Maintenance.

Additionally, should this Court either reverse and render or reverse and remand, then Gay contends that she would be entitled not only to one hundred percent of the reasonable attorneys' fees as to set by the lower Court, but also one-half of that sum ($6,011.26) or $3,005.63 as attorneys' fees, together with

Court costs, for having to prosecute this appeal as such an award has been this Court's custom and practice. ***Klumb***, *supra.*, at 225.

Conclusion

In the final analysis this Court should be led back to the Mississippi Supreme Court's 1984 decision of ***Marble v. Marble***, *supra.*, and should reverse the lower Court and render Judgment against Peirce on the question of separate maintenance and child support and award Gay one hundred percent of her reasonable attorneys' fees incurred below and one-half of those for prosecuting this appeal. Alternatively, should this Court affirm on the ground of habitual cruel and inhuman treatment issue, this court should reverse and remand on the equitable distribution, alimony and attorneys' fees issues.

Respectfully submitted, this the 16th day of April, 2007.

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CERTIFICATE OF SERVICE

I, Edward D. Lamar, one of the attorneys for Plaintiff, do hereby certify that I have this, the 16th day of April, 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.
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Edward D. Lamar