

Supreme Court of Mississippi

TERRY F. SWIDERSKI

APPELLANT

versus.

NO.2007-CA-01517

CYPRIANNA ELLEN (HORMANSKI) SWIDERSKI

APPELLEE

BRIEF OF APPELLANT

(ORAL ARGUMENT NOT REQUESTED)

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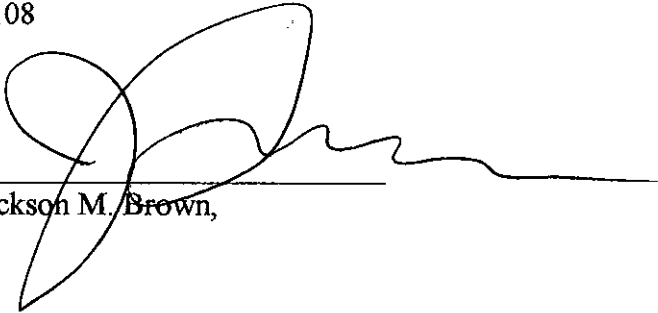
APPELLEE

Certificate of Interested Parties

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

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Statement of Issues.

Appellant, Terry F. Swiderski (hereinafter Terry), asks for a review of the following (C.P. 116-118, Statement of Issues):

1. Refusal of Terry's post "Judgment" request for findings of fact to undergird the conclusions. Stated differently, there is no separate opinion containing factual findings and the "Judgment" itself, contains either insufficient findings or no facts to support the conclusions. Moreover, the vast weight of the credible evidence support different inferences upon which to draw logical conclusions.

2. Child Custody. The *Albright* facts are insufficient to warrant a finding that the children's best interests would be served by granting custody to the mother. The convincing evidence supports an opposite finding and those facts are totally unaddressed by the "Judgment." In effect, the "Judgment" awarded custody to the mother's ever-changing series of babysitters while she was at work overnight and/or out- of- state. The "Judgment" breached the Party's contract for Dad to detrimentally give up his Texas practice and become "Mr. Mom."

3. Child Visitation. The "Judgment" mirrored the "Temporary Order" allowing "other visitation" considering the parent's work schedule which proved unworkable. The proof showed there was no "other visitation" even when the mother worked overnight or out-of-state for days. In effect, the "Judgment" awarded the Mother's babysitters the "other visitation" to the exclusion of Terry and the children's life-long surrogate grandmother.

4. Child Support. Not only does the award deviate from the statutory guidelines, it is unsupported by the record; it is arbitrarily speculative without a predicate. In effect, the

“Judgment,” is in breach of the agreement, forces the father to get out of town/state to work, after he detrimentally gave up his one county Texas practice to become “Mr. Mom.”

5. Equitable Division. The property division is not supported by the record and is miscalculated. Moreover, the “Judgment”’s phrase “as divided by the Court at trial” is virtually unascertainable now, even with the court reporter’s transcription.

6. Alimony. The “Judgment” neither delineated the case law factors nor state why some form of alimony was not appropriate under the facts. The proof showed that the parties agreed that the husband would give up his one county Texas practice and follow wife to her “dream job” to become the breadwinner while father became “Mr. Mom.” “The Judgment” contains no findings to analyze upon review.

Statement of the Case.

This domestic quarrel is centered on child custody/visitation with peripheral issues of support and equitable property division without an award of alimony.

Father, Terry F. Swiderski (hereinafter Terry), sued Mother, Cyprianna Swiderski (hereinafter Cyprianna) after she said she wanted a divorce. The lower court temporarily awarded Cyprianna custody of the three children, support, and limited Terry’s visitation, unless otherwise agreed, as well as use and possession of the marital abode. (CR 18-20; R.E. 3-5 ;) Subsequently, the parties agreed to no-fault divorce reserving the remaining issues. (CR 55-56)

After a two day trial, followed by an out-of state deposition, Cyprianna was granted a “Judgment” (C.R. 79-93) awarding her permanent custody, subject to the same limited visitation as contained in the “Temporary Order,” additional child support, a division of marital assets, and a

denial of any alimony to husband/father (CR 91) even though he gave up his Texas practice to follow Cyprianna to her "dream job" and become "Mr. Mom."

Terry asked the chancellor to reconsideration or at least opine factual findings upon which to base the "Judgment" (CR 94-105) but he was denied in toto (C.R. 106). Terry appeals. (CR 106; 111-122)

Statement of Facts

The "Temporary Order" (RE 3-5; CR 18-20) awarded Cyprianna temporary custody of three children (§1), monthly child support from Terry in the sum of \$264.00 (§3), use and possession of the marital rental abode and contents except for Terry's personal belongings and items he needed for his veterinary practice (§5). The court allowed visitation:

"2. [The parties] are encouraged to agree on Terry's visitation considering their respective schedules. The Court expects an agreement, but if they [can't] then Terry shall have []:

"a. [first and third] Weekends . . . on Friday when school is dismissed until 4:00 [on] Sunday.

...

"c. [each party] shall be liberally permitted at reasonable hours to have telephone contact with the children . . . Neither parent shall refuse to answer the phone . . . to deny the other [] contact. . . . messages . . . should be returned as soon as possible.

"Should a conflict arise [over reasonableness] then Terry shall have telephone access . . . on Wednesdays between 6:00 and 7:30 p.m.

"d. If Terry is unable to [visit], then Ellen Swiderski, Terry's mother, may exercise the visitation in his place.

"11. Neither [shall] transfer, encumber, conceal or otherwise dispose of any marital property

"12. All other issues are reserved"

The case came to trial in late April 2007. Uncontested facts reveal that Terry and Cyprianna met at LSU vet school. Terry graduated and went into private practice in Magnolia, MS. Cyprianna continued her veterinary studies at LSU two hours away, they married and Cyprianna kept her Baton Rouge residence. Terry secured a loan for a home with acreage. Cyprianna's name was put on the deed. Their first child, Katelyn, was born July 27, 1996. Terry's mother, Mrs. Ellen Swiderski (hereinafter Ms Ellen), age 71, and Cyprianna's father, Mr. Hormanski, age 78. (Tr. 257) helped with Katelyn while Cyprianna continued her studies and Terry worked. (Tr. 11-12) Cyprianna graduated with a PhD and moved to Magnolia and practiced with Terry. Sarah, the second child, was born on May 21, 2000 (Tr. 10). Ms Ellen began taking a more active role in the children's care. Out of state opportunities became available and Terry, Cyprianna, the two girls, and Ms. Ellen moved to Texas. Matthew, the third child, was born December 29, 2002. (Tr. 11-12). Cyprianna breast fed all three children.

A part time job opened at Mississippi State and Cyprianna took it. Terry, Ms Ellen and the three children remained in Texas. Later, Cyprianna was offered a valuable teaching position at State's Vet School. Cyprianna and Terry discussed MSU's offer and agreed: Cyprianna would take the job and become the breadwinner; Terry, would give up his local Texas practice, and with Ms Ellen's continued help, would become "Mr. Mom" (Tr. 116; 127; 205) and start a part-time practice in Starkville. Terry moved Cyprianna, Ms. Ellen and the three children into a MSU rental. Terry returned to Texas and concluded his practice and then moved to Starkville with his family. Cyprianna negotiated the purchase of some "Highway 12 property. Since Terry was just starting his part-time vet practice, the loan was made solely on Cyprianna's income.

The children started school. Terry and Cyprianna separated in June of 2006. Terry was 41

years old and Cyprianna was 44 at trial.

The case became contentious.

Cyprianna claimed her and Terry's agreement worked phenomenal for a week (Tr. 205) until he began hanging around the vet school soliciting customers.(Tr.207) Cyprianna said, for the most part, visitation was working under the "Temporary Order" and she had been a perfect mother.

On the other hand, Terry said, corroborated by Ms. Ellen and Dr. Mary Anne Busenitz,^{2/} the "Temporary Order" was not working. Not only had he sued Cyprianna for contempt (CR 33-35) for refusing to give him his personal things and veterinary tools (Tr. 43;79) as directed by the "Temporary Order," he complained, *inter alia*:

*Terry primarily took care of the children with Ms Ellen's help until they were locked out of the rental.(Tr. 30; 41;42;45;48). He attended to her personal needs. All she had to do was come home, relax, eat and go to bed (Tr. 19)

*Terry felt compelled to file for divorce after Cyprianna told him they were getting a divorce (Tr. 17; 19) when she threatened him with signing papers exactly the way she wanted or he would never see the children again (Tr. 20; 52).

*Terry's hours were flexible having just starting a part time practice; he only worked by appointment and he did no emergency work (Tr. 48)

●Confirmed by Ms Ellen: Terry started working part-time but because there was not enough money to make both payments [rent and Hwy 12 mortgage] he had to

² Ms. Ellen had been her grandchildren's live-in surrogate for about 5 years. She did the children's cooking, bathing, clothes washing, chauffeuring, grocery shopping, homework help, took them to the doctors, etc. She was ready, willing, able and desirous to continue her role. (Tr. 114;116) Mrs. Ellen was corroborated by Dr. Mary Anne Busenitz (Ct R. P. 102-244) as well as Cyprianna's E-Mail (Ct. R. P. 339-344; R.E.25-26).

start working more. (Tr. 129). Terry scheduled his out-of-town work when Cyprianna was not on clinics. (Tr. 130)

*Cyprianna, after forcing Ms Ellen out of the rental (Tr. 120,) had hired at least four different full-time baby sitters in the seven months following the Temporary Order and trial. At least one of the sitters, Valerie, had been abusive to Katelyn and Matthew, and on one occasion had been too drunk/hung-over to babysit. (Tr.33)

*Cyprianna refused Terry and the children any "other visitation" or "telephone contact", other than the least mandated by the "Temporary Order", regardless of her long, sometimes over night work, emergencies, and symposiums that lasted for days. (Tr. 44)

- Corroborated by Ms Ellen (Tr. 124) and Dr. Mary Anne (Tr. 173) and admitted by Cyprianna (Tr.168)

*Often, Cyprianna would refuse to answer the telephone or allow the children to return messages. Sometimes, Cyprianna would turn her phones off so she would not have to cope with any crises, some of which involved the children. (Tr.44) Sometimes she could not be located (Tr. 121).

- Confirmed by Ms Ellen (Tr. 120-121)
- Corroborated by Dr. Lee Tyner of the vet school ³ / (Tr. 267).
- Corroborated by Dr. Mary Anne Busenitz (Tr. 183)
- Corroborate by Matthew's school teacher (Tr. 5-8)

*Cyprianna was unstable and unreasonable having discontinued her Prozac (Tr. 19-20; 49)

*Cyprianna refused to produce her financial records (CR 75) but Terry produced his. (Tr.51)

*Cyprianna did not attend Sarah's graduation, preferring to talk with Dr. Mary Anne Businetz on the cell phone for an hour in the school parking lot. (Tr.165-166).

³MSU Vet School Administrator Lee Tyner testified that Cyprianna was one of State's most productive clinicians but occasionally he had to look for her and had called Terry trying to locate her. (Tr. 264-267),

*There have been times that Cyprianna failed to get Katelyn to her soccer games or attend them. (Tr. 51-52)

*Cyprianna had lost her temper, tackling Katelyn off the bicycle, striking her multiple times causing Katelyn to escape the beating by running and locking herself in the house. Because Cyprianna was out of control, Terry would not let Cyprianna take Katelyn fearing for her safety. (See audio tape exhibit Ct. R. P. 101)

- Corroborated by Ms Ellen (Tr. 123) and the Tape Recording Exhibit (Ct. R. P. 101).

*Cyprianna became upset with Matthew and screamed at him for interrupting her while she was on the phone, shaking him so hard he dropped his milk (Tr. 26) Cyprianna spanked Matthew for refusing to tell Cyprianna that he loved her when he continually said he loved his grandma (Tr. 48)

* Matthew became sick at day care. The school could not reach either Cyprianna or babysitter Valerie because their phones had been turned off or would not answer. Terry was notified and Matthew was picked up. (Tr. 54-55)

- Corroborated by Matthew's teacher :(Tr. 5-6)

- Ms Ellen corroborated another occasion when Katelyn had a school accident and the school could not find Cyprianna (Tr. 120-121)

*Cyprianna was a Bulimic (Tr. 142)

- Corroborated by Cyprianna's e-mail (Ct. R. P. 340) as well as Dr. Mary Anne. (Ct R. P. 340).

*Terry believed that due to Cyprianna's mental problems, her sub-par coping temperament with the children, coupled with her onerous work schedule, with Ms Ellen's help, it was in the children's best interest that he be awarded custody. (Tr.

- Confirmed by Ms Ellen (Tr. 124)

*Cyprianna had hired at least 4 different full time baby sitters following the "Temporary Order" and trial (Tr. 33)

Terry put Cyprianna on the stand and she was cross-examined:

√Cyprianna admitted hiring at least two different full time baby sitters following the “Temporary Order” and trial. (Tr. 211) with backups (Tr.214)

√Cyprianna admitted she had previously swore that Terry had made “serious hurtful allegations about her, none of which were remotely true; he had accused her of having a bad temper.”When pressed, Cyprianna confessed sending a 3/31/06 E-Mail (RE 24-26; Ct. R. P. 243-244) saying:

⌘Her depression was looming which made her short tempered and intolerant of her colleagues (R.E. 25; 2nd ¶, 2nd sentence; Ct. R. P. 243).

⌘Cyprianna’s life was intruded upon by her work (R. E. 25, 2nd ¶5th line;Ct R. P. 243)

⌘Cyprianna feared she could not measure up and that the first proof of this comes when she couldn’t keep promises. It becomes obvious that she had few friends because they, like her family, could not count on her. (R. E. 25-26, 2nd ¶, next to last line on first page and the 1st 2 lines on 2nd page; Ct. R. P. 243-244)

⌘Cyprianna needed help to make it to the lake, finish a few things, and keep the greatest friendship she ever had growing. The worst thing that could happen to her would be to not make it to the lake. The 2nd worse would be to not use this opportunity to grow [their] friendship. She needed to get a few more things off her plate and then head out. She hoped Mary Anne could see she was moving a mountain of sorts - because Mary Anne was so important to her. (R. E. 26, 2nd page, 1st full ¶; Ct. R. P. 244)

⌘She needed Mary Anne’s help [] because she had been having a panic attack for the last two days and it was escalating, her job was sucking her breath out with a vengeance. She could not think clearly, her head was flooding with thoughts of not measuring up at school and as a mother, her experiments not getting done, and the things she had not completed that are way overdue which is now being seen by other s. (R. E. 25, 1st ¶, Ct. R. P. 243)

●Ms Ellen had previously testified about Cyprianna’s job stress (Tr. 121)

⌘ She lived a life [] kept together by a thread but that the sad part is that she didn't use the thread to run her whole life. Her mom-in-law [Ms Ellen] shops, cooks, does home work with the kids, carts Sarah to ballet, sits in the pick up line, does the laundry, feeds the pets - everything that she should do (R. E. 25, 2nd ¶, lines 9-12, Ct. R. P. 243)

Cyprianna admitted she had made herself hand written notes (Tr. 139), the day before

Terry's birthday, listing her "Issues:"

⌘ Patience; Terry; Aggressive behavior; tongue keeping, Security; Insecure; Control; Children X; Time issues w. work, House new 12; Childcare Help, Death, Asking for what you need - 'hearing you", Religion; NOT CALL; BEING LATE; Poor word choice -big problem for me; Same thing lets get closer give more power (Tr. 140)

● Ms Ellen confirmed Cyprianna was always late on everything (Tr. 125)

Cyprianna also wrote in another E-Mail dated 3/5/06:

⌘ the only thing that sings to me is the issue of control. Being a recovering bulimic I'm sure you know much about my issues with control".(R.E. 22, 2nd page, 2nd full ¶; Tr. 142; Ct. R. P. 340).

⌘ Cyprianna admitted being served with a subpoena duces tecum for her to produce her financial records on March 26, 2007, but she refused to produce them. (Tr 143; CP 75)

⌘ Cyprianna admitted she was again served with another subpoena duces tecum for her to bring her financial records to the trial (CR 77), but again, she refused to produce them. (Tr. 143)

√ Cyprianna testified she did not recall if she was served to produce her credit card statements (Tr. 149)

⌘ Cyprianna admitted she previously had sworn she had told the marriage counselor, Dr. Anna Dunn, and Terry, that she was angry with Terry and hated him for allowing her to take the MSU position, as well as swearing that during a counseling session, Dr. Dunn told Terry that it was very cruel for him to tell Cyprianna that Dr. Mary Anne Businetz was the cause of the divorce and to demand that Cyprianna discontinue the friendship. (Tr.

145).

√Cyprianna admitted that in discovery, she listed Dr. Dunn, a licensed psychiatrist, as an expert on her case, who would render an opinion regarding Terry's abuse.

√Cyprianna admitted that after listing Dr. Dunn as her expert, she was notified that Dr. Dunn's deposition would be taken by Terry and that she and her attorney appeared and participated. (Tr. 145; 146)

Cyprianna was pressed about Dr. Dunn's deposition testimony and the events that occurred::

⌘ Cyprianna admitted that Dr. Dunn had testified she never told Terry that it was very cruel for him to tell Cyprianna that Dr. Mary Anne was the cause of the divorce and demand that Cyprianna end the friendship. She further admitted, in fact, that her attorney asked the same question several times and Dr. Dunn again denied making such a statement (Tr. 145).

⌘Cyprianna admitted that during Dr. Dunn's deposition, her attorney asked Dr. Dunn questions about Cyprianna but Dr. Dunn refused to answer because Cyprianna had not given her a release. (Tr. 145-146)

⌘ Cyprianna admitted that after Dr. Dunn refused to answer her attorney's questions about her since she had not given a release, and then, she and her attorney took a short recess but even after the deposition resumed, Cyprianna still would not give Dr. Dunn the release, on the advice of her counsel (Tr. 146)

⌘Cyprianna was asked why she didn't have Dr. Dunn present to testify in her behalf, even though she had listed the doctor as her expert to testify as to Terry's abuse, her attorney stipulated that Dr. Dunn had moved. (Tr. 146-147)

⌘ Cyprianna admitted she had sworn in Interrogatory No. 14 that Ms Ellen only had a grade school education that limited her ability to help Katelyn with homework since that was what her understanding was at the time she answered. (Tr. 147-148)

- Ms Ellen had testified earlier she had in fact graduated from high school (Tr. 113). Moreover, Cyprianna's E-Mail conclusively shows what Ms Ellen did in attending to the children (R.E. 15, 2nd ¶)

⌘ Cyprianna confessed she had been on Prozac at least 6 times since 1988. (Tr. 148)

⌘ Cyprianna admitted she had asked Terry for the divorce on his birthday but that she had previously sworn in discovery that Terry had sued her out of the blue. Her explanation: she didn't expect Terry to sue her. (Tr. 148-149)

⌘ Cyprianna recalled the Katelyn "bicycle incident," but in opposition to Terry's and Ms Ellen's testimony, (Tr. 123), she denied tacking Katelyn off the bike and striking her in the back. (Tr. 149-150)

⌘ Cyprianna corroborated Terry and Ms Ellen that after the bicycle incident, being upset, she called her attorney's office and was instructed to leave. Her explanation: Terry would not get out of her car. (Tr. 150)

⌘ Cyprianna admitted that part of her MSU duties required her to give 15 annual didactic lectures which required intensive and extensive preparation. (Tr. 150)

⌘ Cyprianna admitted that on 4/16/06, she had spent the night with Mary Anne at the Best Western rather than staying with her children (Tr. 150-151)

⌘ Cyprianna admitted arriving home at 10:45 p.m. on 4-30-06, because she had taken off work, driving to Tuscaloosa to eat with Mary Anne. (Tr. 151-152)

⌘ Cyprianna denied returning home at 5:30 a.m. on 5/2/06 but admitted that she had clinic and emergency duty from 4/24 - 5/7/06 and that on certain days she could not go home to be with the children (Tr. 152)

- Corroborated by Ms Ellen that she was able to come home and eat. A lot of times she be in by 8:00, sometimes 9:00 and sometimes later. If she had clinic you wouldn't know when she would come in. (Tr. 117)

⌘ In Admission Request No. 8, Cyprianna was asked to admit that on 5/4/06 she got home at 1:00 a.m. and she responded that on certain days she could not go home to be with the children (Tr. 152-153)

⌘ After quibbling, Cyprianna finally admitted she traveled to Alabama to visit Mary Anne on 5/10/06 (Tr. 153)

⌘ After more pressure, Cyprianna admitted she had clinic duty from 5/15 - 5/22 as well as emergency duty which would not allow her to go home and be with the children but added, it was an exception. (Tr. 153-154)

⌘ Cyprianna admitted that in Admission Request No. 14 she had denied arriving home at 1:30 a.m., explaining she got home about midnight after visiting Mary Anne (Tr. 155)

⌘ Cyprianna admitted that in Admission Request No. 15 she had initially denied arriving home at 10:00 p.m. but added that there were certain days . . . (Tr. 155)

√ Cyprianna denied not seeing her daughter Sarah graduate having spent the entire event on the telephone with Mary Anne in the parking lot (Tr. 157- 158). On the other hand, Dr. Mary Anne remembered the occasion well:

⌘ Cyprianna and Mary Anne had a conversation while Cyprianna was in the school parking lot. Mary Anne heard Terry tell Cyprianna to come on, but Cyprianna did not stop talking for an hour and missed Sarah's graduation entirely. (Ct. R. P. 164-167)

⌘ Cyprianna admitted she had previously denied spending the day (5/26/06) with Eleanor at the Chester Hotel, but then added that since she was the coordinator of the house office program at MSU and Eleanor was her resident and graduate student, she had taken her clothes to her at the Chester. Terry was fully aware of this and why. (Tr. 158-159)

⌘ In Admission Request No. 19 Cyprianna denied leaving home about 6:30 and not returning that night or morning of 5/26/06 but added that week had been difficult for Mary Anne and there were many days she visited to give moral support and that she believed she was in Tuscaloosa the afternoon of May 26 and into the early evening (Tr. 159)

⌘ Cyprianna denied that Terry came to her office at 8:00 a.m., on 5/26/06, to find out where she had been all night and telling him she had worked all night (Tr. 159) but added she believed she was in Tuscaloosa that day into the early evening giving Mary Anne moral support. (Tr. 160)

⌘ Cyprianna admitted being at a Kentucky ACVIM conference from 5/30/06 thru 6/4/06 (Tr. 160-161).

⌘ Cyprianna admitted she had been asked to admit that, on May 19, 2006, she came home about 2:00 o'clock and had sworn she had clinic duties and emergencies. On the stand she added she had come home and spent time with the children and had returned to work so she didn't have to endure Terry's abusive behavior. (Tr. 157)

⌘ Cyprianna listed Dr. Dunn as an expert on her behalf to render an opinion about Terry's abuse. In fact, at Dr. Dunn's deposition, Cyprianna did not ask Dr. Dunn any questions regarding Terry's alleged abuse and also refused to give Dr. Dunn a release to testify but Terry had given his. Moreover, Cyprianna chose not to ask Dr. Dunn about Terry's alleged abuse even after listing Dr. Dunn as her expert who would render an opinion regarding Terry's abuse. (Tr. 146)

⌘ Cyprianna admitted she had denied a request to admit she spent the week of March 30 - April 7 with Mary Anne in Tennessee *cabin* but when pressed she admitted spending that week with Mary Anne in a Tennessee *condo* (Tr. 162)

Cyprianna's credibility was further tested with a series of Dr. Mary Anne Busenitz

questions:

√ Cyprianna denied choking Katelyn at Mary Anne's house (Tr. 163)

√ Cyprianna denied spanking Katelyn with a spatula in Orlando (Tr. 163)

● Ms Ellen testified Cyprianna had used the spatula on Katelyn (Tr. 125)

⌘ Cyprianna admitted that Dr. Mary Anne had told her baby sitter Valerie had chased Katelyn, who escaped by locking herself in the bedroom, and the lock had been broken (Tr. 164-165)

✂Cyprianna admitted that Dr. Mary Anne told her babysitter Valerie would stop Matthew from breathing, by pinching his nose, to force-feed him (Tr. 165)

✓Cyprianna denied telling Dr. Mary Anne that she had to take off work because babysitter Valerie had called too drunk to drive the children. (Tr. 165)

✓Cyprianna denied telling Mary Anne that when she went to a Texas conference she left the children with Valerie. Matthew became sick at school but no one would answer the telephone (Tr. 165)

✓Cyprianna denied ever losing her temper and cursing Mary Anne (Tr. 166)

✓Cyprianna admitted becoming upset with Mary Anne when Mary Anne canceled on Cyprianna and the children for a Tuscaloosa swim (Tr. 166)

✓Cyprianna denied cursing Mary Anne while Mary Anne was in a meeting (Tr. 168)

✓Cyprianna denied telling Mary Anne that during a two week period she would not answer Terry's phone calls since the court order only provided for Wednesday contact, and "that's- that." (Tr. 168)

✓Cyprianna denied telling Mary Anne she had only eaten with the children maybe five times in a year, she cooked all the time (Tr. 168)

✓Cyprianna denied telling Mary Anne there was nothing more important to her than her job (Tr. 169)

✓Cyprianna denied telling Mary Anne that her intention was to gain sole custody and move out of state to keep Terry away from the children (Tr. 169)

✓Cyprianna denied telling Mary Anne that she forced Terry to change his work schedule

many times after Cyprianna would change her schedule abruptly (Tr. 169)

√Cyprianna denied telling Mary Anne she was fighting for child custody even though she didn't really want them, that she just didn't want Terry to have them (Tr. 169)

√Cyprianna admitted to having hired only two sitters, Valerie and Nicole ~~3~~but when pressed she admitted "Awalla" helped with the kids, *just not weeks at a time* (Tr. 171)

Cyprianna offered direct: She had always been the primary care giver to the children. When it was her weekends to have the children, she was there. Other than conferences, her work required no travel. Her job affords her tremendous flexibility. If her father, Mr. Hormanski helps, she still keeps a sitter. Cyprianna did attend clinics. (Tr. 257-258). Cyprianna also had certain clinic blocks invading her schedule that would not allow her to achieve Terry's visitation during the summer under the "Temporary Order". (Tr.260-261).

- Her father, Mr. Hormanski, testified that Cyprianna was a good mother but she had clinic duty for two week straight periods which continues (Tr. 288)

Terry offered rebuttal, first calling Ms Ellen. (Tr. 295). The court asked what she would testify to and Terry's lawyer stated she would impeach Cyprianna's testimony that she never missed games and would testify that Cyprianna in fact, missed three soccer games and after one of the games Katelyn had to telephone Cyprianna to come pick her up and the last game Katelyn had to call Mr. Hormanski to pick her up (Tr. 295) Cyprianna objected. The court had permitted Ms Ellen to remain in the courtroom after she had testified and that the sequestration rule had been invoked. The court admitted that it caused the problem and sustained the objection. (Tr. 296; 131)

Terry did testify in rebuttal (Tr. 298) and he introduced a tape recording of the bicycle event which was played for the court ⁴/. (Exhibit P3) (Tr. 300-301) Terry testified that he considered filing charges against Cyprianna, but after consultation, decided not to. (Tr. 301)

The party's rested their cases. The court commented that Terry had made a very good case for custody (Tr. 261) and then recessed to allow Terry to take Dr. Mary Anne Busenitz out-of state deposition, *via* Letters Rogatory, in Tuscaloosa, the following week (C.P. 57-74; Ct. R.

⁴ The 7/24/06 audio tape Exhibit recorded the event and Terry was not in Cyprianna's car. A dispute arose over Terry's visitation. Terry maintained no one was at home and no one would answer the telephone, so Terry took the children with him rather than putting them out at the curb. On the tape, Cyprianna contradicted herself several times about who was at the abode to receive the children. The dispute escalated. Cyprianna insisted the children be present to hear what she had to say: Terry filed for divorce and the courthouse papers prove it. Cyprianna told the children to get their things they were leaving. Terry asked Cyprianna to let the children get their things, to quit shoving things around and going through all the drawers, but Cyprianna said: "Excuse me, this is my house [Hwy 12, unsolved by the "Temporary Order]." Terry asked Cyprianna what she had snagged from his desk. Cyprianna responded "anything I want for god's sake." Terry asked Cyprianna what plans she had for the children that day and Cyprianna [screamed:] "F**k you." Cyprianna demanded that Katelyn tell [Terry] why you've been instructed not to answer the phone. [Katelyn said she didn't know]. Cyprianna [voice became louder/angrier told Katelyn]: "Don't tell me you don't know!" [The children were crying. Cyprianna told Katelyn that] "crying "may work on your father, but it won't work on me." [Cyprianna demanded that Katelyn answer] if Cyprianna had ever told Katelyn not to speak to her father. Katelyn said yes. Cyprianna told Katelyn, that's not true, its "Bull S**t." Katelyn said it was true [begging]: "Daddy, stop her." [Terry called the Sheriff telling dispatch Cyprianna] was screaming and the children were in tears; she was acting very ugly and had grabbed and shook one child. [Terry hung up and asked] Cyprianna to calm down and leave. Events then moved outside. [The sounds captured of the "bicycle event" reveal a collision followed by several distinct meat-to-meat contact sounds]. [Terry hollered]: "Hey! [Katelyn cried]" "Oh! Oh!" [Cyprianna told Katelyn to] get in the car. [Terry said] "Cyprianna, Cyprianna, Cyprianna . . . you ought to leave her. I don't think its safe. . . for her to go with you." [Terry called the Sheriff again asking for a deputy:] she's not cooling down and is wanting to whack on my daughter. Terry hung up and told Cyprianna she needed to get in the car, calm down, and go, he was not letting Katelyn leave with her while Cyprianna was acting that way." [Cyprianna called her attorney's office which told her to] "calm down." [Terry also talked with Cyprianna's attorney's office], advising that Cyprianna had "tackled" Katelyn off the bike and he would take Katelyn to Cprianna after lunch when she calmed down. Ms Ellen confirmed that Terry did not let Katelyn leave with Cyprianna (Tr. 123)

Dr. Mary Anne Busentiz, holds a Stanford's bachelors degree as well as M.D. and Psychiatric degrees from Harvard. She is a retired University of Alabama at Birmingham psychiatrist and she had direct and highly relevant knowledge and testified:

⌘ She had told Cyprianna that Valerie had chased Katelyn to hit her for having a bad attitude but Katelyn escaped by locking herself in the bedroom and that Valerie broke the lock to get at her (Ct R. P. 146-147)

⌘ She had told Cyprianna that Valerie was force feeding Matthew by holding his nose and cutting off his air to make him swallow food. (Ct R. P. 148)

⌘ Cyprianna told Mary Anne that baby sitter Valerie had called Cyprianna at work, too sick and hung over from drinking to attend the children, and Cyprianna had to leave work.⁵ (Ct R. P. 149-150)

⌘ Cyprianna, knowing all these things about babysitter Valerie, did not fire her, but kept her employed for two more months. The sitter only quit because she had broken up with her boyfriend and was leaving. (Ct R. P. 149-150)

● Corroborated by Cyprianna's father, Mr. Hormanski (Tr.293)

⌘ After Mary Anne had told Cyprianna about the sitter's abuse and before the sitter quit, Cyprianna, flew to a Texas conference, leaving the children with this sitter. Matthew became sick at day care but the school could not reach Cyprianna or Valerie, both phones had been turned off. (Ct R. P. 182-183). The school, found Terry who came and picked up his son.

⌘ Mary Anne saw Cyprianna refusing to answer Terry's calls and stating that since the court order only required Wednesday contact: "*that's that.*" (Ct R.P. 173)

⌘ Mary Anne was present in the home and saw Cyprianna deny Terry phone calls to the children (Ct R.P. 197)

⁵ Assuming Cyprianna was not at work all night, she either knew babysitter Valerie's condition or did not check the sitter out before leaving for work..

⌘ Mary Anne had kept Katelyn at her home in Tuscaloosa because Cyprianna was hiding Katelyn from Terry and didn't want him to have visitation (Ct. R. P. 156).

⌘ While Mary Anne was hiding Katelyn from Terry, pitifully, Katelyn was so starved for home cooking she literally licked her plate clean. (Ct. R. P. 155-156). Since the divorce, the children don't eat at home, they go out to eat and Katelyn liked eating at home. (Ct. R. P. 180; 250)

- Terry testified that when he picked the children up they were starving and he had to feed them immediately (Tr. 54)

⌘ Mary Anne testified that her daughter had come to her crying, begging her to make Cyprianna stop choking Katelyn - who was screaming and crying that she couldn't breathe. The event even had Mary Anne's 5 year old son crying. Later, Cyprianna told Mary Anne that only by choking Katelyn could Cyprianna control her. (Ct. R. P. 156-158; 296-297)

⌘ Dr. Mary Anne testified Cyprianna whipped Katelyn with a spatula and Mary Anne told Katelyn not to ask her mother for anything else and if Katelyn had needs she should tell Mary Anne's daughter who would advise Mary Anne and then, Mary Anne would attend to it. For example, ice cream but if Cyprianna came in, Katelyn was to hide it under the bed. Ct. R. P. 181-182).

√ Cyprianna admitted she swatted the children with a spatula (Tr. 217)

- Corroborated by Ms Ellen (Tr. 125)

⌘ Cyprianna is an emotional horrid roller coaster (Ct. R. P. 144).

⌘ Cyprianna had terrible mood swings and had done things with the children Mary Anne could not understand She has an explosive temper which got worse over time (Ct. R. P. 144-145; 154; 155)

⌘ Cyprianna has an inability to take pressure well. She scurries around, she gets hyper, she overreacts, she yells, she has a short fuse; a short temper (Ct. R. P. 154; 199).

⌘ Mary Anne became to fear Cyprianna and believed that Cyprianna would kill Mary Anne's horses (Ct. R. P. 188-189).

⌘ Mary Anne declined to testify when Terry asked her to because she was afraid of Cyprianna. (Ct. R. P. 190)

⌘ Mary Anne will no longer take her animals to MSU because of Cyprianna (Ct. R. P. 190; 222). Mary Anne believes that Cyprianna is so mad at her she would kill her horses. (Ct. R. P. 188-189; 191)

⌘ Cyprianna is terrible handling child crises situations; she gets frustrated very quickly; gets hyper and it made Mary Anne nervous. (Ct. R. P. 183-184). She scurries around, gets hyper, overreacts, yells and has a short fuse. (Ct. R. P. 199)

⌘ Cyprianna did not need the children because of her temper (112) and does not know how to be a mother (Ct. R. P. 213; 215-216).

⌘ Cyprianna made Mary Anne a nervous wreck (Ct. R. P. 139) and Mary Anne had been the object of Cyprianna's temper (Ct. R. P. 264)

⌘ Mary Anne invited Cyprianna to 2006 Thanksgiving not knowing Cyprianna's father was in town. Cyprianna wanted to bring him but Mary Anne did not have an extra chair to sit him. Cyprianna got very angry and yelled at Mary Anne because her father couldn't come. Cyprianna called Mary Anne every dirty name in the book and Mary Anne finally hung up. (Ct. R. P. 141-144)

⌘ On one occasion, because Cyprianna was so mad, Mary Anne, fearing for Katelyn's safety, refused to let Cyprianna take Katelyn from her home in Tuscaloosa and Cyprianna had to drive to MSU and come back another day to pick up Katelyn. (Ct. R. P. 217-218).

⌘ Mary Anne invited Cyprianna to attend a dressage meeting in Birmingham. Cyprianna wanted to talk about herself and Terry but Mary Anne didn't want to talk about it at the time and asked Cyprianna to discuss it later. Cyprianna responded: "what about me?" Mary Anne repeated she didn't want to talk about it then and Cyprianna began screaming at Mary Anne saying "what about me?" Mary Anne turned the car around and drove back home and asked Cyprianna to get out. She was tired of being yelled at and dogged if she did not respond the way Cyprianna wanted. (Ct. R. P. 136-138)

● Corroborated by Ms Ellen (Tr. 123)

√ On cross, Cyprianna was asked if she became angry with Mary Anne when asked for a rain-check- on Cyprianna bringing the children to Tuscaloosa to swim. Cyprianna, admitted to a series of questions but denied others about the event. On the other hand Dr. Mary Anne's testimony was piercing:

⌘ [This was] the event that broke the the camel's back; a day that shall live in infamy (Ct. R. P. 218).

⌘ When Mary Anne informed Cyprianna that she, her husband and children were leaving to do something else, Cyprianna went ballistic, yelling and screaming; it went on and on; Mary Anne finally hung up. But Cyprianna continued to call and leave progressively worse phone messages. Mary Anne would not answer because she didn't want to get yelled at anymore. One message left by Cyprianna was that she was en route and that Mary Anne had better be there. In another message, Cyprianna said she was almost in Columbus, and that Mary Anne was not answering, but that Mary Anne had better be there. Then, the last really mean and nasty message, Cyprianna recorded she was at Mary Anne's house and Mary Anne wasn't; that Cyprianna and the children could not get in because the doors were locked. On this occasion Mary Anne had locked up and she never locks her house. Mary Anne and her family did not return home until they were sure Cyprianna had left to go back to MSU. (Ct. R. P. 219221)

⌘ Cyprianna has terrible violent mood swings (Ct. R. P. 144-145)

⌘ Cyprianna's mother-in-law always cooked because Cyprianna was at work. Cyprianna was not usually at home for meals. The kids were bathed and put to bed before Cyprianna got home. Mary Anne witnessed this over a two week period. Cyprianna would be at the vet school at 3:00 a.m.; she was there all the time, being a workaholic and under a ton of pressure from her job. (Ct. R. P. 159-160) Her boss made huge demands on her. (Ct. R. P. 162).

● Confirmed by Ms Ellen (Tr. 121)

⌘ Cyprianna's mother-in-law would make Matthew any color pancake he wanted. Ms Ellen catered to the children. (Ct. R. P.

⌘ Cyprianna's priority was work - not taking care of the children. (Ct. R. P. 163)

●Ms Ellen testified the children were Terry's priority (Tr. 124) and added:
Cyprianna works so many hours she has to hire baby sitters to look after them
more than their mother (Tr. 125)

§Since Matthew was born, Ms Ellen has been with the family twenty-four hours a day
around the clock. She picked the children up from school, cleaned the house, did the
laundry, bought the groceries. (Ct. R. P. 179)

§There was nothing more important to Cyprianna than her job. (Ct. R. P. 161; 290)

§Mary Anne stayed clear of Cyprianna, "she's crazy and I've had it." She's "lost her
freaking mind" (Ct. R. P. 210-211)

§But I got to tell you, she does not need those children because of her temper" (Ct. R. P.
213)

§Cyprianna has a serious control issue. She wants to control every situation and
everyone in the situation" which is what Bulimic's do. (Ct. R. P. 226-227)

§Cyprianna needs parental counseling classes. (Ct. R. P. 194; 216)

§Cyprianna played "head games" with Terry as to whether or not he could visit the
children which made Terry change his work schedule. (Ct. R. P. 302)

●Corroborated by Ms Ellen (Tr. 130)

§Cyprianna is looking for jobs out of the state. Its fifty-fifty: half wanting less work
hours and the other half to spite Terry. (Ct. R. P. 223-224)

About Terry, Dr. Mary Anne said:

♣I've never seen a man fight for his children like Terry , and I've never seen anyone try as
hard as he has; he genuinely adores his children." (Ct. R. P. 200) Katelyn adores him. (Ct.
R. P. 297) Terry's the better parent (Ct. R. P. 194), he's a great guy (Ct. R. P. 195); he's
very good with the children (Ct. R. P. 202) He deserves his kids (Ct. R. P. 239)

- Ms Ellen corroborated Mary Anne having testified that the children were Terry's priority (Tr. 124) Cyprianna would call work, claiming to be sick, and go to Mary Anne's, allowing a stranger to pick up the children (Tr. 125-126)

- ✦ Terry had told Mary Anne from the beginning of her and Cyprianna's friendship what would happen, and how, as she got to know you, things would progress, and bless his heart, he was a hundred percent accurate. It did come true, and "she dogged me just like she dogged him." (Ct. R. P. 200-201)

- ✦ If Terry did not get custody, Dr. Mary Anne recommended to the court that Terry or Ms Ellen pick up the children after school and keep them if Cyprianna was working. (Ct. R. P. 304-305)

- Prior to the "Temporary Order" Ms Ellen at first picked up the children about 50% and then most of the time because Terry had to work more because of the money (Tr. 118)

- ✦ Mary Anne's expert opinion was that Terry and Ms Ellen be allow to pick up the children from school was also requested by Terry (Tr 154) and Ms Ellen especially since the children's care would otherwise be with a hired sitter (225)

- ✧ Compared to Cyprianna's email: She lived a life [] kept together by a thread but that the sad part is that she didn't use the thread to run her whole life. Her mom-in-law shops, cooks, does home work with the kids, carts Sarah to ballet, sits in the pick up line, does the laundry, feeds the pets - everything that she should do (2nd ¶, lines 9-12, Ct. R. P. 243)

Financial Matters

The parties had split a certificate of deposit each receiving \$89,474.00. (Tr. 236; Ct. R. P. 8) Neither of Cyprianna's 8.05's reveal her \$89,474.00 asset. (R.E. 50-57; 58-66; Ct. R. P. 25-32; 69-77). The parties agreed to sell and split the equity of their Magnolia property. (Tr. 133)

In violation of the Temporary Order (R. E. 5; C. R. 20) Cyprianna took \$1666.00 from the joint checking account and closed it (Tr. 65) Cyprianna admitted to the court she also took

\$8200.00 from the joint savings leaving a \$3800.00 balance. (Tr. 64; 235-236)

Terry's 8.05 reveals an adjusted gross income of \$1633.00 each month (R.E. 42; Ct. R. P. 3; Tr. 57) corroborated by his CPA prepared self employed 2006 tax returns (Ct. R. P. 78-100).

Both Cyprianna's 8.05 exhibits reveal a net monthly pay of \$4828.00 from MSU (R.E. 51; 59; Ct. R. P. 26-70). Cyprianna did not produce her wage earner 2006 tax returns or a W-2 at the April 2007 trial. ^{6/}

Cyprianna's first 8.05 listed her PERS Retirement was \$25,807.00 (Ct. R.P.30). Her second 8.05 showed her PERS retirement had decreased by \$10,000.00, to \$15,620.00 (Ct. R. P. 74). Her explanation: she "presumed--the pension fund fluctuates depending on how many people remove money from it." The court asked her if it was deferred compensation. "Cyprianna said: "It's PERS". (Tr. 237) The court responded that there are two different types of it and asked if she had any money taken out of her check that she didn't have to pay taxes on? Her attorney interrupted and asked: "*Have you increased a voluntary allotment to retirement?*" Cyprianna responded: "No . . . No." The court commented: "May be different than what we have." The court questioned Cyprianna further: "Where did you get that figure. Did you get something from PERS?" Cyprianna responded that she "called the Mississippi retirement system." The court pressed further: "[D]id you get any kind of statement from them?" Cyprianna answered: "No, but I can. I actually called and checked on the number . . . yesterday." (Tr. 238). Cyprianna produced no pay stub, W-2, or PERS statement to corroborate her testimony.

⁶MUCCR 8.05 (B) requires copies of the preceding year's Federal and State Income Tax returns, in full form as filed, or copies of W-2s if the return has not yet been filed. [] The failure to observe this rule, without just cause, shall constitute contempt of Court for which the Court shall impose appropriate sanctions and penalties.

Cyprianna told the court her Roth IRA, valued at \$13,867.00, was accumulated during the marriage (Tr. 238) but that the "Individual Account" of \$16,607.00 (Ct. R. P. 74) was acquired before the marriage (Tr. 239). Again, she produced no documentation to corroborate her assertion that the "Individual Account" was acquired before marriage. Moreover, no explanation was given as to why her first 8.05 listed a "2AZ Account," valued at \$14,682.00 (Ct. R. P. 30) and was not listed as an asset in her second 8.05 (Ct. R. P. 74). Terry's 8.05 showed his Roth with a value of \$29,113.25 (R.E. 47) but Cyprianna said it was \$31,548.21.

Cyprianna 2nd 8.05 listed several horses, not included on her 1st 8.05, most with values. (R. E. 66; Ct. R. P. 77), and she wanted all. She valued "DA Dandy" at \$7500.00, "Okies Dry San Gen" at \$1500.00, "Dry Not Blue" at \$20,000.00, "Liberty" at \$10,000.00 (Tr. 253). Terry attempted to stipulate he would take "DA Dandy" at her value and she could have the remaining horses at her values. Suddenly, Cyprianna interrupted, blurting, no, she didn't want them that way; she wanted them appraised because she hadn't seen them and something might be wrong with them; she needed "to be sure her valuation was accurate." (Tr. 254-255).

Cyprianna wanted the horse trailer she valued at \$18,000.00 (R.E. 64; Ct. R. P. 75) as well as the 1977 Dodge Ram, she valued at \$5600.00 (R. E. 63; Ct. R. P. 74) in exchange of waiving claims against Terry's vet equipment and trucks that Cyprianna valued at \$30,000.00, not listed in her 8.05s, but valued by Terry at \$10,000.00. (R.E. 46; Ct. R. P. 7; Tr. 242-243) She also wanted the tractor she valued at \$14 - \$35,000.00 having researched values on the on the Internet. (Tr. 244)

Cyprianna wanted \$1500.00 each month for child support as compared to the \$264.00

required by the "Temporary Order" (R.E. 4; C.R. 19) based on her speculation, as pointed out by the court, of what Terry should be earning. (Tr. 247-248) Over a predicate objection, she testified that based on her being an equine vet for 20 years, having practiced in poor, rural, Pike County, Terry's practice was about \$235,000.00 in bad economic times but he was now in a different subspecialty. Now, Terry exclusively does horse dentistry in multiple states with a higher profit margin. Anyone in the equine practice can reasonably make \$250,000.00 (Tr. 249-250).

Cyprianna, after reviewing Terry's overhead numbers to clear \$1300.00 each month was not reasonable based on an \$8000.00 income. (Tr. 249). Terry's 8.05 actually showed \$1633.00 each month (R.E. 42; Ct. R. P. 3). On cross she admitted she was not an accountant and had no training in business valuation (Tr. 271) but she did not question the accuracy of Terry's CPA prepared 2006 tax returns (Tr. 272; Ct. R. P. 78-100) Whether or not an individual is qualified as an expert in a field is within the trial judge's discretion. *Morris v. Morris*, 783 So. 2d 681 (Miss. 2001) (citing *Hall v State*, 611 So.2d 915, 918 (Miss. 1993), citing *Wilson v. State*, 574 So.2d 1324, 1334 (Miss. 1990); *Smith v. State*, 530 So.2d 155, 162 (Miss. 1988)). The fact that she gave testimony does not make her an expert, nor does it put her in a position to give an opinion unless Sharon's attorney was able to lay the proper predicate and qualify her as an expert since it lacked sufficient reliability under Miss. R. Evid. 702.

Cyprianna said she was not capable of paying alimony (Tr. 250)

Cyprianna admitted that her 8.05's showed her monthly rent to be \$1621.00 each month but then admitted to the court it was actually \$821.00 each month. She also admitted a failure to list any jewelry. (Tr. 273-274)

Both Terry and Cyprianna had purchased new vehicles after the divorce. Terry's 8.05 lists his (Ct. R. P. 7), but Cyprianna's does not reflect hers. (R.E. 25-77; Ct. R. P. 29-30; 73-74)

The court directed Cyprianna to prepare two lists that she felt would be a fair division of personalty and submit them to Terry and then he could make a list of things she left off. (Tr. 244-247).

§ The final "Judgment" recites that since the court directed Cyprianna to divide the household goods and furnishings by making two lists of her division with Terry given the opportunity to select and she did not, the court would not address these items in the opinion ["Judgment"]. (R. E. 16; C.P. 89)

Summary of the Argument

I. The court refused to make a separate finding of facts and conclusions contrary to the Rules of Court and case law even though requested.

II. The *Albright* factors were either not weighed or mis-weighted causing a mis-carriage of justice.

III. The "Judgment" granted the same "other visitation" as contained in the "Temporary Order", shown unworkable. The "Judgment" in effect gives Cyprianna to unilaterally give the "other visitation to babysitters, to the exclusion of the father and the life-long surrogate grandmother, even though the mother is out-of state for days, has clinic duties for two week stretches, or working overnight.

IV. The child support awarded is speculative, without predication, and is incalculable of calculation based upon the proof.

V. The equitable division of property is mis-calculated leaving Terry with a deficit.

VI. The "Judgment" recites no facts upon which to deny Terry alimony, even though - to his detriment- he gave up his one county Texas practice to follow Cyprianna to Mississippi, and become "Mr. Mom"; the "Judgment" orders him to get out of town to practice.

Argument

I. REFUSAL OF TERRY'S POST "JUDGMENT" REQUEST FOR FINDINGS OF FACT TO UNDERGIRD THE CONCLUSIONS WAS ERROR. THE VAST WEIGHT OF THE EVIDENCE SUPPORT DIFFERENT CONCLUSIONS.

Terry filed a 12 page MRAP 4(d) motion requesting the court to amend the "Judgment"

and make additional findings of fact pursuant to MRCP 52(b) and MRCP 59 (C.R. 94-105) but it was denied in toto. (C.R. 106). Rule 4.01 of the Uniform Chancery Court Rules titled "Findings by the Court" provides that in all actions where it is required or requested, pursuant to M.R.C.P. 52, the Chancellor shall find the facts specially and state separately his conclusions of law thereon. The request must be made either in writing, filed among the papers in the action, or dictated to the reporter for record and called to the attention of the chancellor. Where underlying facts are disputed, and credibility resolutions must be made, without specific findings of fact and conclusions of law by the chancellor, the appellate court is unable to review the child custody decision. Therefore, the chancellor's custody judgment should be vacated, for the entry of specific findings of fact and conclusions of law pursuant to M.R.C.P. 52(a). *Patout v. Patout*, 733 So. 2d 770 (Miss. 1999) If a request is made and no ruling is entered, the appellate court must consider the effect of the trial court's missed responsibility, and overwhelming evidence may be required as a condition for affirmance. *Lowery v. Lowery*, 657 So. 2d 817, 819-20 (Miss. 1995) If no request is made, the appellate court accepts facts specifically found unless manifestly wrong. The court will then review the record and presume that the chancellor resolved, in the appellee's favor, those fact issues not specifically found. *Owen v. Owen*, 798 So. 2d 394, 398 (Miss. 2001); *Bryant v. Cameron*, 473 So.2d 174, 179-80 (Miss. 1985); *Cheek v. Ricker*, 431 So. 2d 1139, 1143-44 (Miss. 1983). Where the presumption applies, the chancellor's decision will stand if it is supported by substantial and credible evidence. *Owen*, 798 So. 2d at 398. Essentially, a chancellor's findings of fact will only be reversed when the record possesses no credible evidence to support them. *Hensarling v. Hensarling*, 824 So. 2d 583, 586 (Miss. 2002). A chancery court's conclusions of law, however, are reviewed de novo. *Southerland v. Southerland*, 875 So. 2d 204, 206 (Miss.

2004)

II. THE CHILD CUSTODY AWARD UNDER ALBRIGHT IS INSUFFICIENT TO WARRANT A FINDING THAT THE CHILDREN'S BEST INTERESTS WOULD BE SERVED WITH THE MOTHER. THE EFFECT OF THE "JUDGMENT" IS TO GRANT CUSTODY TO THE MOTHER'S EVER CHANGING BABYSITTERS.

The "Judgment" under the heading of Child Custody (R.E. 7-10) lists the "Albright Factors" with the court's findings:

(1) *Age, Health and Sex of the Children*. The court found that Katelyn, 10, Sarah, 7, and Matthew, 4, were "generally healthy" which "favors neither party." (R.E. 7).

However, the court failed to address at all the considerable proof of Cyprianna's abuse of Katelyn and the profanity she used in the presence of all the children while involving them in the case. This was compounded by Cyprianna allowing the sitter to abuse Katelyn and Matthew and being too drunk/hung-over to babysit and astonishingly, even with this knowledge, not only did Cyprianna keep the sitter in her employ, she jetted to Texas, leaving the children with the sitter. This can't be good for the children's health. This factor should be weighed for Terry.

(2) *Continuity of Care Prior to the Separation*. The Court found this factor favored Cyprianna because she had court ordered temporary custody for 7 months after separation and since she suckled (Terry cannot lactate), changed diapers, bathed and ensured all three children were involved in activities. Contrary to the court's finding, Terry did not admit that before the MSU move, Cyprianna provided most of the care. Terry, in fact, testified his mother, Ms Ellen, provided almost 24/7 care to all three children following Matthew's birth (4 years). This fact was admitted by Cyprianna on cross-examination and corroborated by her E-Mail, Ms Ellen and Dr. Mary Anne. The proof was overwhelming: Ms. Ellen, provided the primary care of the children

before and after moving to Starkville. Terry and Cyprianna agreed that Cyprianna would be the breadwinner, and Terry, with the continued assistance of Ms Ellen, would become “Mr. Mom” and practice part time. Cyprianna, on the other hand, is many times unavailable and has employed several sitters. If after separation is the sole test, then the babysitters should be favored. The court further found that because Cyprianna was heavily involved with work and Terry provided her a number of meals, sometimes even taking her meal to the vet school. This factor should have favored Terry but for some unknown reason, the court favored Cyprianna (R.E. 7-8, ¶ 11 (2)). In *Copeland v Copeland*, 904 So. 2d 1066 (Miss. 2004), the chancellor specifically found that the continuity of care factor favored the father, given the fact that he would go and be with his child when he came home from work, or he would begin preparation of supper and get Mason ready for bed until the mother came home from work. The chancellor noted that during mother’s custodial periods, she would put the child in daycare with several other children, while the father put the child in the custody of his mother.

(3) *Willingness and Capacity to Provide Primary Child Care*. The Court found this factor favored neither party (R.E. 8, ¶ (3)). The court rejected, without comment: (i) Cyprianna’s failure to attend Sarah’s graduation and Katelyn’s games; (ii) Cyprianna’s opting for Tuscaloosa visits (3.6 trips a week); (iii) her long work hours and out of state symposiums which frequently prevented her from coming home for supper, baths, or to spend time with the children, as overwhelmingly shown by her E-Mails, the Daily Log (R.E. 27-40) and testimony by Terry, Ms Ellen, Dr. Mary Anne, and Cyprianna. A decision to leave the family and spend that special time with another constitutes a clear indication of priorities. This action demonstrate an unwillingness rather than a willingness to parent. *Bower v. Bower*, 758 So. 2d 405 (Miss. 2000) This factor should have favored Terry.

(4) *Employment of the Parents and Responsibilities of that Employment*. The Court found Cyprianna's MSU job demands had been great, requiring her to do numerous research projects, clinic work, sometimes two weeks in a row, requiring her to work late, often be on call, which required her to return to the vet hospital late evenings or early hours. The court further found that Terry was self-employed but due to his specialty he was required to be gone for days. Cyprianna's work schedule prohibits consistent, in depth care of the children. *Hollon v. Hollon*, 784 So. 2d 943 (Miss. 2001). Moreover, the court found that **Cyprianna's job demands may have caused the marriage demise**. The court found that this factor favored neither party (R.E. 8-9, ¶ (4)). The court obviously held Terry's alternate week end visitation against him which in fact allowed him to seek out of town work. The proof showed, admitted by Cyprianna, corroborated by her E-Mails, Terry, Ms Ellen and Dr. Mary Anne, that Terry forfeited his full time Texas practice to follow Chipper to her MSU "dream job," to become "Mr. Mom," and work part-time, as they contracted. Moreover, the proof showed that Terry was available - being part time and was able to take emergency calls concerning the children. This factor should favor Terry.^{7/}

(5) *Physical and Mental Health and Age of the Parents*. The Court found these 3 items **favored neither** party. Terry submits, in weighing this factor, the court rejected Cyprianna's bulimia, Prozac medications, volatileness (as later found by the court in 10), confirmed by her E-Mails, Terry, Ms Ellen and Dr. Mary Anne. Moreover, the proof showed that Terry and Dr.

⁷ This factor is applied two ways: it either prefers a parent making money over one unemployed, or more often, prefers a parent who works less or not at all who can spend more time with the children. *Ivy v Ivy*, 863 So. 2d 1010, 1014 (affirming this factor favored custody with parent who worked less rather than long hours; (affirming *Copeland*, 904 So. 2d at 1076, which preferred the dad who had a more flexible schedule allowing him more time with the child). See also, *Jerome v. Jerome*, 689 So. 2d 755, 759 (Miss. 1997) and *Gilliland v Gilliland*, 2005-CA-01568-COA.

Mary Anne each refused to allow Katelyn to leave with Cyprianna because of her anger, fearing for Katelyn's safety. This proof is compounded by Cyprianna's refusal to give Dr. Anna Dunn a release to testify as to her mental health and the adverse inference to be drawn therefrom as well as the discovery violations. *Boutwell v. Boutwell*, 829 So. 2d 1216 (Miss. 2002) Terry should have been favored on this factor.

(6) *Emotional Ties of Parent and Child*. The Court found a strong bond between the children and both parents and therefore it favored neither. Terry suggested that the court reconsider psychiatrist Mary Anne's testimony of the ties between Terry and the children as compared to Cyprianna's. Obviously, there is something wrong with Cyprianna's relationship with Katelyn, compounded by her refusal to fire the abusive sitter. The evidence shows Katelyn adores Terry; he is very attentive to all the children. Matthew is strongly attached to Ms Ellen who is available. Moreover, Mary Anne testified that Terry was the better parent and he deserved custody because of Cyprianna's temper and lack of mothering knowledge. This factor should have favored Terry.

(7). *Moral Fitness*. The Court found this factor favored neither. Terry suggests that the court should have weighed Cyprianna's profane and abusive language directed at Katelyn, in the presence of the other children, and her involvement of the children in the domestic dispute, in this factor and favor Terry.

(8) *The Home, School, and Community Record of the Children*. The court found this factor to be neutral. The proof showed Ms Ellen attended to the children for at least 4 years prior to the separation. If this is weighed neutral, it is suggested the court actually favored the babysitters after the separation over the 4+ years of service by grandma. If the Court should err, it

should be on the side of caution, that is, for the benefit of the children. *Jerome v. Stroud*, 689 So. 2d 755 (Miss. 1997) If Cyprianna is seeking other employment elsewhere, it would require another move. Terry's flexible work schedule and unlimited family support favors Terry in this area. Terry has no health issues and the presence of grandma contributes to the children's stability, a legitimate factor that can give weight in a custody determination. *Neville v. Neville*, 734 So. 2d 352, 355 (¶¶10) (Miss. Ct. App. 1999),

(9) *Preference of the Child*. None of the children are old enough to state a preference.

(10) *Stability of the Home Environment and Employment of Each Parent*. The Court found that Cyprianna's "job demands have often made her **volatile**." (R.E. 10, ¶(10)) "There are accusations that she assaulted Katelyn on the bicycle and also choked her but Cyprianna denied the allegations" even though her actions were proven by Terry, Ms Ellen, the Audio Tape and Dr. Mary Anne. Cyprianna says that she now has additional faculty and support staff to help her at school and at clinic and says her hours will now be from 8:15 to 4:30 p.m. "*The Court hopes this is the case.*" This finding is contrary to the proof. In fact, even Cyprianna's father testified that she still has the two week clinic duties. "Terry and Cyprianna's employment has been discussed in detail earlier. Terry is more stable in the recent past than [Cyprianna] but the divorce seems to have somewhat stabilized [her]." The court found the factor to be neutral when it should be in favor of Terry. Compare *Hollon v. Hollon*, 784 So. 2d 943 (Miss. 2001) finding the analysis inexplicable.

This ruling allows the current babysitter to pick the children up from school and keep them for at least an hour, assuming that Chipper will in fact be off work by 4:30 p.m., as well as all day long during the summer vacation, and not have to return for emergencies in the evenings or early morning, and be out of state for symposiums. Even though Cyprianna might be able to provide the children with a stable environment, the proof showed otherwise. She had not been available as attested to by the MSU Administrator and the school teacher. Cyprianna had several sitters in 7 months. Discounting Cyprianna's abuse, Terry afforded the children stability by being available.

Cyprianna's stability is questionable. *Gilliland v Gilliland*, No.2005-CA-01568-COA (Miss. App. 2007).

In *Albright Factor* (4) above the court determined that the employment of each and the responsibilities of the employment favored neither. Obviously, the Court eliminated from consideration in factor (4) and this factor (10) that the parties had agreed that Terry would quit his Texas practice and follow Cyprianna to her MSU "dream job" and work part-time in MS which *surprisingly* has less horses, and become "Mr. Mom" or that Cyprianna's clinic duties and her several out of state symposiums each year, which often prevented her from being home with the children. Likewise here, the court in effect, favored the sitters over Terry and grandma. Nowhere does the court even mention the fact that Terry and Dr. Mary Anne both had refused to allow Cyprianna to leave with Katelyn because of her anger causing Cyprianna to receive the child later after she had cooled down. This factor should have favored Terry rather than being neutral.

(11) *Other factors*. The court observed nothing under this factor other than the role of the grandparents. The court made no mention of Cyprianna's protracted absences from the children, due to her onerous job responsibilities, along with her unnecessary Tuscaloosa trips, dilatoriness, temper, questionable stability, and violence. This factor strongly favor Terry.

(12) Best Interests. The court found both Terry and Cyprianna to be fit but for the court's above expressed reasons it was in the best interests of the children that Cyprianna's and her sitters be awarded custody in lieu of "Mr. Mom" and Grandma. The familiar standard holds that, absent an abuse of discretion, the appellate court will uphold the decision. "To disturb the factual findings of the chancellor, this Court must determine that the factual findings are manifestly wrong, clearly erroneous or the chancellor abused his discretion." *Jerome v. Stroud*, 689 So. 2d 755, 757 (Miss. 1997). However, where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error. *Stroud*, 689 So. 2d at

757 (citing *Smith v. Smith*, 614 So. 2d 394, 397 (Miss.1993)).

The court eliminated discussion of Cyprianna's voluntary 3.6 absences a week compounded by her onerous local and out of state work schedule, requiring numerous babysitters, some abusive, sometimes overnight for weeks during the temporary order, her admitted dilatoriness, volatile temper, lack of stability, bulimia and need for Prosac in weighing not only this factor but all of the others to reach the Polestar: This factor overwhelmingly favors Terry. A chancellor's decision is reversible error if the rationale for each *Albright* factor is not specifically articulated. See *Norman v. Norman*, No. 2005-CA-00882-COA (Miss. Ct. App. Oct. 10, 2006). See also, *Davidson v. Coit*, 899 So. 2d 904, 911 (¶¶18) (Miss. Ct. App. 2005) (citing *Powell v. Ayars*, 792 So. 2d 240, 249 (¶¶33) (Miss. 2001)) The court's favoritism of Cyprianna on this issue is especially troubling when considering the next part of the "Judgment."

III. THE COURT'S ALTERNATE WEEK-END VISITATION IS NOT VIABLE UNDER THE CIRCUMSTANCES.

In ¶13 of the "Judgment", the court again encouraged Terry and Chipper to agree to Terry's visitation considering their respective schedules but if not, then Terry had specified visits as outlined. This ruling basically mirrored the court's "Temporary Order" which was overwhelmingly shown unworkable since Cyprianna unilaterally decided that only the minimum visitation would be allowed, and "~~thats-that~~" as testified to by Dr. Mary Anne (Ct. R. P. 204-205), Terry and Ms Ellen. Apparently, the Court believes that having repeated the parties are encouraged to agree to other visitation that Cyprianna will now do right by the children. Again, by this ruling, the Court favors the babysitters over Terry and Ms Ellen, and as alternatively requested by Terry. In *Cox v. Moulds*, 490 So.2d 866, 869 (Miss.1986) all that need be shown is

that there is a prior decree providing for reasonable visitation rights which isn't working and that it is in the best interest of the children as fostering a positive and harmonious relationship between them and their divorced parents to have custody provisions made specific rather than flexible and attendantly vague. *Cox*, 490 So.2d at 869

IV. THE AMOUNT OF CHILD SUPPORT IS HIGHLY SPECULATIVE AND WITHOUT FOUNDATION.

The court believed Terry had grossly underestimated his income and was capable of earning \$3750.00 per month and set support at \$750.00 monthly. (§ 14.) Terry suggests that the amount is belied by the record and the only possible way this sum could have been determined was through Cyprianna's speculative and without predication testimony since she has no accountancy or business valuation training. See *Gray v. Gray*, 745 So. 2d 234 (Miss. 1999) which required reversal.

The award deviates from the statutory guidelines, MCA § 43-19-101, and failed to consider the reasons for deviation required by MCA § 43-19-103, especially (g). In effect, the "Judgment," in breach of the party's agreement, forces the father to get out of town/state to work, after he detrimentally gave up his one county Texas practice, to become "Mr. Mom." Neither party offered any proof of any extraordinary needs of the children. Terry does have interest income which is derived from the CD split (see *Equitable Distribution*). Based on the \$1669.00 annual interest, this would only increase his income by \$139.08 each month, just as Cyprianna's income would be increased by the same amount. It appears the finding that Terry is capable of earning \$3750.00 each month is a guess. There is no way to calculate Terry's potential earnings from the tax return and/or Terry's 8.05. The "Judgment" is even more confusing since it

directed Cyprianna's counsel to prepare a withholding order. Since Terry is self-employed the withholding order would necessarily have to be served on Terry. A. chancellor can depart from the guidelines with written findings of their inappropriateness." However, "without a written justification, such a departure is error by law and reversible." *Johnson v. Johnson*, 650 So. 2d 1281, 1288 (Miss. 1995).

V. THE PROPERTY DIVISION IS NOT SUPPORTED BY THE RECORD AND IS MISCALCULATED.

The "Judgment" recited that property divvied up "as divided by the Court at trial" is virtually unascertainable even now with the reporter's notes.

Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994) listed seven, non-exclusive, factors for a chancellor to consider in making a division:

(1) [a] *Contribution⁸ to the accumulation of marital wealth includes the [b] contribution to the stability and harmony of marital and family relationships as well as [c] the contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the asset.*

Both parties contributed in the accumulation of the marital wealth. However, the court omitted any discussion of the fact that after Terry graduated, he went to work and supported Cyprianna while she pursued her PhD, which was instrumental in Cyprianna's later MSU employment and earning power. Moreover, Terry gave up his Texas practice following Cyprianna, the new "breadwinner," to her "dream job," becoming "Mr. Mom" which contributed to the stability and harmony of the family. On the other hand, Cyprianna's unnecessary time away from the family, and cost consuming trips to Tuscaloosa ⁹/ found by the court to be *the probable*

⁸ "We assume that the contributions and efforts of the marital partners, whether economic, domestic, or otherwise, are of equal value." *Hensarling*, 824 So. 2d at 597 (¶48).

⁹ Terry's Day Log Exhibit reveals that in 79 days Cyprianna made 22 trips to Tuscaloosa, an average of 3.6 trips each week. Assuming the Suburban averaged 15 miles per gallon with gas costing \$2.50 a gallon, she spent \$30.00 per trip or \$108.00 each week or \$430.00 per month.

cause of the marriage demise (R. E. 9) without doubt greatly impacted the stability and harmony of the family. This factor favors Terry.

(2) The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.

The parties had already split a certificate of deposit each receiving \$89,474.00. and agreed to sell the Magnolia property and split the profit.

Cyprianna had taken \$1666.00 from the joint checking account and closed it. Cyprianna had taken \$8200.00 from the joint savings leaving a \$3800.00 balance. Cyprianna's unnecessary gasoline spending for Tuscaloosa trips (See footnote 9) and other excursions. Terry made necessary renovations to the Highway 12 property and saved money by moving in rather than paying rent elsewhere, and expended around 300 hours making the place presentable and safe for the children to play. This factor should favor Terry, but if not, it certainly does not favor Cyprianna. The court found Cyprianna's dissipation of assets in violation of the court's "Temporary Order" was justified. (R.E. 16 @ (d)) ^{10/}

¹⁰ Cyprianna said she needed the money for the kid's bread and the court rewarded her finding the dissipation/cannibalism was justified by necessity, even though she refused to produce financial documents as well as refusing a direct order to provide a split/property list, and since she didn't, the court held it would not split the personalty. Moreover, Cyprianna's credibility was substantially strained on other vital issues.

On the other hand, Terry was punished for a "spirit of the law" violation based on a grammatical construction of a phrase: "Cyprianna shall pay 75% and Terry 25% of the mortgage on the "Highway 12" property and the rent on the marital home." According to Tarshis, Barry, "GRAMMAR FOR SMART PEOPLE: your user friendly guide to speaking and writing better English," 1992. pg 48-51, 69, 74, 165-8, structuring, (Tr. 101), the phrase "Cyprianna shall pay 75% and Terry 25% of the mortgage on the "Highway 12" property and the rent on the marital home," Cyprianna is the noun and subject of the sentence. 75% and 25% are the object of the verb shall pay of the mortgage, a prepositional phrase, modifying 75% and 25%. rent, which is a separate object of the verb shall pay. For example: Cyprianna shall pay the rent on the marital home. In order to change the meaning of the sentence one would necessarily have to insert the preposition of in front the rent to create a prepositional phrase modifying 75% and 25%. For

(3) Market and emotional value of the marital assets.

(a) Highway 12 house and acreage. The parties valued the property at approximately \$100,000.00, subject to an approximate \$100,000.00 debt. Cyprianna claimed an attachment to the place; she selected it and secured the financing since Terry had just moved to Starkville. Terry made renovations to the house and cleared the land expending some 300 hours, making it not only presentable, but affording the children a safe place to play. Terry was given no credit for his repairs to the house or hours clearing the land.

(b) Cyprianna was awarded the tractor and attachments. (R.E. 18) The court in footnote 3. of the "Judgment" stated that the party's agreed the tractor and attachments should go with the Highway 12 property and no evidence was given at trial as to value. To the contrary, the transcript reveals no agreement but Cyprianna valued the equipment at \$14 - \$35,000.00. (Tr. 244) Terry has no quarrel with Cyprianna being awarded this personalty but suggests that equity requires her to be charged with a valuation in her award column.

(c) Cyprianna's PERS Retirement. Cyprianna's 1st 8.05 valued the account at \$25,807.00; her 2nd at \$15,600.00. Terry doesn't have a PERS. "*Ferguson*, 639 So. 2d at 934, but inexplicably, the valued her PERS at \$11,000.00 (R.E. 17) reciting in the "Judgment"'s footnote 1 that this was the value of the PERS on August 25, 2006, the date of the "Temporary Order." This is an obvious error. Cyprianna's 1st 8.05, dated July 7, 2006 (R.E. 56) reveals the PERS account

example: Cyprianna shall pay 75% and Terry 25% of the mortgage on the "Highway 12" property and of the rent on the marital home

Terry was punished for his grammatical construction of the sentence, at best a "spirit of the law" violation, and Cyprianna was rewarded for her numerous "letter of the law" violations solely unaddressed by the court. Moreover, he was not given not credit for contributions of more than \$2500.00 over and above the dictates of the "Temporary Order." (Tr. 101)

balance of \$25,807.05 (R.E. 55). Even if the court used her 2nd 8.05 dated April 25, 2007 (R.E. 64), during trial, revealed a balance of \$15,620.78 (R.E. 63). There is no record of the account being worth \$11,000.00, which if nothing else, renders the court's addition a mathematical error." *Watson v. Watson*, 882 So. 2d 95 (Miss. 2004)

(d) Roth IRA's. Cyprianna's first 8.05 did not list a Roth (R.E. 55) but her second listed one valued at \$13,967.00 (R.E. 63). Terry 8.05 showed his Roth at \$29,113.25 (R.E. 47) but Cyprianna swore his had a value of 31,548.21.

(e) Terry's 8.05 showed the parties had already split a certificate of deposit, each having received \$89,474.00. Neither of Cyprianna's 8.05's reveal her \$89,474.00 asset.

(f) The court divided the horses assigning a \$20,000.00 to each party (R.E. 17)

(g) The court awarded Cyprianna the gooseneck horse trailer at Terry's value of \$12,000.00 (R.E. 18) rather than Cyprianna's value of \$18,000.00 (R.E. 64) .

(h) Vehicles. Both have purchased new vehicles after the divorce. Terry's 8.05 lists his, but Cyprianna's does not reflect hers. Cyprianna was awarded the lien free 2004 Suburban, at Cyprianna's second 8.05 value of \$18,5000.00 (R.E. 14; 62) as compared to her first 8.05 of \$20,175.00 (R.E. 54) as compared to Terry's value of \$28,000.00, (R.E. 45). No value was assigned to this award in the court's mathematical addition in the court's equitable division. (R.E. 17-18). Terry was awarded the 1998 Dodge the court valued at \$4500.00. (R.E. 14) This figure is also not included in the court's equitable division math. (R.E. 17)

(4) **Value of non-marital assets.** Cyprianna's 1st 8.05 did not reveal any non-marital assets but she did list a "2AZ" account in the amount of \$14,682.00 (R.E. 55). Cyprianna's 2nd 8.05 listed a Magellan investment in the amount of \$16,607.00 she said she deposited before marriage (R.E.

63), with no mention of the prior “2AZ” account. Cyprianna offered no records to corroborate her non-marital property assertion but the court found the \$16,607 Fidelity Magellan was acquired before marriage. (R. E. 14) The burden is on the party claiming assets to be non marital to demonstrate their non marital character. *A & L, Inc. v. Grantham*, 747 So. 2d 832, 839 (¶23) (Miss. 1999). The court did not assign the “2AZ” account valued at \$14,682.00 in the division. Nor did the court take this non-marital property finding into account in the alimony decision, discussed later.

(5) Tax and other economic consequences of the property division. There was no proof as to any tax consequences but Terry showed he detrimentally gave up his one county Texas practice to follow Cyprianna and start a new, part-time practice. Surely being forced to practice out of town and state is an economic consequence that needs to be addressed.

(6) Minimization of future friction between the parties.. “. . . [D]ue to the fact that they have [children], contact and possible friction between the couple will be inevitable. *Weeks v. Weeks*, 832 So. 2d 583 (Miss. App. 2002). On the other hand, the court found its division would eliminate friction.

(7) The needs of the parties and their income and earning capacity. *Ferguson*, at 928. The trier must address and discuss this factor in view of how it relates to the parties’ income and ability to provide for themselves.. Terry, by giving up his Texas practice, is out on a limb. He testified it would take several years to establish a practice to be financially self sufficient having just started his supposed-to-be part-time practice. At trial, Cyprianna was in a much better financial position to provide for herself as compared to Terry. Terry made financial contributions while working and Cyprianna was attaining her PhD, as well as afterwards. Later, Terry made

contributions as the primary caregiver while Cyprianna worked at MSU. Terry's position could be compared to a temporarily disabled person. Terry kept the vehicles washed, gassed, serviced, cut the grass, as well as providing the domestic services for the children while pursuing a part time veterinary practice. Cyprianna admitted Terry made renovations and cleared the property but disputed the hours Terry claimed he expended.

Each party is required to produce enough credible evidence to allow the chancellor to analyze the marital finances to make a distribution. *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994). Usually, a one-half split of marital assets is considered equitable.

In ¶ 19. of the "Judgment" the Court considered the Ferguson factors (R.E. 14-18):"

(b) Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage. The court found Cyprianna spent more time on family duties than Terry. But the proof overwhelming showed Chipper's onerous schedule (which made her *volatile*) and spending 3.6 days a week out of state on visits (led to the marriage *demise*), not counting her out of state symposiums and two week clinic duties. This is an oxymoron.

(c) Contribution to the education, training or other accomplishments bearing on the earning power of the spouse accumulating the assets. The court found Terry provided more family support while Cyprianna was in school but some of her grants paid for some family expenses but the court did not mention or apparently consider other things, such as car payments, home mortgage, insurance, hospital, fuel, computers, clothes, etc.

(d) The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any property distribution of such assets by agreements. The court found that

Cyprianna used some marital assets for the family after separation but it was justified. (See footnote 10 supra) Nowhere does the record show how and where these assets were expended. Indeed, Cyprianna admitted she refused to produce financial documents in discovery and twice failed to obey the subpoenas duces tecum for the records. It is submitted this holding is unsupported by the proof, other than Cyprianna's *ipso facto* testimony, and, **that's that**.

(e) The market and emotional value of assets. The Court directed Cyprianna to divide the household goods and furnishings by making two lists of her division with Terry being given an opportunity to select the list he chose. Cyprianna failed to do this but the Court held: "*Therefore, the Court will not address these household goods and items in this opinion.*" Obviously, Cyprianna is rewarded all the goods, even though she was in violation of the court's order. Moreover, no valuation is assigned to Cyprianna in the court's mathematical totals.

In ¶ 20. the Court, having considered the law and factors and found the following division to be fair:

A. Terry shall have

<u>Asset</u>	<u>Value</u>
veterinarian equipment, books and Porte-Vet insert	\$30,000.00

[At trial the vet equipment was valued at \$10,000.00, books at \$5000.00 and the Porte-Vet insert at \$2500.00 but now the value is profoundly escalated from \$17,500.00 to \$30,000.00, some \$12,500.00.]

DA Dandy, Okies Dry San Gen, Liberty, Arab Adult	20,000.00
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Roth IRA	31,548.21
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[The Court used Cyprianna' value as compared to Terry's 8.05)

Rent not paid pursuant to temporary order	1,800.00
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[The court gave no credit to Terry for his extra payments]

Riding mower	1,500.00
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[The court made an award here even though it said it would not address the goods since Cyprianna failed to make the lists]

pistol collection	7,000.00
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[The court made an award here even though it said it would not address the goods since Cyprianna failed to make the lists]

CD already divided (one-half)	89,474.00
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\$181,322.21

Chipper shall have:

<u>Asset</u>	<u>Value</u>
MSU retirement (PERS)	\$11,000.00

[The chancellor, in footnote 1 of the "Judgment," noted it valued this on the date of the "Temporary Order" of August 25, 2006, *however*, the 1st 8.05 by Cyprianna valued it at \$25,807.05. There is no proof what caused such a decrease in its value of \$14,807.00 as contained in her 2nd 8.05, much less \$11,000.00]

IRA	13,967.00
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Fidelity Magellan Mutual Fund	16,607.09
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Highway 12 property	no equity
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Dry Not Blue and Arabian To Hidden Springs	20,000.00
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tractor and attachments	0
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[The court's footnote 3 recites that the parties' agreed the tractor and attachments should go with the Highway 12 property and no evidence was given at trial]

red 1997 Dodge 3500 truck	3,500.00
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gooseneck trailer 12,000.00

[Chipper's 2nd 8.05 in evidence valued the trailer \$18,000.00]

CD already divided (one-half) 89,474.00

\$166,548.08

[The \$14,807.00 PERS disappearance and \$6000.00 diminished trailer valuation and home furnishings of \$9000.00 and computer at \$1500.00 together totals \$31,302.00 which added to the Court's value of \$166,548.08 results in an actual valuation of \$197,855.14 which is \$31,032.93 more than Terry's division using these amounts with the wrong figures]

In ¶21 the Court directed the personal property to be divided as direct by the Court at trial. Without a transcription of the record, an impossibility, and even with the notes, there remain questions.

In ¶5 the court attached Exhibit "C" a children's property list outside the record. Terry has no quarrel with his children receiving the listed property, but he does object to the statement that Terry and Ms Ellen stole a box of pictures which cannot be tested by cross examination.

The property division when adjusted to conform to the proof should be:

Terry

Veterinary equipment, books, Porta-vet insert \$17,500.00

DA Dandy, Okies Dry San Jen, Liberty, Arab adult \$20,000.00

Roth IRA \$29,113.25

Rent unpaid per Temporary Order (unadjusted by credits) 1,800.00

1998 Dodge 2500 truck 4,500.00

Total \$72,913.25

[Not included is the \$1500.00 mower or \$7000.00 pistol collection since the court chose not to address a division of the personalty but actually did consider some]

Cyprianna

MSU PERS retirement	\$25,807.25
IRA	\$13,967.00
Fidelity Magellan	\$16,607.09
Highway 12	0
Dry Not Blue and Arabian to Hidden Springs	\$20,000.00
Tractor and attachments	\$14,000.00
Red 1997 Dodge 3500 truck	5,600.00
Gooseneck trailer	\$18,000.00
2004 Chevy Suburban	\$20,000.00
Total	\$133,981.34

This computation leaves Terry a \$61,068.09 deficit.

VI. UNDER THE FACTS AND CIRCUMSTANCES IT WAS ERROR NOT TO AWARD TERRY ALIMONY.

In ¶ 27 of the “Judgment” the court stated it had considered every “Armstrong factor” except fault or misconduct and made findings of fact concerning those factors in its discussion of property division or child support. Even though the chancellor stated he considered Armstrong guidelines, he failed to delineate his reasoning and analysis. *Holley v. Holley*, 892 So. 2d 183 (Miss. 2004) of matters omitted in the division and child support other than fault and neither was guilty of misconduct. Obviously, the court did not list the “Armstrong factors” or consider an award of rehabilitative alimony even though Terry followed Chipper to her “dream job” to

practice part time, giving up his one county Texas practice to become “Mr. Mom” to his detriment. *Sanderson v Sanderson*, NO. 1999-CA-00915-COA; aff’d, 824 So. 2d 623 (Miss. 2002); *Hankins v. Hankins*, 729 So. 2d 1283 (Miss. 1999). “The division of property will not remove the need for periodic payments [.]” *Barnett v Barnett*, No. 2003-CA-01665 COA (2005). Nowhere does the “Judgment” mention in any fashion that Terry’s move was not a detrimental reliance. Alimony is not hermetically sealed, but is to be considered separate from other financial matters, but alimony and equitable distribution work together to provide for the parties after divorce. *Buckley v. Buckley*, 815 So.2d 1260, 1262 (§10) (Miss. Ct. App. 2002). “[W]here one expands, the other must recede. If the marital assets, after equitable division and in light of the parties’ non-marital assets [\$16,607 Fidelity Magellan] will adequately provide for both parties, then no more need be done. But if one party is left with a deficit, then alimony should be considered.” *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994); *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994). When permitted, the discretionary amount should be reasonably proportionate to the husband’s accustomed living standard, less his own resources, considering the wife’s ability to pay. *Gray v. Gray*, 562 So. 2d 79, 83 (Miss. 1990); *Bower v. Bower*, 758 So. 2d 405, 412 (§31) (Miss. 2000). *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993) requires consideration of at least 12 factors:

1. The income and expenses ^{11/} of the parties. Terry’s 8.05 showed a monthly net of \$1633.00, less expenses of \$1126.00 that included an additional \$314.00 for the children’s school, over and above the \$264.00 ordered support. His expenses are reasonable if not frugal.

¹¹Terry’s 2006 individual tax return exhibit corroborated his 8.05. On direct, Cyprianna maintained if Terry would go to work he could make more money than her.

Cyprianna had not prepared her 2006 individual tax return and in violation of the Rule she failed to present a W-2 compounded by her discovery violations and failure to honor court issued subpoenas made it virtually impossible to test the accuracy of her 8.05’s or have anything for the court to review.

Cyprianna's 8.05s show a net monthly income of \$4828.00 with living expenses of \$5104.00, leaving her with a monthly deficit of \$300.00. Of significance, Cyprianna lists \$1200.00 for monthly child care, an expense not incurred while Ms Ellen was attending the children (R.E. 60). Moreover, if Cyprianna had obeyed the Temporary Order and allowed Terry visitation considering her work schedule the amount spent for sitters would be much less.

2. **The health and earning capacities of the parties.** The physical health and earning capacities are probably equal after Terry has an opportunity to reestablish a practice.

3. **The needs of each party.** There was no proof offered by either party other than contained in the 8.05s.

4. **The obligations and assets of each party.** (See equitable distribution computations).

Cyprianna earns about \$84,000.00 annually while Terry earns \$25,000.00, 3.3 to 1.

5. **The length of the marriage** was 14 years, long enough for the court to consider alimony.

6. **The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care.** The children were aged 11, 7 and 4 at trial, and Cyprianna has been paying \$1200.00 monthly for full time sitters due to her long work hours and excursions.

7. **The age of the parties** favors neither.

8. **The standard of living of the parties, both during the marriage and at the time of the support determination.** The \$180,000.00 certificate of deposit acquired during the marriage and split after separation is telling. Not only did the children receive a better than average things in life, Terry and Cyprianna amassed this large CD in 14 years and other considerable assets, savings for the children, some no doubt attributable to Ms Ellen's free child care. Moreover, Ms Ellen's assistance alleviated any mental stress of child care concerns allowing the parties to financially flourish.

9. **The tax consequences of the spousal support order.** There was no proof.

10. **Fault or misconduct** Even though an irreconcilable differences divorce is granted, it does not prevent proof of fault or misconduct when considering alimony. *Driste v. Driste*, 738 So. 2d 763, 766 (¶9) (Miss. Ct. App. 1999) The proof showed Cyprianna's culpability by her absences, favoring time with others over her family over a protracted period of time; her ugly language in the children's presence; her involvement of the children in the domestic dispute, her physical abuse of the children, and her "dogging" Terry. The audio tape reveals the real Cyprianna and the court believed her frequent Tuscaloosa trips caused the marriage's demise.¹² /

11. **Wasteful dissipation of assets by either party.** Cyprianna took all \$1666.00 of the joint checking and \$8200.00.00 of joint savings. She had unjustified gasoline expenses to Tuscaloosa of more than \$400 each month. Moreover, because Cyprianna failed to obey production rules and subpoenas for financial records, she could not be examined to test the veracity of her 8.05's.

12. **Any other factor** deemed to be "just and equitable" in connection with the setting of spousal support. *Hammonds v. Hammonds*, 597 So. 2d 653, 655 (Miss. 1992); *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993). Terry "sacrificed [his] own professional career to further the purpose of the marriage" by finishing his veterinary obligations in Texas and following Cyprianna to MSU and did become "Mr. Mom." (Tr. 127).

In *Sanderson v Sanderson*, NO. 1999-CA-00915-COA; aff'd, 824 So. 2d 623 (Miss. 2002) the court held: "It would be inequitable to deny her some reasonably equivalent measure of financial security greater than was afforded her under the combined lump sum and rehabilitative alimony award under consideration." It would be grossly unfair to allow [Cyprianna] to reap the

¹²What type of marital misconduct constitutes fault is not clearly defined. *Richard v. Richard*, 711 So. 2d 884 (Miss. 1998). "Given our review of the record, we can find no manifest error in the chancellor's rejection of Michael's version of the [] incidents." *Rakestraw, infra*. In *Lawton v Lawton*, 905 So.2d 723 (Miss. App. 2004), a wife's monthly bingo spending of \$240.00 and \$100.00 for cigarettes was not wasteful dissipation. But *Richard* held that *Lawton* was not analogous since Mrs. Richard demonstrated reprehensible conduct by refusing to get a job, forcing Mr. Richard to get a second job, she was physically abusive to her husband, wrongfully accused him of adultery and child molestation, and refused to take the children to the doctor when they were sick. *Id.* at 887-88.

benefits acquired during the marriage while [she] worked and [Terry] was, at [her] instance, a homemaker and primary care giver,” *Hankins v. Hankins*, 729 So. 2d 1283 (Miss. 1999), compounded by the forfeiture of his Texas practice. “The division of property will not remove the need for periodic payments [].” *Barnett v Barnett*, No. 2003-CA-01665 COA (2005).

The first Cheatham factor [lump sum] is the "substantial contribution to accumulation of total wealth of the payor, *either by quitting a job to become a housewife* or assisting in spouse's business." *Cheatham v. Cheatham*, 537 So. 2d 435, 438 (Miss. 1988). “In order to award lump sum alimony, the chancellor must look at the substantial contribution to the accumulation of total wealth, length of the marriage, the inadequacy of the separate estate and the financial security of the spouse.” *Flechas v. Flechas*, 791 So. 2d 295, 304 (¶31) (Miss. Ct. App. 2000). In *Lauro v. Lauro*, 847 So. 2d 843, 849 (Miss. 2003), there was no abuse of discretion in failing to award lump sum alimony; however, the Court addressed periodic alimony as a separate issue: “*Rehabilitative alimony is awarded to parties who have put their career on hold while taking care of the marital home [and] allows the party to get back into the working world in order to become self sufficient.* Therefore, rehabilitative alimony is not considered during equitable distribution. In contrast to periodic alimony which is for an indefinite period. “*Id. Armstrong v. Armstrong*, 618 So. 2d. 1278, 1280 (Miss. 1993).

In *Neville v. Neville*, 734 So. 2d 352 (Miss. Ct. App. 1999) due to the disparity in the earning capacities, the court approved rehabilitative alimony of \$1400 a month for ten years. Should the chancellor deny an alimony award, there must be an on-the record consideration of the *Armstrong* factors especially considering a large amount of money was unaccounted for which the other party did not have access to. “The [husband] is entitled to support corresponding to [his] rank and condition in life, and the estate of [his wife].” *Tutor v. Tutor*, 494 So. 2d 364 (Miss. 1986) (citing *Jenkins v. Jenkins*, 278 So. 2d 446, 449-50 (Miss. 1973). “Taking all the evidence [], the case [was] reversed for failing to award [] any alimony.” *Weeks v. Weeks*, 832 So. 2d 583 (Miss. App. 2002)

If, an equitable division of marital property, considered with each party's non-marital assets, leaves a deficit for one party, then alimony should be considered. *Kilpatrick v. Kilpatrick*, 732 So. 2d 876 (¶16) (Miss. 1999). The decision to award alimony is largely within the discretion of the chancellor, and a decision in this regard will not be disturbed on appeal unless it is found to be against the overwhelming weight of the evidence or manifestly in error. *McNally v. McNally*, 516 So. 2d 499, 501 (Miss. 1987). See also *Guy v. Guy*, 736 So. 2d 1042 (Miss. 1999)

Conclusion

Based upon the weight of the evidence, credibility of the witnesses^{13/} and applicable law, something is bad amiss in the "Judgment" which, for the most part, is a *non sequitur*. The few findings are belied by the record rendering the conclusions flawed. Terry, attempting to comply with the spirit of the oral argument rule, did not request it, since the record is clear. However, should the court believe oral argument would assist, he will most willingly appear.

Respectfully submitted,
TERRY F. SWIDERSKI

BY: 

Jackson M. Brown

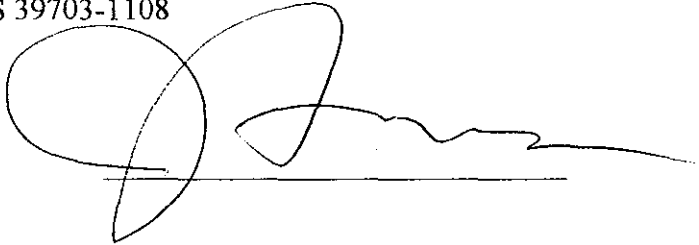
¹³Mary Anne's testimony regarding *Cyprianna's need for total control* was corroborated by Cyprianna's actions and inactions. Cyprianna was in contempt for refusing Terry visitation/contact, as well as refusing to give Terry his personal things. Moreover, not only did she defy Discovery Rules, on the stand, she admitted, she had twice refused to obey two different court issued subpoena duces tecums for her financial records, the last one for trial. Additionally, she disobeyed the court's instruction to deliver Terry a property list, but rather than holding this against her the court chose not to consider the personalty in any fashion. Cyprianna's credibility is dubious at best.

CERTIFICATE OF SERVICE

I, Jackson M. Brown, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing MRAP Rule 4(d) and MRCP Rules 52 and 59 Motions, to the following:

Carrie A. Jourdan, Esq
Attorney for Chipper
P. O. Box 1108
Columbus, MS 39703-1108

This the 29 day of January 2008.

A handwritten signature in black ink, appearing to be 'J. Brown', is written over a horizontal line.

Supreme Court of Mississippi

Terry F. Swiderski

Appellant

v.

NO.2007-CA-01517

Cyprianna Ellen (Hormanski) Swiderski

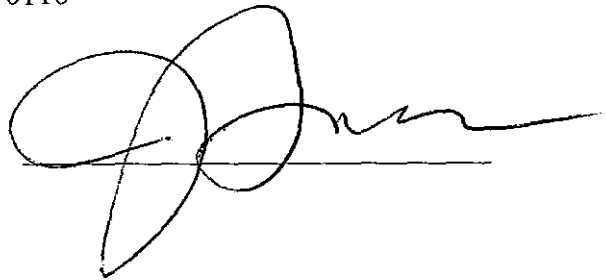
Appellee

CERTIFICATE OF SERVICE

I, Jackson M. Brown, do hereby certify that on January 29, 2008, I mailed a true and correct copy of the Appellant's Brief and Record Excerpts to Carrie A. Jourdan, Esq. and on this day mailed a true and correct copy to:

Hon. Kenneth M. Burns
P. O. Box 110
Okolona, MS 38860-0110

This the 4th day of February, 2008.

A handwritten signature in black ink, appearing to be 'J. Brown', written over a horizontal line.