MISSISSIPPI SUPREME COURT

GAY REED MCINTOSH	**APPELLANT**
VS.	**NO. 2006-CA-01762**
PEIRCE MCINTOSH	**APPELLEE**

Brief

CONSOLIDATED WITH:

PEIRCE MCINTOSH	**APPELLANT**
VS.	**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 & Daniels; and
5. Honorable Marie Wilson, Washington County Chancery Court Judge.

Respectfully submitted, this, the 18th day of June, 2007.

JOHN H. DANIELS, III, #5787

Dyer, Dyer, Jones & Daniels
P. O. Box 560
Greenville, MS 38702-0560
Telephone: (662) 378-2626
Facsimile: (662) 378-2672

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUES

Peirce in response to the errors assigned by Gay would show as follows as to each:

I. The lower court did not err in awarding Peirce a divorce on the grounds of habitual cruel and inhuman treatment;

II. The lower court did not err in dismissing Gay's Complaint for Separate Maintenance;

III. The lower court did not err in granting Peirce a divorce, entered a reasoned and well planned Judgment which should remain in full force and effect;

therefore, the Court should not remand this matter for additional review as it applies to Peirce's PERS account through the State of Mississippi or any other retirement account as all such information was properly before the Court.

IV. The lower court was correct in not granting Gay an award of periodic or other type alimony;

V. No attorneys' fees should have been granted; and

VI. Gay failed to file any post-trial motion relief pursuant to Rule 59, M.R.C.P. (or otherwise) therefore she waived the benefits of that post-trial review which is substantial before this Court as it precludes her argument on many issues.

STATEMENT OF THE CASE

Without substantial argument or detailed contest, Peirce McIntosh (hereinafter "Peirce") reasonably accepts the procedural history as suggested by Gay; however, with a number of exceptions.

1.

The Chancellor entered a specific and exhaustive Judgment dated October 2, 2006. (R. 32-57). In that Judgment the Chancellor extensively covered all issues of both law and fact – entering a well reasoned opinion which adjusted the equities of the parties as to the distribution of assets, custody of the minor child and the issues of marital dissolution.

The Chancellor's Judgment (R. 32-57) concluded, rightfully, that Peirce was entitled to a divorce on the grounds of cruel and inhuman treatment and from that point provided support to the minor child and a division of the marital assets which would provide for the comfort and support of the parties hereto as well as their minor child, Jae.

2.

That by Order of this Court, this Court has consolidated the within matter with an appeal as perfected by Peirce who is the Appellant therein and Gay who is the Appellee therein; and for that reason Peirce would note that any matter for which the lower court took up following the entry of the Court's Final Judgment of October 2, 2006, should be decided upon the issues presented in that appeal as consolidated herein.

3.

Moreover, Gay sought no post-trial judgment review pursuant to Rule 59, M.R.C.P.; new trial, JNOV or the like. For this reason this Court is limited in its scope of appellate review – not being able to consider matters which should or could have

been brought to the attention of the "trial judge" in order that they might be considered on appeal. ***Graves v. Maples, et al***, 950 So.2d 1017 (Miss. 2007).

4.

Therefore, and because of the Chancellor's well reasoned opinion and Gay's failure to seek post-trial review of the lower court's decision – thereby limiting this Court's scope of review, the lower court's Judgment should be affirmed, upheld and entered as a matter of law.

STATEMENT OF FACTS

Gay and Peirce, 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, Mississisppi, and is in the 11th grade at St. Joseph High School. (R. 9, T. I, pp. 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).

Peirce has a Bachelor of Science degree from Sterling College in Sterling, Kansas (1979) and a graduate degree in education administration from George 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 beginning in the summer of 2006 as Principal of Columbus High School in Columbus, Mississippi.

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).

Both Gay and Peirce presented causes of complaint to the lower court – Gay claiming a right to separate maintenance and Peirce seeking a divorce from Gay on the grounds of cruel and inhuman treatment.

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. 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. 34, 35).

The Chancellor, in her findings of fact and conclusions of law, divided the marital assets and liabilities of the parties; divested Peirce of his interest in the marital domicile; required Gay to pay the indebtedness it collateralized (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. 49-52); granted Gay the right to claim Jae as an exemption for tax purposes (R. 54-55); and ordered Peirce to pay one-half of what the Court considered to be Gay's reasonable attorneys' fees and expenses (R. 55-57).

SUMMARY OF THE ARGUMENT

Peirce contends that the lower court's Judgment of October 2, 2006, was a well reasoned decision which adjusted the equities of the parties and granted Peirce a divorce absolute from Gay.

That decision should stand.

Peirce also contends that the appellate review of Gay is limited, limited in scope for Gay's failure to seek post-trial review of the Court's Judgment of October 2, 2006.

Notwithstanding, this Court should affirm the lower court's decision as published on October 2, 2006. Moreover, the Court had before it all issues of any kind or

character; particularly the issue of Peirce's retirement plan through PERS. That issue arose during a review and cross examination of Peirce as to the sums deducted from Peirce's payroll check from Columbus High School. (T. II, p. 175). Counsel failed to explore those issues notwithstanding the fact that it may not have appeared in bold print and on Peirce's 8.05.

STANDARD OF REVIEW

Gay's recitation of the Standard of Review is correct. In addition Peirce would show that the following additional cases are helpful insofar as it concerns the standard. ***Morris v. Morris,*** 783 So.2d 681 (Miss. 2001); ***Dillon v. Dillon,*** 498 So.2d 328 (Miss. 1986); ***Hill v. Southeastern Floor Covering Company,*** 596 So.2d 874 (Miss. 1992).

ARGUMENT

I. The Chancery Court of Washington County, Mississippi did not enter an erroneous Order granting Peirce a divorce on the grounds of habitual cruel and inhuman treatment.

Gay suggests that ***Marble v. Marble,*** 457 So.2d 1342 (Miss. 1984) is the case closest in character and kind to the case-at-bar. Peirce would show to the contrary.

To commence this analysis it is important to understand that causes of action on the basis of cruel and inhuman treatment are "fact specific." That said, while cases may mirror in some regard previously decided cases of this Court, it is very important to understand that while that may be true these cases rest on their "on bottom" and cannot be placed in a pigeon hole as if they have come off of an assembly line.

In that regard the following is important:

> This Court has repeatedly stated that it will examine the record and accept the evidence reasonably tending to support the findings made below, along with all reasonable inferences which may be drawn therefrom and which favor the lower court's finding of fact.

Morris v. Morris, 783 So.2d 681, 687 (Miss. 2001).

> The chancery court sitting as the trier of fact has the primary authority and responsibility to assess the credibility of witnesses.

Bryan v. Holzer, 789 So.2d 648, 659 (Miss. 1991).

> Moreover, where we find substantial evidence in the record supporting the findings of fact, we will seldom reverse, whether those findings be of ultimate fact or evidentiary fact. (Emphasis added).

Mullins v. Ratcliff, 515 So.2d 1183, 1189 (Miss. 1987). See also ***Dillon v. Dillon,*** 498 So.2d 328, 329 (Miss. 1986).

With the preceding in mind the burden upon (in this case) Peirce was to prove by a preponderance of the evidence his right to a divorce on the grounds of cruel and inhuman treatment. That being said the lower court decided correctly that Peirce had survived his burden of proof.

> This court has held the following: The ground for habitual cruel and inhuman treatment may be established by a preponderance of the evidence, rather than clear and convincing evidence, and the charge "means something more than unkindness or rudeness or mere incompatibility or want of affection."

Smith v. Smith, 614 So.2d 394, 396 (Miss. 1993).

> This Court has held that it no longer requires that a specific act must be the proximate cause of a separation before a

> divorce may be granted on grounds of habitual cruel and inhuman treatment.

Robison v. Robison, 722 So.2d 601, 603 (Miss. 1998).

This Court has gone on further to say; which has been affirmed and confirmed time and time again.

> Evidence sufficient to establish habitual, cruel and inhuman treatment should prove conduct that: Either 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, be so unnatural and infamous as to make the marriage revolting to the offending[ed] spouse and render it impossible for that spouse to discharge the duties of the marriage, thus destroying the basis for its continuance.

See ***Morris v. Morris,*** 783 So.2d 681 (Miss. 2001); ***Bodne v. King,*** 835 So.2d 52 (Miss. 2003).

The latter portion of the above (standard) carries no precise definition as the plain meaning of the words (unnatural and infamous) are sufficient to describe the conduct of the offending spouse and that such conduct (being fact specific) is found or not found on a case by case basis. ***Bodne,*** *supra.*, at 58. It is not the lack of or maltreatment which may be intended for or directed at the offended spouse; yet it is the affect of this "unnatural and infamous" conduct upon the offended spouse. ***Bodne,*** *supra.*, at 58.

Moreover, this conduct on the offended spouse is determined by a "...subjective standard" as opposed to a "normative standard." ***Bodne,*** *supra.*, at 59; citations omitted.

All of this being said we must now measure the facts as seen by the Chancellor and the effect of those facts upon Peirce.

As previously mentioned the lower court went to exhaustive and a very detailed/accurate summation of the testimony concerning the factual allegations and proof to demonstrate the cruel and inhuman activities of Gay and the reason for the Court's grant of a divorce to Peirce.

A review of the record as well as the lower court's Judgment demonstrate the activities of Gay in bring about the grounds for divorce and over a 27 year period.

During the cross examination of Gay, Gay admitted over this 27 year period (having been married in 1978) that she had not been truthful with her husband. (T. III, p. 342). That from time to time she would secretly take checks from her husband, from his checking account and forge his name to those instruments. (T. III, pp. 342-343). That she would sign his name to checks and other documents without his knowledge. (T. III, p. 343). The checks that Gay would take from Peirce would be cashed and then that cash would be used to purchase items which she would not tell Peirce about and would keep these matters secret and away from Peirce. (T. III, p. 343). That when she would take the checks and secrete her crime from Peirce, he would only find out after he exhaustively went through his records or reconciled his checkbook. (T. III, p. 345).

That Gay secreted and took without permission Series E bonds from Peirce, bonds that had been acquired by Peirce, bonds that were in his name solely. (T. III, p. 347). Gay took these bonds and cashed them, forging Peirce's name to the bonds (before their maturity) and took the money, both principal and interest earned on the

bonds without Peirce's knowledge and without seeking his permission or asking for his permission. (T. III, pp. 348-350). In addition, Gay, without telling Peirce about the Series E bonds, continued to secrete her unauthorized (and potentially criminal) act when Peirce sought about looking for the bonds, could not find them and Gay never admitting her unauthorized act some months later. (T. III, pp. 350-351).

> Q. When he was looking for the Series E bonds and he didn't find them, did you confess then?
>
> A. No, I did not.
>
> Q. Okay. So you knew he was looking for the bonds?
>
> A. That he was looking for them? Yes, I did know that he was looking for them.
>
> Q. Did he ask you where the bonds were?
>
> A. Yes, he did.
>
> Q. What did you tell him?
>
> A. I didn't know.
>
> Q. Mam?
>
> A. I did not know.
>
> ....
>
> Q. What did you tell him – and I'll ask the question again — what did you tell Mr. McIntosh when he asked you the location of the bonds?
>
> A. I told him I did not know.

(T. III, pp. 350-351).

In addition, Peirce would from time to time give Gay money to pay household bills, to take care of necessities but she was again deceitful. She took the money, kept it in her possession and did not do the right thing, the best thing for her family. She used the money for other needs thereby allowing bills, necessities or otherwise to remain unpaid and to the detriment of her family. (T. III, p. 353).

One particular event occurred when Peirce and Gay were living at Delta State University in Cleveland, Mississippi. Peirce gave Gay money to pay the rent for the housing provided by the DSU. The rent money was provided to Gay but deceitfully she failed to pay the rent, bringing back a paid receipt and demonstrating to Peirce that the rent had been paid. (T. III, pp. 353-354). (While Gay suggests that Peirce lost his position at Delta State for other reasons I am certain that it did not bold well for Peirce being connected with the university and failing to pay his rent.) (T. III, pp. 356-358, 410-412).

The plot thickens. From time to time Gay would use the family credit card. She would purchase items on the credit card, bring them home but later return the items for cash, not telling Peirce nor crediting the credit card account for the purchases previously made. (T. III, pp. 359-360). The same pattern continued by Gay when either she or Peirce were involved in a school or church related fund raiser. Items would be purchased for the fund raiser by the use of the family credit card or otherwise, the items would be purchased for use at the fund raiser but then taken back to the place of purchase by Gay and after which she would return them for cash. (T. III, pp. 359-361).

What a horrible imposition this would place upon Peirce. Understanding that both he and Gay were public school employees, Gay being in charge of the fund raiser, having the family credit card used to purchase the fund raising items then not presenting the items and with Gay receiving cash; this is tantamount to embezzlement. (T. III, pp. 362-364).

The use of the credit card, the family credit card by Gay would be without the knowledge of Peirce but more sinister Gay would take the credit card from Peirce without his knowledge, and from his wallet. (T. III, p. 366).

However, of all the transgression, and as serious as they were, the rouse presented by Gay insofar as it concerns the income tax probably "takes the cake." The facts on this point are extensive and the record bears them out clearly. Starting in approximately 1995 and in the family hierarchy, it was Gay's responsibility to prepare and to file the tax returns. Did she do it? No. Did she deceive Peirce? Yes. Is there a substantial tax burden now on this couple? Without question. As mentioned, the record is complete on this point. Now the couple is saddled with a huge tax burden and for which Gay now places upon Peirce in some strange way; given that she was the person responsible for the filing of the tax returns and the failure of the family to address the tax issue given the deceitful manner in which she explained to Peirce that the taxes had either been filed, paid or an extension sought. (T. III, pp. 366-372).

Moreover, and to further erode the trust between this couple and to bring about further pressure upon Peirce, Gay drops yet "another bomb" on Peirce when she reveals the issue of a child born out of wedlock and for which she never revealed or

confessed. (T. III, p. 375).

As the Court so well knows the function of a principal at an elementary, middle or high school is an enormous and important job. Not a day goes by that our state newspaper reports an infraction or a serious offense occurring in our public schools. As principal of Gentry High School (notwithstanding Peirce's imposing size), Peirce occupied the position of both a father and a mentor to many a child in the Indianola city school system. As such, his representation to both the students and faculty was very important. This being said one would have thought that Gay would have supported Peirce in his profession, as he supported her. Notwithstanding, Gay chose never to appear at any school function that Peirce had while the principal at Gentry High School in Indianola. This is certainly strange and put yet and again an additional strain on the marriage as well as Peirce. (T. III, pp. 376-377, 424-425).

Even more heinous was Gay's attitude in charging (unfounded accusations) of Peirce's alleged adulterous relationship with one of his faculty at Gentry – and further Gay demonstrated her attitude in telephoning this alleged paramour, Gloria Sample – at work. (T. III, pp. 383-385, 389-393, 426-427).

All of the above which was confirmed by the lower court in its Judgment of October 2, 2006, and more as is demonstrated in the record, brought about and caused the separation of the parties and the conclusion by the lower court that Peirce was entitled to a divorce. Furthermore, the effects of these activities were shown on Peirce's health and demonstrated outwardly by Peirce and for which his sister, Adrian Haynes (T. III, pp. 252-259) and co-worker, Gwen Melton, testified and confirmed. (T.

III, pp. 419-427).

In addition, the following is further evidence of the cruel and inhuman treatment of Peirce at the hand of Gay.

T. III, pp. 378-379 - lack of trust.

T. III, p. 379 - stopped having sex.

T. III, p. 393 - did not attend church for ten (10) years.

T. III, p. 393 - did not attend church with Peirce or her son, Jae.

T. III, pp. 405-406 - unauthorized possession and use of credit card in the name of Peirce; and

T. III, p. 407 - extensive cell phone/phone bill.

What more proof is needed by the given standard of "...preponderance of the evidence." More than enough, Peirce has sustained his burden; which has been substantiated by the findings of fact and conclusions of law of the lower court – this Court should sustain that Judgment.

II. The lower court did not err in dismissing Gay's Complaint for Separate Maintenance.

Clearly Gay did not sustain her request for separate maintenance. In fact, and to the contrary the Court concluded that Peirce was entitled to a divorce, absolute from Gay. That standard is frankly higher, more restrictive and "trumps," if you will, the allegation of Gay's request for separate maintenance.

Correctly cited by Gay is the test (two prong) announced by ***Lynch v. Lynch***, 616 So.2d 294 (Miss. 1993).

a. Separation without fault; and

b. Wilful abandonment of the wife by the husband accompanied by a refusal of support.

In the case at bar neither prong is met by Gay; in fact she (Gay) was the reason for such separation.

It cannot be said that the Chancellor misapplied the law or the facts in concluding that Peirce was entitled to a divorce and Gay was not entitled to separate maintenance; the facts of this case frankly do not support such an award. For this reason this Court should affirm the lower court's decision in not granting Gay separate maintenance.

III. The lower court did not err in granting Peirce a divorce, entered a reasoned and well planned Judgment which should remain in full force and effect; therefore, the Court should not remand this matter for additional review as it applies to Peirce's PERS account through the State of Mississippi or any other retirement account as all such information was properly before the Court.

Gay correctly sets forth the "laundry list" as directed by ***Ferguson v. Ferguson,*** 639 So.2d 921 (Miss. 1994). In the lower court's decision of October 2, 2006 (R. 32-57) the Court exhaustively and very particularly outlined the ***Ferguson*** factors as it applies to the equitable division of the marital assets.

The cause of complaint as suggested by Gay was that the court's reasoning was "skewed" for failure of Peirce to outline his retirement through PERS. In response, and initially, Peirce would show that during his cross-examination (T. II, p. 175) he was

questioned about the deductions from his payroll check from Columbus and/or Gentry High School. Counsel for Gay had the opportunity (notwithstanding whether the retirement appeared on Peirce's amended and/or original 8.05) to cross examine Peirce concerning retirement. There was no question that Peirce was deducting (mandatorily) retirement from his gross income to arrive at a net monthly income. It was not Peirce's fault, it was counsel opposite's fault for not exploring and diligently cross examining Peirce concerning this issue.

Moreover, and without question every state employee within the State of Mississippi (including members of this court) are subject to the retirement dictate of PERS. Not a soul in this state is without knowledge of such information. Additionally, and as astute as counsel is for Gay, they cannot now be heard to complain about their failure of cross examination and exploration of Peirce's retirement account.

Now we must also take the issue one step further. Gay failed to file or request any post-trial/post-judgment review of the lower court's Judgment of October 2, 2006. As such, appellate review is limited. ***Graves v. Maples,*** 950 So.2d 1017 (Miss. 2007).

In review of ***Graves***, *supra.*, this writer directs the Court to ***McLemore v. State,*** 669 So.2d 19 (Miss. 1996) which stated:

> In ***Jackson*** we enunciated that there are certain errors that parties must bring to the attention of the 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 new trial where it is contended that the verdict is against the overwhelming weight of the evidence, and the denial of a continuance...The rationale for this rule is based on the policy of giving the trial judge, prior to appellate review, the opportunity to consider the alleged

error.

Id., at 24. (Citation ommitted).

Gay cannot now be heard to complain of the issues for which she should have addressed in the lower court. Notwithstanding, the lower court had before it all information that it needed to satisfy the ***Ferguson*** factors. An additional review would not have produced an otherwise different result. Again, the lower court's decision should be upheld.

IV. The lower court was correct in not granting Gay an award of periodic or other type alimony.

In the fourth proposition Gay seems to conclude that the court (not having sufficient evidence before it concerning the retirement accounts of Peirce) made a decision without first classifying or identifying all marital assets. This is not so.

First we must go back to Proposition III and/or II to point out and again that counsel for Gay failed to cross examine Peirce concerning what was already known – he was a public school employee, he was subject to mandatory retirement, he disclosed the mandatory retirement deduction from his gross income and there is no question whatsoever that as an employee of the public school system (which they knew he had been for many, many, many years) he had to have a retirement account; just like Gay. "Where's the beef?"

Rightly, ***Armstrong v. Armstrong,*** 618 So.2d 1278 (Miss. 1993) with the addition of ***Ferguson***, *supra.*, sets forth on a reasonable basic basis the award and/or grant of alimony, periodic or otherwise. But the Chancellor has the authority to adjust

the equities and to thereafter divide the marital assets. What Gay seems to forget are a number of salient points set forth in ***Armstrong,*** *supra.*, to-wit:

1. the income and expenses of the parties;

2. the health and earning capacities of the parties;

4. the obligations and assets of each party;

9. the tax consequences of the spousal support order;

10. fault or misconduct;

and most importantly,

11. wasteful dissipation of assets of either party.

With this in mind, remember that by Gay's negligence, by Gay's overt and intentional acts, she has caused this family (the McIntosh family) to be saddled with a substantial income tax liability. Whether explicitly set forth by the lower court in its Judgment of October 2, 2006, or implicitly set forth, the fact remains somebody has to pay the taxes and, as this Court so well knows, it is both joint and several.

With this understanding, Gay's argument is without support either in fact or in law. In the adjustment of the marital assets, the court has the ability to adjust the equities and this includes the granting or not granting of periodic or other alimony. Clearly given the facts (and most certainly the tax liability upon the McIntoshs) the Court concluded rightfully that Peirce could not afford nor was Gay entitled to periodic or rehabilitative alimony. If you consider the factors set forth in ***Armstrong,*** *supra.*, particularly the wasteful dissipation of assets and the unreasonable tax burden caused by Gay's actions, the Court obviously and clearly concluded that periodic alimony was

not a proper vehicle to afford Gay with additional and monthly support. Moreover, Gay is in good health, is employed, earns a substantial salary, is provided child support for the minor child, has a home, has retirement and many other factors which the lower court clearly considered in not granting Gay alimony, periodic or otherwise.

> Alimony...should not be taken as an isolated subject. It is to be considered along with or as a part of the total package of judicial consideration to be directed to any case where a final dissolution of the marriage is determined to be proper. Where marital assets, as determined by the court according to the ***Ferguson*** guidelines, are not sufficient to accomplish the objective of equitable division, the chancery courts are not prohibited from granting periodic alimony, but it should be stressed that "finality" of the economic relationship between husband and wife is a goal to be achieved whenever possible.

Mississippi Divorce, Alimony and Child Custody, 6th Ed., §11:1, 376.

V. No attorneys' fees should have been granted.

The lower court has the ability to determine (as it is within the discretion of the chancellor) to award, or not award an attorney fee. ***Creekmore v. Creekmore,*** 651 So.2d 513 (Miss. 1995).

The award of an attorney fee in a divorce case is not made unless there has been a firm establishment of the inability to pay, and only in the event that the fee is fair and compensates for the actual services rendered in behalf of the litigant.

It is difficult to say that the Chancellor abused her discretion in granting Gay at least in part some attorney fee for her prosecution and/or defense in the case at bar. Obviously Peirce is of the opinion that no fee should be granted whatsoever; however, it is a discretionary call and only if this Court can demonstrate that the Chancellor

abused that discretion would there be a cause of complaint by anyone.

That being said, the services rendered in behalf of Gay, given the facts, given the nature of the complexity of the litigation and other factors, were called into question by the Chancellor in obviously granting the attorney fee that was awarded. However, given the fact that Peirce was successful in his divorce, it would only seem prudent that no attorney fee be granted in behalf of Gay. For this reason, the lower court's decision should be reversed and this Court should find that no attorney fee should be awarded Gay.

VI. Gay failed to file any post-trial motion relief pursuant to Rule 59, M.R.C.P. (or otherwise) therefore she waived the benefits of that post-trial review which is substantial before this Court as it precludes her argument on many issues.

It has been made clear by Peirce that Gay did not seek post-trial review following the court's decision of October 2, 2006. That being said and armed with the authority provided by ***Graves v. Maples,*** 950 So.2d 1017 (Miss. 2007), the appellate review afforded Gay is limited. It is limited by those issues which can only be raised given Gay's failure to perfect or rather employ a post-trial review of the Chancellor's decision. Because the post-trial review was not instituted, this Court is "hamstrung," if you will, and cannot address issues such as e.g. sufficiency of evidence, weight of evidence, or other issues which give the trial court the opportunity to test the previous decision and thereby afford this Court a full and complete review of the case at bar.

Those things being said, Peirce would demonstrate and show clearly to this

Court that many, if not all of the issues raised by Gay should be denied given her failure to seek post-trial review.

CONCLUSION

This Court should affirm the lower court's decision of October 2, 2006; with one exception, that the Court conclude that no attorney fee should be granted to Gay. The Court should affirm this decision and provide the parties with a much needed divorce. To reunite this couple would further exacerbate a clear and obvious bad situation; which would go from worse to really, really bad. The Chancellor was thoughtful in her decision and it should be upheld as written.

Respectfully submitted, this the 18 day of June, 2007.

PEIRCE McINTOSH

BY: _____
JOHN H. DANIELS, III, MSB [redacted]

DYER, DYER, JONES & DANIELS
Post Office Box 560
Greenville, Mississippi 38702-0560
Telephone: (662) 378-2626

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I, John H. Daniels, III, attorney for Appellee, Peirce McIntosh, certify that I have this day mailed, via regular U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to:

Honorable Marie Wilson
Chancellor for the Ninth District
P. O. Box 1762
Greenville, MS 38702-1762

Edward D. Lamar, Esq.
Henderson & Dantone
P. O. Box 778
Greenville, MS 38702-0778

This, the 18th day of June, 2007.

JOHN H. DANIELS, III, MSB [redacted]