

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	iii
Statement of Issues.....	1
Statement of the Case.....	2
Statement of Facts	4
Summary of the Argument	7
Standard of Review.....	8
Argument.....	9
I. Whether the lower Court erred in awarding Peirce a divorce on the ground of habitual cruel and inhuman treatment.....	11
II. Whether the lower Court erred in dismissing Gay's Complaint for Separate Maintenance.....	15
III. Assuming <i>arguendo</i> 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.....	16
IV. Assuming <i>arguendo</i> 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.....	17

TABLE OF CONTENTS (CONTINUED)

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.....	18
VI.	Whether Gay, by not filing any post-trial motion(s) for relief pursuant to Rule 59, Miss. R. Civ. P., waived her right to appellate review of many issues.....	19
	Conclusion.....	20
	Certificate of Service.....	21

TABLE OF AUTHORITIES

Cases:

<i>Billiot v. State</i> , 454 So.2d 445 (Miss. 1984).....	10
<i>Colson v. Sims</i> , 220 So.2d 345, 346 n1 (Miss. 1969).....	10
<i>Creekmore v. Creekmore</i> , 651 So.2d 513 (Miss. 1995).....	18
<i>Daigle v. Daigle</i> , 626 So.2d 140 (Miss. 1993).....	8
<i>Ferguson v. Ferguson</i> , 639 So.2d 921 (Miss. 1994).....	16
<i>Graves v. Dudley Maples, L.P., et al.</i> , 950 So.2d 1017, 1021 (Miss. 2007).....	9
<i>Hill v. Southeastern Floor Covering</i> , 596 So.2d 874, 877 (Miss. 1992).....	11
<i>Jackson v. State</i> , 423 So.2d 129 (Miss. 1982).....	10
<i>Johnson v. Johnson</i> , 650 So.2d 1281 (Miss. 1994).....	9
<i>Kiddy v. Lipscomb</i> , 628 So.2d 1355, 1359 (Miss. 1993).....	9
<i>Klumb v. Klumb</i> , 194 So.2d 221 (Miss. 1967).....	19
<i>Lynch v. Lynch</i> , 616 So.2d 294 (Miss. 1993)	15
<i>McLemore v. State</i> , 669 So.2d 19, 24 (Miss. 1996).....	9, 10
<i>Marble v. Marble</i> , 457 So.2d 1342 (Miss. 1984).....	20
<i>Potts v. Potts</i> , 700 So.2d 321 (Miss. 1997).....	20
<i>Wilson v. Wilson</i> , 547 So.2d 803, 805 (Miss. 1989).....	11

Rules:

Rule 59, Miss. R. Civ. P.....	9
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Statement of Issues

Gay assigns as error the following five issues replying to Peirce's contentions regarding same and responds to a sixth issue Peirce has raised in his Appellee's Brief:

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 accounts 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;

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; and

VI. Whether Gay, by not filing a post-trial motion(s) for relief pursuant to Rule 59, Miss. R. Civ. P., waived her right to appellate review of many issues.

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. I, 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. III, 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. I, pp. 34, 54-56; T. II, 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. I, 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. I, 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. I, 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. I, 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 (T. I, pp. 95, 115, 195, 292-299).

In his counter-claim for 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, and that the Court failed to marshal, rank and distribute the marital assets, the lower Court erred when it 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 as Gay proved she could not pay them and as the Court found what a fair and reasonable attorneys' fee should have been.

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

In his summary of the argument and in Issue VI. of his Appellee's Brief, Peirce McIntosh (hereinafter "Peirce"), contends that this Court should limit its review as Gay McIntosh (hereinafter "Gay") did not file post-trial motions pursuant to Rule 59, Miss. R. Civ. P., citing as his authority for that position the case of **Graves v. Dudley Maples, L.P., et al.**, 950 So.2d 1017, 1021 (Miss. 2007). Cf. **Kiddy v. Lipscomb**, 628 So.2d 1355, 1359 (Miss. 1993).

Gay contends that this Court's review, rather than being limited, is plenary as the only errors which Gay has alleged that the Chancellor committed were ones based upon the record in the lower Court proceedings, including information in the testimony and exhibits admitted into evidence, and not in any newly-discovered evidence. One of the cases relied upon by this Court in its decision in **Graves, supra.**, is **McLemore v. State**, 669 So.2d 19, 24 (Miss. 1996), in which Late Judge Sullivan talked about the types of situations to which this concept of preservation of error should pertain when he stated as follows:

The State argues that **McLemore** did not preserve the issue [concerning testimony about other crimes] for appeal since he did not raise the error in the motion for a new

trial, citing **Billiot v. State**, 454 S.2d 445 (Miss. 1984), and that **McLemore** did not assign the issue in the post-trial motions and that there was no objection. The State's argument must fail. In **Jackson v. State**, 423 So.2d 129 (Miss. 1982), we said that "many attorneys in both criminal and civil cases are unfamiliar with the requirement as to what matters assigned as error must be included in a motion for a new trial". **Id.** at 131. That in order "to take advantage of the alleged error on appeal to this Court, it may be helpful for us to point out that it is not necessary to make a motion for a new trial grounded upon errors shown in the official transcript. . ." **Id.** (quoting **Colson v. Sims**, 220 So.2d 345, 346 n1 (Miss. 1969)). In **Jackson**, we enunciated that there are certain errors that parties must bring to the attention of a trial judge in a motion for a new trial. These include, all new matters, motions made upon the ground of inadequate or excessive damages, motions made for a new trial where it is contended that the verdict is against the overwhelming weight of the evidence, and the denial of a continuance. **McLemore, supra.**, at 24.

Gay contends that the errors committed by the Chancellor constituted plain error which included the finding that Gay had committed adultery when there was no testimony in the record to that effect and the finding that Gay and Peirce had resided in Starkville, Mississippi when the record contains absolutely no evidence of that fact. These two instances are merely the precursors of even more critical errors contained in the Court's Findings of Fact, Conclusions of Law and Judgment, including the Court's ruling on the mixed question of fact and law as to whether Gay was guilty of cruel and inhuman treatment of Peirce. Assuming *arguendo* that Peirce's proof on that question passed muster, the Court failed to marshal all of the assets of the parties, including Peirce's Public Employee's Retirement System of Mississippi (PERS) mandatory retirement account and also contributions he made on a

voluntary basis to the deferred compensation plan (SBA-MDC TP) which together amounted to more than \$120,000.00 of marital assets. Additionally, the Chancellor failed, in her division of the marital assets, to rank the restricted retirement account holdings versus the liquid assets, an error which the lower Court recognized at the time it heard Gay's Motion to Stay the Judgment (R.E. 051-055) in Appeal No. 2006-CA-02136, styled Peirce McIntosh v. Gay McIntosh. These errors have nothing to do with the sufficiency of the evidence but are plain on their face and are proper subjects for review and upon which this Court can base a decision to reverse and render or, if need be, remand.

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

It is interesting that Peirce, in his citation of cases outlining the standard of review, would cite late Judge Sullivan's opinion in **Hill v. Southeastern Floor Covering**, 596 So.2d 874, 877 (Miss. 1992), for, in that case, the Court, by analogy, clearly set out what Peirce was required to do in order to establish a *prima facie* case that he was entitled to a divorce on the basis of cruel and inhuman treatment; i.e., establishing by a preponderance of the evidence, under all the facts and circumstances of record, that Gay's conduct was "so unkind, so unfeeling or brutal as to endanger or put one in reasonable apprehension of danger to life, limb or health and further that her conduct must be habitual, that is, done so often, or continue for so long, that it may be reasonably said to be a permanent condition." **Wilson v. Wilson**, 547 So.2d

803, 805 (Miss. 1989).

None of the things which Peirce has alleged, has Gay done. She never endangered his life or his health or rendered the relationship unsafe for him. Additionally, none of the things which he alleged to have taken place even occurred, if at all, within the last five years other than her use of two credit card accounts in his name, a fact about which he admitted he had no knowledge or apprehension until she testified about it at the evidentiary hearing. Therefore, it is clear that her using those two credit cards after he left the marital home did not cause him to leave Gay and Jae on April 22, 2005, as she used those two credit cards to buy things because after he left home, he did not provide for them as he had in the past.

Clearly, the most piercing and probative proof was Peirce's admission that, once Gay started teaching in the fall of 2002, making "good" money, they did not have the financial problems about which he testified had occurred in the 1980's when they lived in Pensacola, Florida or in 1991 when he left her in Kansas and went to Alabama to coach. She and infant Jae followed him to his mother's home in Amory, Mississippi. While living there, she readily admitted that she cashed some of Peirce's Series E bonds to buy groceries and diapers for Jae. Then she pursued him even farther by going and renting a hotel room in Alabama so that the three of them could be together, again (T. 104).

Peirce latched upon the question of her using the money he had given her to pay the student apartment rent while they were at Delta State University in Cleveland, Mississippi as an example of her alleged cruel and inhuman

treatment. However, circumstances totally unrelated to her use of the rent money caused them to be removed from the campus apartment in which they were living, namely, the fact that he had to resign because of a difference of opinion with the head football coach and the fact that she was no longer a student. Those latter two facts combined to make them not eligible to continue to remain in the student apartments at Delta State University. Certainly money did not play a role in that situation as Peirce explained at length that he had purchased a Certificate of Deposit in his name and Jae's name (not Gay's) using the equity from the sale of Peirce and Gay's home in Pensacola, Florida, at a bank in Cleveland, Mississippi, and that he borrowed "from himself" using that Certificate of Deposit as security time and time again. Peirce could have easily borrowed sufficient funds to pay the rent had money really been a problem (T. I, p. 25; T. I, p. 80)

Peirce's explanation of his failure to pay income taxes for the last ten years as being based on the fact that he claimed that Gay deceived him about the preparation of the returns is incredible when he basically stated that since his employer was taking out money for income taxes from his gross salary, he believed that there was no need for him to file a return or pay any additional taxes (T.103).

While Peirce also complained about Gay's lack of truthfulness in telling him twelve (12) years after their marriage, that the child to whom she had given birth before they even started dating, had been adopted and did not die as she had related previously to him, he had to admit that that event occurred fifteen

(15) years before he chose to abandon Gay and Jae in April, 2005 (T. 112).

Peirce contended that Gay's accusations concerning his infidelity with Gloria Sample were unfounded. However, they were based upon the investigation which she undertook in early May, 2005, some two weeks after he left the marital home as she heard them talking inside the recreational vehicle and videotaped her car next to his, and then again in November, 2005, when she, as corroborated by Deputy Sheriff Grantham, confirmed her suspicions concerning Peirce's illicit activities with Gloria Sample. Peirce may feel guilty about having an affair, but that guilt should not translate into a basis for him contending that Gay was being habitually cruel to him.

Peirce complained that Gay's actions caused the aggravation of his diabetes, yet for at least ten (10) years he had been treated by the same physician in Cleveland, Mississippi. Yet Peirce didn't call his personal physician to testify about any aggravation of his pre-existing Type II Diabetes. He called his sister and his Chief Administrative Assistant whose testimony at best would be called subjective, and, at worst, biased.

Finally, Peirce listed Gay's wrongdoings. However, it was Peirce who requested that they not have sex from September, 2004 through the time he left in April, 2005. As far as his allegation of Gay not going to church with him, one must also remember that Gay "led their son, Jae, to the Lord", was present at this baptism at Peirce's church and led Bible study in their home, particularly on Sunday afternoons.

Clearly, these petty complaints of Peirce coupled with the fact that since Gay had been teaching high school English beginning in the fall of 2002, their financial situation had improved to the extent that they could buy a home in Greenville, each operate a vehicle commuting at least 25 miles one way per day, that Peirce could purchase unimproved property in Monroe County and in Sunflower County, indicate that finances were not one of Peirce's marital concerns (T. 113, 451, 452).

Two things are clear from the record in the Court below. Firstly, Peirce was tired of being married to Gay and, secondly, that his testimony is not credible, particularly after his admission that he negotiated checks made payable to Gay from a non-profit organization receiving federal grant money based on time records which he falsified, particularly as this "money" was "income" to her on which she owed taxes, but the benefit of which she has never seen (T. 183-193, 274). Once that fact became clear, Peirce's testimony should have been completely discarded by the Court.

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

As Peirce agreed with Gay that the case of *Lynch v. Lynch*, 616 So.2d 294, 296 (Miss. 1993), directly set out the test in order for Gay to succeed on her Complaint for Separate Maintenance, the Court, in reviewing the record, should be convinced, Gay contends, that any alleged misconduct of Gay that it finds to be proved, did not materially contribute to Peirce's decision to leave the marital home. Until the lower Court's order of January 18, 2006, Peirce, other

than paying the mortgage and providing Jae individually with “lunch money”, was not supporting Gay and Jae in the manner in which they had become accustomed. Therefore, Gay contends that this Court should reverse and render in her favor, awarding her separate maintenance, child support for their son, Jae, to be payable until Gay and Peirce are reconciled.

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.

As set out *infra*, Gay contends that the lower Court erred in its failure to follow the factors set out in ***Ferguson v. Ferguson***, 639 So.2d 921, 928 (Miss. 1994), and, in particular, the first factor which required the Chancery Court to determine the respective parties’ direct or indirect contribution to the accumulation of property. The lower Court utterly failed, in light of the testimony and exhibits which were in evidence, to set out in its recap of the respective parties’ assets Peirce’s PERS account information or the dollar value of his deferred compensation plan (SBA-MDC TP), which when added together, increased the total amount of the parties’ assets by a sum greater than \$120,000.00. Additionally, the lower Court failed to appreciate and allocate the

parties' assets based upon whether they were liquid as in a regular investment account or whether they were restricted as in an IRA or other retirement account, the withdrawal of funds from which by one less than 59-1/2 years old would subject the recipient of those funds to the payment of a ten percent (10%) penalty.

As argued *infra*, Peirce's argument that Gay did not preserve these issues for review by this Court is erroneous as Gay does not seek to bring any newly-discovered evidence, but merely requests this Court to correct the plain error of the lower Court which failed to marshal the parties' marital assets, to rank them according to their liquidity, and therefore, through its' attempted 50/50 allocation, effectively took at least \$60,000.00 from Gay and awarded it to Pierce. Therefore, this Court, if and only if it is convinced that the lower Court acted within its authority in granting Peirce a divorce, should reverse and render or remand on this issue.

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.

The question of the awarding of alimony is part and parcel of the equitable division of the marital assets and liabilities set forth in Issue III. *infra*. Therefore, as the lower Court incorrectly marshaled, ranked and then divided the marital assets and liabilities, the theoretical underpinnings for its decision not to award alimony become a house built on sand rather than rock and thus, call out for this Court to reverse and render, or remand, in order that both the

division of marital assets and the alimony questions can be addressed properly, incorporating the disparity in earning capacity of the parties, the length of the marriage, and Gay's contribution in rearing Jae.

Peirce's argument that the parties' tax liability was caused by Gay is as specious as his own argument that since his employer took out income taxes from his gross paycheck, there was no need for him to pay any more taxes or to file a return! If anyone is guilty of wasteful dissipation of assets, it would be Peirce, who as the major breadwinner, was also the party who generated the majority of the tax liability. Unfortunately, he did not understand that what his employer deducted was merely a good faith estimate of what his total tax liability would be. Clearly, this Court can not allow him to profit from his own ignorance.

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.

As Peirce contends that the Court had broad discretion to award Gay an attorneys' fee, citing *Creekmore v. Creekmore*, 651 So.2d 513, 520 (Miss. 1995), Gay contends that the lower Court abused its discretion, when in the face of testimony of Gay's inability to pay and proof in the record that the attorneys' fees had been incurred as substantiated by counsel's time records, by only awarding to Gay one-half of what it considered to be a reasonable attorneys' fees and expenses incurred.

Gay, in her Motion to Strike Peirce's Argument filed on or about July 3, 2007, with regard to whether this Court should reverse the lower Court on its award of one-half of the attorneys' fees, stated that as Peirce did not file a Cross-appeal in this matter, but chose to file a separate appeal from the lower Court's Order of December 4, 2006, which Order did not address the question of the awarding of one-half of Gay's reasonable attorneys' fees, Peirce had no standing at this time to argue that this particular portion of the Court's Judgment should be reversed.

Gay continues to maintain that should this Court reverse and render, or remand, this case to the lower Court, that she should be awarded one-half of the reasonable attorneys' fees found by the lower Court, for successfully prosecuting this appeal. ***Klumb v. Klumb***, 194 So.2d 221, 225 (Miss. 1967).

VI. Whether Gay, by not filing any post-trial motion(s) for relief pursuant to Rule 59, Miss. R. Civ. P., waived her right to appellate review of many issues.

Rather than being "hamstrung" as alleged by Peirce, Gay contends that this Court, in light of the plain error of the lower Court and the fact that Gay has not alleged any newly-discovered evidence or matters which should have been brought to the trial court other than that which was contained in the record, including both the transcript of the testimony and exhibits admitted into evidence, has its full panoply of authority with which to address and correct the errors of the lower Court, which, Gay contends, compound upon each other as do falling dominoes.

Conclusion

Gay contends that this Court should reverse and render, relying on this Court's decision of **Marble v. Marble**, 457 So.2d 1342 (Miss. 1984), and find as former Judge Banks stated in **Potts v. Potts**, 700 So.2d 321, 323 (Miss. 1997), "without belittling [Peirce's] unhappiness with his marriage, we hold that the trial court was manifestly in error, or alternatively, has applied an incorrect legal standing concluding that [Peirce] was subjected to habitual cruel and inhuman treatment by [Gay]."

Alternatively, should this Court affirm the lower Court on the issue of Peirce's entitlement to a divorce, then clearly this Court should reverse and render or reverse and remand with regard to the errors made by the lower Court concerning the marshaling, ranking and distribution of the marital assets holding that those errors materially impacted the lower Court's decision to award no alimony in any form to Gay and to award her only one-half of what the lower Court considered to be her reasonable attorneys' fees.

Respectfully submitted, this the 5th day of July, 2007.



Edward D. Lamar, MSB [REDACTED]
Attorneys for Appellant

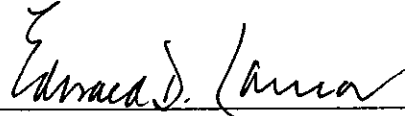
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CERTIFICATE OF SERVICE

I, Edward D. Lamar, one of the attorneys for Appellant, do hereby certify that I have this, the 5th day of July, 2007, caused to be mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing to:

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

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

A handwritten signature in cursive script, reading "Edward D. Lamar", written over a horizontal line.

Edward D. Lamar