IN THE SUPREME COURT OF MISSISSIPPI

REYNA CORRIDORI WELLS	APPELLANT/CROSS APPELLEE
VERSUS	NO. 2007-CA-01813
FORREST SIMPSON WELLS	APPELLEE/CROSS APPELLANT

APPEAL FROM THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE/CROSS APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

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Respectfully submitted, on this the 1st day of September, 2009.

GARY L. ROBERTS

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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This case originated on April 22, 2004. Reyna Corridori Wells (hereinafter Reyna) filed on that date a Complaint for Declaratory Judgment against her husband, Forrest Simpson Wells (hereinafter Forrest) (CP 8-15). In that Complaint, which was filed pursuant to Rule 55 of the Mississippi Rules of Civil Procedure, Reyna referred to a Post-Nuptial Agreement that had been executed by the parties, and asked the Chancery Court of Jackson County to declare the agreement to be null, void and of no effect, asserting a lack of consideration, duress, over-reaching, and other legal theories of recovery. She also sought attorney's fees and costs.

Also on April 22, 2004, Forrest filed in the same Court a Complaint for Divorce on the statutory ground of habitual cruel and inhuman treatment (Section 93-5-1, sub-paragraph 7 of the Mississippi Code of 1972, as amended) and seeking a divorce in the alternative on the ground of irreconcilable differences (Section 93-5-2) (CP 1-7). Forrest sought custody of the parties' two minor children, twins named Jeb and Josh, each born on June 3, 2001. Forrest also requested reasonable child support, contribution to the children's health care, exclusive use, possession and ownership of the marital home, an award of his non-marital property, the equitable division of the marital assets and liabilities, and a hearing on temporary issues at the earliest possible date. In his Complaint, Forrest also asserted that an additional child was born

to Reyna during the marriage, namely Ben Wells, a male born February 4, 2004 (hereinafter Ben). Forrest affirmatively pled, however, that Ben was not his child, and that he should not be adjudicated to be Ben's father, nor should he have any legal obligation for Ben.

Forrest filed a timely Answer to the Complaint for Declaratory Judgment, admitting the jurisdictional allegations, and generally asserting the validity of the Post-Nuptial Agreement (CP 29-33). Forrest also filed a Counterclaim to the Declaratory Judgment action, specifically praying that the Court adjudicate the agreement to be valid and enforceable (CP 34-41).

Reyna filed a timely Answer to the Complaint for Divorce, admitting the jurisdictional allegations, and admitting that her third child, Ben, is not the biological child of Forrest (CP 16-18). Simultaneously with the filing of her Answer on May 7, 2004, Reyna filed a Motion for Temporary Relief, seeking physical custody of all three minor children, child support, use and possession of the marital home, alimony, and other relief (CP 19-23). She did not file a Counterclaim for Divorce until more than eight months later, January 31, 2005 (CP 87A - 87H).

On July 9, 2004, an Order consolidating the cases was entered (CP 50-51). The cases were set for trial for March 23 and 24, 2005, and discovery was initiated by both parties.

On October 6, 2004, and prior to the hearing on temporary issues, an Agreed Order was entered (CP 59-61). It provides that, for the purposes of a hearing on temporary matters and any temporary order or judgment that may result:

A. The Post-Nuptial Agreement (which, among other things, absolves Forrest of any alimony liability to Reyna in the event of a divorce) shall not govern or affect the Court's adjudication or ruling on the issue of any temporary alimony obligation. It states that, in the event that Forrest is ordered to pay temporary alimony to Reyna, and thereafter if, upon a final resolution of the case, the Post-Nuptial Agreement is adjudicated to be valid, then any such alimony paid by him to Reyna would be paid back either by direct reimbursement or by reduction in Reyna's share in the marital estate; and

B. Forrest shall be adjudicated to be the father of the twin boys, Jeb and Josh, but there would be no adjudication at the temporary hearing concerning the paternity of Ben. However, Forrest would have no right, responsibility or obligation to Ben with respect to any temporary order that was entered. In the event of a final judgment or order adjudicating Forrest to be the father of Ben, then the Court would retain discretion to award Reyna retroactive child support if it deems same to then be appropriate.

In lieu of a temporary hearing on September 30, 2004, an agreement was reached by the parties and it resulted in an Agreed Order that was filed on December 9, 2004, but which is, by its terms, effective nunc pro tunc from and after September 30, 2004 (CP 62-67). The Agreed Order provides, inter alia:

A. The parties are awarded the joint legal custody of Jeb and Josh, with the parties equally sharing the amount of time with the twins, as each parent would have them during every other or alternate week.

B. The joint use of the marital home in Ocean Springs, with specific direction to peacefully coexist and to refrain from any harassment or disturbance of the other's peace.

C. Inasmuch as the parties would have equal time with the twins, no child support was to be paid by either party to the other, but Forrest was responsible for paying Reyna $1,500.00 per month as temporary alimony or spousal support, $657.00 per month for food and household expenses for the family, and all of the regular and customary family expenses at the marital home as reflected on Reyna's Financial Declaration. Forrest also agreed and was ordered to pay at least the monthly

> minimum on the home equity line of credit that was used to purchase the motor vehicle operated by Reyna, as well as the pre-school tuition, after care and snack money for Jeb and Josh.

No specific adjudication was made with respect to Ben Wells, except that Reyna would bear the sole responsibility for any of his expenses not specifically addressed above.

On December 13, 2004, Forrest filed his Complaint to Modify the Agreed Temporary Order, requesting that he be awarded the physical custody of Jeb and Josh, and that Reyna be ordered and directed to vacate the marital residence (CP 68-77). Reyna filed a timely Answer denying the allegations, and she also filed a Counterclaim to Modify the Agreed Order, requesting that Forrest's visitation with the children be modified to "standard visitation" and requesting that she be awarded the temporary exclusive use and possession of the home, along with other financial relief (CP 78-81).

As noted above, on January 31, 2005, Reyna filed a Counterclaim for Divorce, alleging habitual cruel and inhuman treatment, or in the alternative, entitlement to a divorce on the ground of irreconcilable differences (CP 87A-87H). In her Counterclaim Reyna specifically states that she is not making a request to have Forrest adjudicated to be the father of Ben. She instead seeks primary physical custody of all three children, child support, healthcare, use and possession of the marital home and contents, and other relief, including alimony and attorney's fees.

The competing claims to modify the Temporary Order were heard before the Special Master on February 17, 2005. That hearing

resulted in an Order entered on March 29, 2005, denying both parties their respective requests for modification of the custody arrangement, and instead continuing with joint legal custody and the parties having continued rights with Jeb and Josh during every other or alternate week (CP 94-101). Because of the lengthy delay in getting a hearing on the modification requests (due in part to the recusal of Chancellor Pat Watts as well as Forrest's refusal to continue living with Reyna), Forrest had already voluntarily vacated the marital residence by the time of the February 17, 2005 hearing. Accordingly, Reyna was awarded the temporary exclusive use and possession of the home and the Court ordered Forrest to continue paying $1,500.00 per month as temporary spousal support, along with the $657.00 per month for household expenses. He was also directed to pay:

A. The monthly house note (principal, interest, taxes and insurance);

B. The monthly water and sewer bill at the home;

C. The monthly electric bill at the home;

D. The monthly gas bill at the home;

E. The monthly telephone bill at the home;

F. The required monthly lawn maintenance incurred at the home;

G. Any maintenance at the marital home necessary to protect and preserve it as an asset;

H. The monthly cable TV at the home;

I. At least the monthly minimum on the home equity line of credit used to purchase the vehicle driven by Reyna;

J. The currently existing automobile insurance on both of the parties' vehicles;

K. The pre-school tuition and after care bills for Jeb and Josh;

L. An additional sum to Reyna each month for the actual cost of the snack money for the children, not to exceed $100.00 per month.

Forrest was also directed to continue carrying health and hospitalization insurance on Reyna, himself and on Jeb and Josh. He volunteered to continue the insurance coverage on Ben, since he could do so at no additional cost. Forrest was also held responsible for the twin's reasonable and necessary medical and dental expenses not covered by insurance, and Reyna was held responsible for all of her own uncovered medical and dental expenses, as well as any such uncovered medical or dental expenses for Ben.

On March 14, 2005, Reyna filed a Motion for Appointment of A Professional Business Appraiser (CP 92-93). Forrest is a plastic surgeon, and is the owner of Gulf Coast Plastic and Reconstructive Surgery, PLLC, a Mississippi Corporation which was formed in 2003 and is the legal entity out of which Forrest conducts his practice. Reyna asked that a qualified business appraiser be designated by the Court to establish the value of the PLLC in the divorce proceeding. Following a hearing on that Motion, the Court held in abeyance the question concerning the appointment of an appraiser, pending an adjudication by the Court of the validity of the Postnuptial Agreement (CP 121-124). The trial of the two causes of action was bifurcated. The Declaratory Judgment action was set for

trial on Tuesday July 26, 2005. The Court also denied Reyna's request for the appointment of a Guardian ad Litem for Ben.

In his Reply to Reyna's Counterclaim for Divorce, Forrest set forth numerous defenses, one of which was an affirmative allegation that Ben Wells was conceived by Reyna by artificial insemination without the knowledge and consent of Forrest, and that Ben was in fact conceived by Reyna through deceit, fraud, and trickery, along with the concealment of same (CP 125-133). Forrest alleged that he is not the father of Ben and that the Chancery Court should so adjudicate.

On May 3, 2005, an Order was entered allowing Reyna's original counsel of record to withdraw and substituting new counsel for her (CP 125-133).

The trial in the divorce case was previously scheduled for December 5,6, and 7, 2005, well after the Court's scheduled trial on the Declaratory Judgment action. Reyna's new counsel had a conflict with both the Declaratory Judgment action trial date and the divorce trial date. Following a hearing, an Order was entered on June 15, 2005 resetting the Declaratory Judgment action for trial on August 26, 2005, but denying the request for a continuance on the December 5,6, and 7, 2005 divorce trial dates (CP 147-149).

On July 22, 2005, Reyna filed a Motion for Attorneys Fees, requesting that Forrest be responsible for paying her attorney's fees, pendente lite (CP 174-180).

The Declaratory Judgment action came on for trial on August 26, 2005. After the presentation of all evidence, both sides rested on that issue.

Hurricane Katrina struck the Mississippi Gulf Coast three days later.

On October 13, 2005, the Court entered a Ruling, setting aside, in its entirety, the Post-Nutpial Agreement (CP 181-186).

On November 21, 2005, Reyna filed a Motion to Amend her Counterclaim for Divorce (CP 225-234). It was scheduled for hearing on the first day of trial, December 5, 2005.

Due to the devastation caused by Hurricane Katrina, and the inability of the parties to prepare for the early December 2005 trial, the case was continued again. An Order was entered on December 5, granting Reyna the right to file her Amended Counterclaim, which she did on that date (CP 235) (CP 236-243).

Reyna's Amended Counterclaim continued to seek a divorce on the ground of habitual cruel and inhuman treatment or on the alternative ground of irreconcilable differences, but she asserted, for the first time that "...there is no reason to treat the minor child, BEN COHEN WELLS, any differently from the parties' other minor children...". She claimed that Forrest's actions placed him in a position of "in loco parentis" to Ben, and she alleged that Forrest is charged with the rights, duties, and liabilities of a natural parent with respect to Ben. She sought custody, child support and all of the other relief set forth in her prior divorce pleadings.

On December 7, 2005, an Order was entered appointing Mr. James Koerber to perform the valuation of Gulf Coast Plastic and Reconstructive Surgery (CP 244-245). The Court selected the

valuation date to be September 30, 2004, which is the effective date, nunc pro tunc, of the first temporary Agreed Order. The Order also rescheduled the trial to January 25, 26, and 27, 2006.

Following a hearing, the Court entered an Order on December 8, 2005, denying Reyna's request for attorney's fees pendente lite (CP 246-249). The Court noted the many financial obligations placed upon Forrest in the original Temporary Order and the Amended Order, including the monthly house note, the regular monthly expenses at the home occupied by Reyna, $1,500.00 per month in temporary alimony plus $657 per month for Reyna's food and household expenses. Moreover, the Court noted that Reyna had received additional cash in the amount of $10,800 ($4,500 from Forrest and $6,300 in cash which she took from the safe inside the marital home).

In his reply to Reyna's Amended Counterclaim for Divorce, Forrest once again denied the material allegations and set forth numerous affirmative defenses, including that Ben Wells was conceived by Reyna through means of artificial insemination without his knowledge and consent, and in fact through the deceit, fraud, trickery and concealment of same perpetrated by Reyna (CP 312-321). He again alleged that he should not be adjudicated to be Ben's father, but sought the affirmative relief for which he previously pled.

On June 16, 2006, Reyna's then counsel filed a Motion to Withdraw, citing "adequate reason for counsel to withdraw" (CP 325-326). On July 12, 2006 an Order was entered granting that Motion,

but reciting that the Court was not inclined to grant any further continuances to Reyna (CP 327-329).

On August 10, 2006, more than two years after the case was first filed, Forrest learned of Reyna's adulterous relationship with Conley Freeman. Accordingly, he moved to amend his original Complaint to assert uncondoned adultery as an additional ground for divorce (CP 330-332).

Following a hearing, the Court granted Forrest's Motion (CP 333-337). He filed his First Amended Complaint on August 28, 2006 (CP 338-340). Within the Order of August 21, 2006, the Court granted Forrest's Motion to Compel Reyna's deposition testimony and Forrest's Motion to Compel answers to discovery that had been propounded to Reyna back on April 3, 2006. The Court further denied Reyna's Motion for a Continuance, inasmuch as the Motion for a Continuance was not filed in a timely manner, and was made on her behalf by newly retained counsel who had not even filed an Entry of Appearance. In its Ruling, the Court held, in pertinent part, that

> ...the trial of this consolidated civil action is now specially set for October 31, November 1, and November 2, 2006 and the Court does not desire any further continuance. This Court also notes that on June 23, 2006, this Court adjudicated, as stated in its July 12, 2006 Order that the Court "... is not inclined to grant any further continuances of this civil action to the Plaintiff and the Plaintiff shall so notify any counsel she elects to retain. Moreover, the Court notes that the Plaintiff was granted thirty (30) days additional time from and after June 23, 2006, within which to retain counsel to represent her in this case, and that nothing was filed by the Plaintiff, or on her behalf, until the August 18, 2006 Motion for Continuance." (CP 333-338).

On October 31, 2006, more than two and a half years after the filing of the initial pleadings, the trial finally began. Both

parties were present in Court and represented by counsel. The parties signed and filed their written Consent to Divorce on the Ground of Irreconcilable Differences (Ex 6). In that Consent, Reyna and Forrest agreed that they should be awarded the joint legal custody of Jeb and Josh, and that Forrest would not be adjudicated to be the father of Ben. He accordingly would have no legal duties or obligations with respect to that child. The issues which the parties submitted to the Court for resolution are:

A. The physical custody of Jeb and Josh, and visitation rights;

B. Child support, health insurance coverage and other health care expense not covered by insurance;

C. The use, possession and ownership of the marital residence and the payment of debt on same;

D. The equitable division of the marital assets and liabilities;

E. Whether Forrest is required to pay any alimony to Renya, and if so, the kind or kinds of alimony, the amount(s) and the duration;

F. Whether Reyna is entitled to any attorney's fees, and if so, the amount thereof;

G. The assessment of all Court costs;

H. Life insurance on the parties for the benefit of Jeb and Josh.

After three (3) days of trial, Reyna had not yet rested her case as Plaintiff. The Court granted a special setting for the conclusion of the trial on February 8 and 9, 2007, in Greene County. Finally, on February 9, 2007, all of the evidence was concluded and both sides rested. Each side then presented proposed Findings of Fact and Conclusions of Law. On April 17, 2007, the

Court issued its Findings of Fact and Conclusions of Law (CP 349-391). The Court noted, in describing the procedural history, that there were numerous other filings and Motions not included in the Court's eleven page recitation of that history (CP 359).

Pursuant thereto, a Judgment of Divorce was finally awarded on May 14, 2007 (CP 392-400). In addition to awarding the parties a divorce on the ground of irreconcilable differences, and giving them joint legal custody of Jeb and Josh, the Court ruled as follows:

A. That Forrest is not adjudicated to be the father of Ben, and he will have no legal rights, duties or obligations with respect to that child, giving Reyna sole legal and physical custody of him;

B. That Forrest is awarded the physical custody of Jeb and Josh, subject to certain specific visitation rights awarded to Reyna;

C. That Reyna should pay child support to Forrest in the amount of Three Hundred Thirty Six Dollars ($336.00) per month, with Forrest continuing to provide health and hospitalization insurance for Jeb and Josh;

D. That the parties are responsible for equally splitting the Seven Thousand Nine Hundred Fifteen Dollar ($7,915.00) cost for the professional appraisal of Forrest's plastic surgery practice, with Reyna's half to be deducted from her portion of the equitable division of the marital estate.

E. That certain assets of Forrest's are non-marital in nature;

F. That, after adjudicating net values, the marital assets are to be divided equally; and

G. That Reyna's request for alimony and attorney's fees should be denied.

Each side filed timely Rule 59 Motions (CP 401 - 408). In her Motion, Reyna took issue with the award of physical custody of Jeb

and Josh to Forrest and alternatively asserted that her visitation was insufficient. She also complained of having to pay child support and half of the children's medical expenses not covered by insurance. She complained further about having to pay for half of the costs for the appraisal of Forrest's medical practice, about the determination of marital versus non-marital assets, and about the division of the marital assets and liabilities, including the marital residence. She also complained about the denial of alimony and attorney's fees. Forrest also filed a First Amended Post Trial Motion on August 31, 2007 (CP 410-413). Among other things addressed in his Motion, Forrest noted for the Court that, on August 29, 2007, Reyna had filed a letter, advising the Court of her move out of Jackson County, MS, to Troy, Alabama (CP 409). Accordingly, Forrest alleged that the visitation rights awarded to Reyna were no longer appropriate.

A hearing was held on September 7, 2007, pursuant to all the pending post-trial Motions, and an Order thereon was entered September 12, 2007, denying each Motion (CP 414, 415).

Being aggrieved by the Court's Judgment of Divorce, and the subsequent Order overruling her post-trial Motion, Reyna filed her Notice of Appeal (CP 429-431).

Being aggrieved by the nominal amount of child support awarded by the Chancellor, Forrest filed a timely Cross Appeal (CC 444-45).

B. FACTUAL HISTORY

Reyna Wells was thirty four (34) years of age at trial, having been born on December 17, 1971 (T 766). She and Forrest were married on May 25, 1996 (T 144, 767). She is originally from Ozark, Alabama, where her family members reside today (T 767). She graduated from high school in 1990 and completed nursing school in 1993, presently holding an associate's degree. Her first professional employment was with the labor and delivery department at the University of Alabama in Birmingham as a registered nurse.

Forrest Wells was thirty eight (38) years of age at trial, having been born on July 23, 1968 (T 379). He had already completed his under graduate degree, four (4) years of medical school, and one (1) year of surgical residency prior to the parties' marriage in May of 1996.

Both parties are in excellent physical health.

After their marriage, Reyna and Forrest lived in Birmingham while Forrest completed four (4) additional years of surgical residency, while Reyna continued to work as a nurse (T 380). Each of them generated incomes of approximately $35,000.00 per year (T 1006). When Forrest completed his general surgical residency in the summer of 2000, he elected to pursue three more years of specialized residency in the field of plastic surgery (T 1004-05). Forrest was accepted into the program at the University of Illinois-Chicago, where he began his plastic surgery residency in the late summer. Reyna did not seek nor obtain employment while

the couple lived in Chicago, and they lived off Forrest's modest surgical resident's salary in the thirty-five thousand to forty thousand dollar per year range (T 1010-1012).

After the completion of Forrest's plastic surgery residency, the couple moved to Ocean Springs, Mississippi where Forrest began his own plastic surgery practice in the late summer of 2003 (T 1029). To assist the couple on their feet financially, Singing River Hospital provided the couple a $150,000.00 loan, (which only Forrest signed). The parties used approximately $40,000.00 of the loan as a down payment for a home they purchased in Ocean Springs. The loan was structured in such a way that, for each complete year Forrest served with staff privileges at Singing River Hospital and Ocean Springs Hospital, $50,000.00 of the loan would be forgiven (T 301). At the time of trial, Forrest had fulfilled his obligation, and the $150,000.00 debt has been forgiven. Nonetheless, it has constituted taxable income to the parties during the life of the loan. Moreover, more than $90,000.00 of this marital debt remained on the books as of September 30, 2004, the date which the Court selected for the valuation of the marital estate and the date after which the accumulation of marital assets ceased (T 302).

As noted earlier, the present litigation between the parties began on April 22, 2004, approximately nine months after the parties established residency in Jackson County. According to Forrest's testimony, this was approximately three months after his plastic surgery practice began to show a profit (T 356).

While living back in Birmingham, the parties began to plan for children, although Reyna did not readily become pregnant.

Fertility studies were undertaken, and, in an effort to enhance the likelihood of Reyna conceiving, the parties agreed to utilize the services of a sperm donor. But by the summer of 2000, Reyna still had not become pregnant (T 356, 770-771, 1007-1008). With their move to the Chicago area, they retained the services of a new reproductive endocrinologist who recommended in-vitro fertilization. Although the process failed on at least 5 occasions, Reyna ultimately became pregnant. Both Forrest and Reyna had played an active role in the selection of the anonymous sperm donor, selecting certain qualities, traits and characteristics of the donor that were mutually agreeable. This pregnancy resulted in birth of twin boys, Jeb and Josh, born June 3, 2001. (T 172-173, 780, 1008).

By the time of the twins' birth, Forrest had completed his first year of plastic surgery residency (T 1011). He worked long hours, sometimes even more than 80 hours per week. Both parties agreed that, until the conclusion of the residency in Chicago in the summer of 2003, Reyna was clearly the primary care provider for the twins. During this time the parties lived in a very modest 900 square foot apartment in suburban Chicago, solely on the resident's salary that Forrest was generating (T 1009-1011).

Reyna testified that she enjoyed motherhood tremendously and wanted to have another baby (T 793). Forrest agreed, but only on the condition that it was by natural conception, not through the use of artificial procedures (T 796, 927). Reyna testified that she clearly understood that it was not Forrest's wish for her to

get pregnant again through the services of a sperm donor (T 793). Nonetheless, when asked by her own counsel how badly she wanted another baby, Reyna testified "desperately" (T 796).

As time passed, with the parties not using any form of birth control, Reyna still did not conceive. She then formulated a plan to get pregnant on her own, without Forrest's knowledge or consent (T 66). She first consulted the same cryobank that had provided sperm for conceiving Jeb and Josh. She learned that the donor was no longer in the program, and on her own, she selected another donor and ordered sperm from the cryobank, choosing her own preferred traits and characteristics. She stated that she was able to do so, even though she is not a physician herself. Exhibit 20, however, shows that Reyna used Forrest's name as her physician, and had the sperm shipped to a fictitious plastic surgery clinic at her home address. Also see Exhibit 21. She testified that she intended to lie to Forrest and to convince him she had conceived naturally. (T 66-69, 797, 932-938)

The sperm delivery was timed to meet with Reyna's ovulation cycle, and since Forrest was working such long hours during his residency, Reyna knew that there was very little likelihood, if any, that Forrest would coincidently discover her plan to become pregnant (T 943).

The frozen sperm arrived in a nitrogen tank from a carrier, and after allowing it to thaw, Reyna, on her own, simply drew it up into a syringe and injected it vaginally (T 799, 933, 942). The shipment contained two vials of sperm, and Reyna attempted to

impregnate herself with both vials, approximately thirty days apart, to mirror her ovulation cycles (T 800). Neither effort resulted in a pregnancy, and Reyna simply shipped the container back to the cryobank, only to try again later (T 945). She ordered more sperm, followed the same procedure, and became pregnant without mentioning any of the procedures to Forrest (T 946). When she did tell her husband, she led him to believe that her pregnancy was natural, and she said nothing about what she had actually done. She readily admitted in her testimony that she was, at the very lease, dishonest (T 804)

Approximately sixteen weeks into the pregnancy Reyna miscarried, in approximately March of 2003 (T 802-803).

Not to be deterred, and wanting a baby desperately, whether Forrest consented or not, Reyna once again contacted the cryobank without Forrest's knowledge. She ordered additional sperm and became pregnant, employing the same procedure taken earlier. Shortly after being able to confirm it herself, she told Forrest about the pregnancy once again, without revealing her deception. She hoped that Forrest would believe that this pregnancy was by natural means, and that he would accept the child without ever questioning the conception. She in fact testified that, had Forrest never found out what actually occurred, she never planned on telling him the truth (T 802-805, 927-928, 950).

The purchase of sperm through a cryobank does not come cheaply. To enable her to succeed in her scheme without getting caught, Reyna also needed to conceal the financial side of the

equation from her husband. She testified that she acquired credit cards without Forrest's knowledge and charged the expenses on those cards (T 797). Those charges ultimately were the impetus that caused her plan to unravel.

The parties were already having great differences about financial matters, without Reyna's sperm donor pregnancy. Forrest testified, and Reyna confirmed, that she brought about $12,000.00 worth of credit card debt into the marriage, something that she did not tell her husband about prior to their May 1996 wedding (T 1014). They worked through that problem, only to encounter it again several years later (T 1015). It became a significant problem after Reyna quit working about the time that the parties moved from Birmingham to Chicago (T 1016). Several months after the parties moved to Ocean Springs, Forrest discovered the hidden credit card charges from the cryobank, and he confronted Reyna. Rather than admitting what she had done, Reyna once again lied and told Forrest that her third child, Ben, had been conceived naturally (T 1021-23). Because he was not convinced that Reyna was telling him the truth or would ever do so, he informed Reyna that, when the child was born, he would have DNA paternity testing performed. In the face of such dilemma, Reyna relented and confessed, approximately seven to eight months into her pregnancy (T 1024).

Forrest testified that, even after being confronted with such cataclysmic events, he still intended to keep the marriage intact (T 1025). He was very concerned about Reyna's spending practices,

not to mention her intentional concealment of debt. And, even though Reyna had deliberately become pregnant on her own, had concealed it from him for many months (even with the baby she lost), Forrest was still intending to work through the problems and hopefully preserve the marriage. He wanted very much, however, to protect himself from Reyna's potential for future misconduct, and therefore sought the services of a lawyer. A post nuptial agreement was prepared and submitted to Reyna, which she signed (T 812). Forrest testified that the reason the agreement was prepared was to offer him a means of protecting himself financially from Reyna, if her future misconduct so required.

It was not until several months later that Forrest actually decided to pursue a divorce. Reyna began using the children in an effort to manipulate Forrest into acceding to her demands. For instance, Forrest testified that Reyna began to make irrational demands, stating that she would move away with the children if Forrest wouldn't buy her new furniture, take her on trips out of the country, and the like (T 1032-1037).

It was a combination of all these things that resulted in Forrest's decision to seek a divorce.

Reyna did not at first agree to a divorce, and in fact claimed that she did not want one. She acknowledged, in her initial pleadings, that Forrest was not the father of Ben, and that she was seeking no relief against Forrest with respect to him. Almost a year after the filing of Forrest's Complaint for Divorce, however, Reyna filed a Counterclaim, seeking a divorce on alleged habitual

cruel and inhuman treatment. Thereafter, her story changed. She then alleged that Forrest had occupied an "in loco parentis" position to Ben, and that Forrest should be adjudicated to be the father and should be required to pay child support for him.

The litigation has floundered for years due in part to Hurricane Katrina, but also due in part to Reyna's changing of counsel on two separate occasions. Moreover, the Court, on its own motion, continued the case from one setting when the identity of Dr. Matherne as an expert witness was not disclosed by Reyna until just days before the scheduled trial.

Reyna professed throughout most of this litigation that she wanted to be a stay-at-home Mom. However, in the spring of 2006, she finally accepted employment as a nurse with a home health care agency, normally working a forty hour week. She held that full time employment until the first day of trial, October 31, 2006, when she announced, effective immediately, that she was cutting back on her work schedule to allow her to "spend more time with the children" (T 906).

Forrest has continued to work in the private practice of medicine as a plastic surgeon. His practice has done well, beginning to show a profit in approximately January of 2004. The financial records in evidence amply show the parties respective financial posture.

Since the entry of the Temporary Order effective September 30, 2004, the parties had been alternating the direct physical care and custody of the twins on a week by week basis. During those weeks

when Forrest had the children with him, he typically worked half days. Jeb and Josh were in school until the early afternoon, so Forrest customarily had afternoons with them. Forrest's mother, who has a home in Orange Beach, AL, had been living with Forrest during the weeks that the boys were in his care. Forrest wanted to move back into the marital residence with Jeb and Josh, pay Reyna her share of the marital equity, and give her standard visitation. Beginning in 2007, Jeb and Josh began school (1st grade) until mid-afternoon, and Forrest stated that he has the flexibility, on a full time basis, to complete a full day of medical practice in time for him to pick up the children at the end of each school day.

During the course of the litigation, Reyna met another man, Mr. Conley Freeman, had fallen in love, and regularly drove to Ozark, AL to be with him. On many occasions she took Jeb and Josh with her and in fact she admitted that she had at least on one occasion spent the night with Mr. Freeman while Jeb and Josh were present (T 915-918). She denied that she intended to move to Alabama where Mr. Freeman lives, but even her own witnesses, her friends, and her family testified that they saw her in Ozark "almost every weekend" (T 746). More recently, Reyna, acknowledged that Mr. Freeman was spending the night with her in the marital home in Ocean Springs. She even stated that she, Mr. Freeman and Ben were occupying the marital bed (T 915).

Shortly after the trial concluded, Reyna filed with the trial court a notice that she had in fact moved to Troy, Alabama (CP 409).

SUMMARY OF THE ARGUMENT

When an appellate court reviews a Chancellor's decision in cases involving divorce and all related issues, the scope of the appellate court's review is limited by the substantial evidence/ manifest error rule. RK v. JK, 946 So.2d 764, 772 (Miss. 2007); (citing Mizell v. Mizell, 708 So.2d 55, 59 (Miss. 1998)). In other words, the appellate court will not reverse the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Manifest error means that error which is unmistakable, clear, plain or indisputable. Magee v. Magee, 661 So.2d 1117 (Miss. 1995); Bell v. Parker, 563 So.2d 594 (Miss. 1990).

It is not the function of an appellate court to substitute its judgment for that of the Chancellor. The appellate court's scope of review is limited to the manifest error standard.

The Chancellor in the present case faced multiple decision-making responsibilities. She exercised those responsibilities prudently, after careful consideration, and after thoroughly analyzing a voluminous record. She then issued a detailed and precise forty-three page Findings of Fact and Conclusions of Law.

Each of the issues raised by Reyna on appeal were carefully analyzed by the Chancellor at the conclusion of the trial. The Chancellor's Judgment, in all respects except one, was perfectly consistent with the evidence presented. She committed reversible

error only by setting child support to be paid by Reyna at such a paltry level that it is indeed manifestly in error.

Accordingly, the Judgment should be affirmed in all respects, save as to child support only. The Chancellor's child support determination should be reversed and rendered, setting it at a level consistent with the uncontradicted evidence.

ARGUMENT

Standard of Review

As noted above, the appellate court's standard of review in a domestic relations case is limited by the substantial evidence/ manifest error rule. RK v. JK, Id., citing Mizell v. Mizell, Id. The appellate court will not reverse the Chancellor's Judgment unless the Chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Also see, Hults v. Hults, Civil Action No. 2007-CA-02186-COA, Court of Appeals of the State of Mississippi, decided June 30, 2009. It is particularly true in the areas of divorce and child support that the appellate court must respect a Chancellor's Findings of Fact which are supported by credible evidence and not manifestly wrong. Id. (Emphasis added). We have long recognized that the trial judge is in the best position to view the trial. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact that have the desired and needed reliability. Gavin v. State, 473 So.2d 952, 955 (Miss. 1985).

ISSUE A.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN AWARDING CUSTODY OF THE PARTIES' MINOR CHILDREN TO FORREST WELLS

The polestar consideration in all custody cases is the best interest and welfare of the children. Albright v. Albright, 437

So.2d 1003, 1005 (Miss. 1983). In fact, Riley v. Doerner, 677 So.2d 740 (Miss. 1996) directs that Chancellors must consider a child's best interest above everything else.

In Albright the Court set out factors for Courts to consider in awarding custody. They are:

1. The age, health and sex of a child;
2. Which parent had continuing care of the child prior to separation;
3. Which parent has the best parenting skills;
4. Which parent has the willingness and capacity to provide primary child care;
5. The employment responsibilities of both parents;
6. The physical and mental health and age of each parent;
7. The emotional ties of the parent and child;
8. The parent's moral fitness;
9. The child's home, school and community record;
10. The preference of the child at the age of twelve;
11. The stability of the home environment and the employment of each parent;
12. Any other relevant factors.

This list is not exhaustive. Courts may consider other relevant factors as well. Sellers v. Sellers, 638 So.2d 481 (Miss. 1994). Moreover, the Albright factors are not a mathematical formula. Lee v. Lee, 798 So.2d 1284 (Miss. 2001). For example, a parent who performs more favorably on more factors than the other is not automatically entitled to custody. In fact, one or two

factors may weigh so heavily in the Chancellor's mind that they alone would control the award of custody. Divers v. Divers, 856 So.2d 370 (Miss. Ct. App. 2003). As Judge Bradley noted in the Court's opinion "...child custody is a matter of equity which requires more than counting votes...". (CP 368).

Furthermore, the trial judge's decision must also take into account other considerations, including the credibility of witnesses, the weight of the testimony, and the weight of the evidence which is capable of more than one interpretation. LeBlanc v. Andrews, 931 So.2d 683 (Miss. 2006); Johnson v. Gray, 859 So.2d 1006 (Miss. 2003).

The Chancellor carefully addressed each of the Albright factors, and found:

1. AGE AND SEX OF THE CHILD OR CHILDREN: The children at issue are twin boys who, at the time of trial, were almost six years of age. They were in good health and were in kindergarten at a private school. They are not children of tender age. For instance, see Mercier v. Mercier, 717 So.2d 304 (Miss. 1998); Gutierrez v. Bucci, 827 So.2d 27 (Miss. Ct. App. 2002); Price v. McBeath, 989 So.2d 444 (Miss. Ct. App. 2008).

The Chancellor found that this factor favored neither parent, but it could easily have favored Forrest. There are numerous cases indicating an increasing acceptance of fathers as primary custodians. For example, a father was awarded custody of a two year old child in Copeland v. Copeland, 904 So.2d 1066 (Miss. 2004). A child's same-sex parent may be considered the better

custodian if all other factors are equal. Watts v. Watts, 854 So.2d 11 (Miss. Ct. App. 2003); Bass v. Bass, 879 So.2d 1122 (Miss. Ct. App. 2004). In Messer v. Messer, 850 So.2d 161 (Miss. Ct. App. 2003), a ten year old boy's age and sex favored his father because of the importance of male guidance at that age. Moreover, in Hassett v. Hassett, 690 So.2d 1140 (Miss. 1997), the father was granted the custody of a six year old child because the "child was entering an age when male guidance [was] needed". Additionally, the father was considered the better custodian of a two year old son and his older brother because the sex of the boys was more important than their age. Steverson v. Steverson, 846 So.2d 304 (Miss. Ct. App 2003).

2. DETERMINATION OF THE PARENT WHO HAD THE CONTINUITY OF CARE PRIOR TO THE SEPARATION: Reyna was the primary care giver prior to the separation, based upon the agreement between her and Forrest, while he completed the balance of his residency program in plastic surgery.

In this particular case, Reyna and Forrest had a very prolonged separation, and both of the parties had the same amount of time with the children for more than two years leading up to the trial. The Chancellor noted that both parents provided good care and demonstrated good parenting skills since their separation in 2004. Parental care during a lengthy separation is an important factor that the trial court should weigh in assessing and considering this particular factor. Jerome v. Stroud, 689 So.2d 755, 757 (Miss. 1997); Caswell v. Caswell, 763 So. 2d 890, 894 (Miss. Ct. App. 2000). The continuity of care prior to the

separation is not favored over care taking responsibilities during the separation. Watts v. Watts, 854 So.2d 11 (Miss. Ct. App. 2003); See also Gantenbein v. Gantenbein, 852 So.2d 63 (Miss. Ct. App. 2002).

The trial court found that this factor favored neither parent.

3. PARENTING SKILLS: This factor encompasses the parents' respective abilities to provide physical care, emotional support, discipline and guidance. It focuses on the children's personal hygiene and medical needs, social and extra curricular activities and free time. Hoggatt v. Hoggatt, 796 So.2d 273 (Miss. Ct. App. 2001); Stark v. Anderson, 748 So.2d 838 (Miss. Ct. App. 1999); Brawley v. Brawley, 734 So.2d 237 (Miss. Ct. App. 1999); Copeland v. Copeland, 904 So.2d 1066 (Miss. 2004).

The evidence showed, and as noted by the Chancellor in her Findings, that Forrest had suitable arrangements for child care by involving his mother to assist him when he is working. He arranged his hours so that he can drop off the children at school and pick them up and be home with them shortly after school lets out at the end of the school day. On the other hand, when the children were with Reyna, they would sometimes travel to Troy, Alabama, to visit family members, Reyna's friends, and her admitted paramour. The Chancellor also noted that Reyna allowed her boyfriend to stay overnight at the marital residence while the children were present.

On this particular point, the Chancellor found that each of the parties has been responsible for providing the direct needs of the children, which included meal preparation, cleaning, keeping a

safe and orderly home environment, laundry, appropriate hygiene and discipline. Forrest has assistance from his mother, and Reyna, who has no close family members around, relies upon babysitters when she is unavailable due to work. Moreover, the Chancellor noted that Reyna has accumulated significant debt but chosen to reduce her own work hours and therefore her available income.

Nonetheless, the Court found that this particular factor favored neither party.

4. WILLINGNESS AND CAPACITY TO PROVIDE PRIMARY CHILD CARE: When considering this factor, and combining it with No. 5 below, the Chancellor determined that it favored Forrest, but only slightly. Forrest runs his own clinic, sets his own hours, and has the flexibility to meet the requirements of his children. Reyna's job is not as flexible. At the time of trial, she traveled throughout the county, and sometimes traveled to adjacent counties. These considerations can weigh more heavily in favor of one parent over the other. Moak v. Moak, 631 So.2d 196 (Miss. 1994); Massey v. Huggins, 799 So.2d 902 (Miss. Ct. App. 2000); Lee v. Lee, 798 So.2d 1284 (Miss. 2001); Rinehart v. Barnes, 819 So.2d 564, 567 (Miss. Ct. App. 2002).

5. EMPLOYMENT RESPONSIBILITIES OF BOTH PARENTS: As noted above, Forrest works for himself in his own practice, sets his own hours, and schedules his surgery in a manner which allows him more time with his twin sons. He works in close proximity to the home and the children's school. On the other hand, at the time of trial, and prior to Reyna moving to Troy, Alabama, Reyna would be

within a reasonable travel distance, but Forrest would be much closer.

6 . THE PHYSICAL AND MENTAL HEALTH AND AGE OF THE PARENTS: The trial court determined that this factor favors neither parent. Both parties were in their thirties and in good health, both physically and mentally.

7. EMOTIONAL TIES OF THE PARENTS AND CHILDREN: The Court concluded that both parents have strong emotional ties with the twins and likewise the children have strong emotional ties to each parent. This factor was held to favor neither Forrest nor Reyna.

8. MORAL FITNESS OF THE PARENTS: A parent's sexual conduct should be considered under the Albright factors as a moral fitness issue. Carr v. Carr, 480 So.2d 1120 (Miss. 1985). Massey v. Huggins, 799 So.2d 902 (Miss. Ct. App. 2001), held that it is proper to consider a parent's cohabitation as a custody determining factor. Still further, in Richardson v. Richardson, 790 So.2d 239 (Miss. Ct. App. 2001), our Court of Appeals affirmed a Chancellor who awarded custody to the father where, among other things, the mother lived with a boyfriend. Also see Thurman v. Johnson, 998 So.2d 1026 (Miss. Ct. App. 2008).

Reyna admitted that she acquired a paramour and testified that they engaged in sexual relations. She stated that her boyfriend was allowed to stay overnight with her at her home, even while the minor children were present. The Chancellor noted in her Opinion that this does not set a "good example" and is not in the best interest of Jeb and Josh (CP 373). See also Webb v. Webb, 974 So.2d 274 (Miss. Ct. App. 2008).

The Court also noted that the parties experienced financial problems due to Reyna's inability to live within their means. She brought large credit card debt into the marriage, concealed it from Forrest, and after the debt was paid off, did it again, and again concealed it from Forrest. In fact, the evidence showed that Reyna even went to Forrest's mother and asked her for help in paying the debt, because she knew that Forrest would be upset about it, if he found out.

Forrest's response was to place Reyna on a budget. Reyna thought it was unreasonable, and began to make threats and insinuations regarding his access to the children if her financial needs were not met.

Perhaps of even greater importance is Reyna's pattern of intentional deceit. In her scheme to become pregnant with her third child, she opened a credit card account in the name of a fictitious plastic surgery clinic at her Chicago home address (Ex. 20). She ran up a large debt in purchasing the donor sperm when she knew Forrest no longer wanted to use artificial means to conceive a child. She then impregnated herself, not once, but twice, lied to her husband about it, and tried to convince Forrest that the pregnancy was the result of natural conception.

This intentional pattern of deceit gave the Court serious doubt about Reyna's moral fitness and her ability to be a good example and positive influence for Jeb and Josh. (CP 26)

The Court determined that the moral fitness factor weighed in Forrest's favor. This is rightfully so.

9. HOME, SCHOOL AND COMMUNITY RECORD OF THE CHILDREN: When considering this factor, the Court should take into account the parents' involvement in the children's activities and in ensuring prompt and regular school attendance. Myers v. Myers, 814 So.2d 833 (Miss. Ct. App. 2002). In Steverson v. Steverson, 840 So.2d 304 (Miss. Ct. App. 2003), a father was awarded custody, at least in part, because of his involvement in his son's sports and extra curricular activities. The fact that one parent's home is near friends and extended family is also to be considered under this factor. Mixon v. Sharp, 853 So.2d 834 (Miss. Ct. App. 2003). Moreover, a Court may consider that one parent is moving while the other remains where the children's friends and family live. Sobieske v. Preslar, 755 So.2d 410 (Miss. 2000); SB v. LW, 793 So.2d 656 (Miss. Ct. App. 2001).

The Court found that this factor favored neither parent. The twin boys were almost six years of age at the time of trial and had only a nominal school and community record. They were enrolled in kindergarten in Ocean Springs and both parents were involved in their activities. Forrest had enrolled the twins in a soccer league and was serving as their coach.

10. PREFERENCE OF A CHILD TWELVE OR OLDER: Inasmuch as the Wells twins are not of sufficient age to express a preference, this factor did not enter into the Chancellor's consideration.

11. STABILITY OF THE HOME ENVIRONMENT AND EMPLOYMENT OF EACH PARENT: Stability of the home environment may be just as important as primary care taking in significance. Bell, Deborah, Mississippi Family Law, Section 503[11] (2005). A parent's personality traits and behavior may also affect this factor. Gable v. Gable, 846 So.2d 296 (Miss. Ct. App. 2003). The presence of extended family in the area where one parent lives is a factor favoring that parent. Copeland v. Copeland, id.; Dearman v. Dearman, 811 So.2d 308 (Miss. Ct. App. 2001). The stability of a parent's employment is also part of the Albright analysis. While the higher income of one parent does not grant a custodial preference, long term stability in employment is, nonetheless, a factor that may favor one parent over the other. Johnson v. Johnson, 872 So.2d 92 (Miss. Ct. App. 2004).

The Chancellor noted that during the pendency of the litigation, Forrest paid almost all of the living expenses as well as temporary spousal support to Reyna, approximating $80,000.00 annually. In spite of this, Reyna accumulated significant debt. She is a registered nurse and has the ability to work and generate a significant income herself. Despite her obvious need to reduce debt that she incurred after the separation, she elected to work only part-time, when working at all. This raised concern on the part of the Chancellor that Reyna did not show the ability to provide a stable or financially secure environment for Jeb and Josh. (CP 376). Instead of Reyna putting forth genuine effort to work and to generate the income that she needs to support herself,

"...she seems content to rely on Forrest's sizeable monthly contribution." (CP 376). Accordingly, the Chancellor determined that this factor weighed in Forrest's favor.

12. OTHER RELEVANT FACTORS: The Albright factors take into account that the Court should make a totality-of-the-circumstances determination. Put differently, there may be other issues that the court should consider when it makes a custody determination. For instances, separation of siblings can be such an issue. There is a preference in the law of the State of Mississippi to keep siblings together unless the circumstances justify the separation. Sellers v. Sellers, 638 So.2d 481 (Miss. 1994). Cases involving the separation of half-siblings, however, are less compelling. It is in fact very common in today's world, involving blended families, where half-siblings are frequently separated simply by necessity. Perhaps more importantly, there is no hard and fast rule that the best interest of siblings will be served by keeping them together. Sellers, Id.; Sparkman v. Sparkman, 441 So.2d 1361 (Miss. 1983); Copeland v. Copeland, Id.; see also Klink v. Brewster, 986 So.2d 1060 (Miss. Ct. App. 2008).

In this custody dispute, the only proper consideration is what is in the best interest of Jeb and Josh Wells. It is not appropriate for any Court to inject into its reasoning what may, hypothetically, be in the best interest of Ben.

If there is indeed a preference for keeping half-siblings together, Reyna sought to use such a preference to her advantage in the custody dispute over Jeb and Josh. The birth of Ben was the

result of her own fraud, which she then concealed for many months. It is indeed ironic that she would seek to benefit in a custody dispute by arguing that half siblings should be kept together. It was Reyna's own misconduct, and her concealment of that misconduct that enables her to make such an argument.

It should not be forgotten that Reyna's misconduct also perpetrated a fraud upon her own children. It destroyed the marriage and the relationship between their mother and father. Certainly no reasonable appellate body would conclude that the Chancellor was in error when weighing what Reyna's own intentional misconduct did to her twin sons. To suggest that the Chancellor committed reversible error by so doing is simply not credible.

ISSUE B.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN AWARDING THE MARITAL RESIDENCE TO FORREST WELLS, NOR DID THE COURT COMMIT REVERSIBLE ERROR IN ADJUDICATING THE EQUITY IN THE MARITAL RESIDENCE

The issue raised here by Reyna has no merit. Her only argument, which is a recitation of what she argues earlier, is essentially, that she should have been given use and possession of the marital residence because she should have been given custody. She presents no authority that a non-custodial parent should be given use and possession of a marital residence. Because she offers no legal authority for her argument, this issue should be summarily rejected. Failure to cite authority in support of

claimed errors precludes appellate review. Price v. Clark, 2007-CA-101671-SCT, Supreme Court of Mississippi, decided 7-23-09.

ISSUE C.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DETERMINING THE AMOUNT OF CHILD SUPPORT TO BE PAID BY REYNA WELLS TO FORREST

Again, Reyna's Brief offers no legal support for her argument. She simply asserts that the nominal child support Reyna was ordered to pay ($336.00 per month) is "not supported by the proof or MCA Section 43-19-101). (Brief of Appellant, page 26). For reasons cited above, the lack of legal support for her argument compels that her argument be rejected. Price v. Clark, Id.

The Mississippi child support guidelines create a presumption that a non-physical custodian should pay fourteen percent of his or her adjusted gross income for one child. Section 43-19-101 (1) of the Mississippi Code of 1072, as amended. Income may be imputed to a payor who is working at less than full capacity. Gray v. Gray, 745 So.2d 234 (Miss. 1999). A Court is also justified in imputing income based upon earning capacity rather than actual income. White v. White, 722 So.2d 731 (Miss. Ct. App. 1999); Bredemeier v. Jackson, 689 So.2d 770 (Miss. 1997); Masino v. Masino, 820 So.2d 1267 (Miss. Ct. App. 2002); Smith v. Smith, 614 So.2d 394 (Miss. 1993).

Reyna asserted that she was working part-time to enable her to spend more time with the children. She worked previously for

approximately six months at a full-time job and testified she could make $24.00 an hour as a nurse. According to her Financial Declaration (Ex. 1), by working just part-time, she can generate $2,078.00 per month in gross income. Her adjusted gross income at the time of the trial was $1,680.00 per month. If she worked full-time, instead of twenty hours a week, she could generate twice as much. Based upon her income potential, assuming she worked full-time, the child support guidelines support a monthly award of $672.00. Nonetheless, the Court set Reyna's child support obligation at $336.00 per month, or a total of only $168.00 per month per child.

Although Forrest is obviously capable of raising the children and supporting them financially by himself, he is the trustee of Jeb and Josh, and any money that Reyna pays belongs to them. For Reyna to complain under these circumstances that she was ordered to pay too much child support is specious.

The trial court's analysis of this issue gives no explanation of how the $336.00 per month figure was reached (CP 379-80). We are left to presume that the Chancellor merely applied the statutory guidelines to Reyna's actual adjusted gross income. No explanation is given as to why the guidelines were applied to an obligor who made twice as much money working full time in the months leading up to trial, but who purposely cut back to twenty hours a week when the trial started. It is difficult to imagine how an obligor can simply elect to make half as much as she was when working full time, and then convince the Court that her

children's support obligation should also be cut in half. Particularly is this true where, as here, the obligor really has no other direct financial obligation to her children, except for half of the medical expenses which are not covered by insurance.

Since the Court noted that imputed income, rather than actual income, may serve as the basis upon which the determination is made, it would behoove the trial Court, at the very least, to explain why it is that a mother obligor, in a gender neutral legal environment, can voluntarily cut her work time in half with financial impunity, while a father obligor would never be permitted to do so, particularly under the pretext of wanting to spend more time with the children.

A much better, and fairer, result, would be for a concise and direct legal adjudication that both parents are expected to support their children in accordance with their respective financial abilities. Reyna's child support obligation should be at least $672.00 per month, a sum that is still relatively nominal for two growing boys.

ISSUE D.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DIVIDING THE PARTIES' ASSETS, NOR DID IT COMMIT REVERSIBLE ERROR IN CLASSIFYING SOME ASSETS AS BEING NON-MARITAL

The trial court properly divided the marital assets and liabilities under the dictates of Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994) and Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994). The assets are to be measured by fair market value, and the

date for the valuation is a matter within the trial court's discretion. Hensarling v. Hensarling, 824 So.2d 583 (Miss. 2002); MacDonald v. MacDonald, 698 So.2d 1079 (Miss. 1997). In the instant case, the trial court determined that the valuation date would be September 30, 2004, the effective entry date of the court's first Temporary Order. The trial court's reasoning is well grounded. For instance, see Pittman v. Pittman, 791 So.2d 857 (Miss. Ct. App. 2001), which affirmed a Chancellor who selected a Temporary Order date. Also see Sullivan v. Sullivan, 990 So.2d 783 (Miss. Ct. App. 2008) which affirmed a Chancellor's discretion in picking an even earlier date, the date of separation. Regardless, the objective of court is to determine the demarcation line that signals of the end of the marital property accumulation.

In analyzing the Ferguson factors, the trial court found as follows:

1. Substantial contribution to the accumulation of property:

   A. Direct or indirect economic contribution -

      The court found that each party made direct and indirect economic contribution, with Forrest working in the medical field while he continued school, and generating income for the family expenses. Reyna remained at home and met the needs of the children and performed household duties.

   B. Contribution to the stability and harmony of the marital and family relationships as measured by quality and quantity of time spent on family duties and the duration of the marriage -

      It was a relatively brief marriage lasting from May

25, 1996 until the separation on March 15, 2004, just under eight years. During this time, both parties worked in the first year, and thereafter Forrest worked and continued his residency program. Reyna became pregnant through in-vitro fertilization with the twins. Reyna testified that Forrest physically and emotionally abused her during the course of the marriage but Forrest adamantly denied those allegations. The only corroboration for Reyna was a witness who did not see any actual physical or emotional abuse. On the other hand, Reyna admitted marital fault in deceiving Forrest and in engaging in the plan to artificially inseminate herself. She also admitted that she fraudulently obtained and used a credit card, concealed the true method she employed in getting pregnant, then lied to Forrest that her pregnancy was the result of natural conception. Moreover, both parties testified that Reyna incurred significant credit card debt, and concealed it from Forrest.

C. Contribution to the education, training or other accomplishments bearing on the earning power of the spouse accumulating the assets -

Forrest had already completed his undergraduate and medical school degree, and his first year of

residency, prior to the marriage. Forrest completed an additional year of residency in Birmingham, Alabama while Reyna served as a nurse. Thereafter, the parties moved to Chicago where Forrest began and completed a plastic surgery residency. Reyna did not work outside the home in Chicago, nor after the parties moved to Ocean Springs following the completion of Forrest's plastic surgery residency.

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

The trial court noted that Reyna took $6,300.00 in cash from the family safe. She used it for her own purposes.

3. The market value and the emotional value of the assets subject to distribution:

The market value of the marital home as of the September 30, 2004 valuation date was $410,000.00 (Ex. 4). The fair market value of Forrest's medical practice, Gulf Coast Plastic and Reconstructive Surgery, PLLC, was established as being $148,000.00 on the same date (Ex. 5). Forrest paid the entire cost of the expert's appraisal and written report, $7,915.00. The trial court determined that it was fair for the parties to split that cost.

Forrest valued the household furniture, appliances and furnishings at $25,000.00, while Reyna presented no values. She likewise failed to present a value for the 2003 Toyota Sequoia she operated. Forrest put the Toyota's value at $20,000.00 at the time

of trial, with a $26,000.00 value back on September 30, 2004. The loan used to purchase the Toyota had a balance of $5,054.00 on the valuation date. Forrest's vehicle, a 1999 Mazda had a value of just over $5,000.00 in September of 2004, with no indebtedness.

Back in September of 2004, Forrest had a personal checking account with approximately $32,000.00 on deposit. He also had a VALIC 401(k) with a then-value of $8,223.00 and life insurance with $4,524.00 in cash value. The trial court correctly determined that the Charles Schwab Retirement Account (with a $32,000.00 value at the time of trial) was non-marital, since it was money saved by Forrest after the September 30, 2004 Temporary Order date. After that date he also purchased an interest in the Mississippi Coast Surgical Center which was valued at $52,339.00 at the time of trial. The Chancellor correctly ruled that both of those assets are non-marital in nature.

The trial court also noted that, in September of 2004, there was a balance of $93,114.00 owed on the loan to Singing River Hospital System.

> 4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage and the property acquired by inheritance of inter vivos gift by or to an individual spouse:

The court noted that there was no evidence presented regarding this factor and Reyna, in her Brief, agrees (P 34).

> 5. Tax and other economic consequences and contractual legal consequences to third parties of the proposed distribution:

The trial court also found that there was no evidence at the time of trial regarding this factor, and no issue has been raised

by Reyna regarding same.

6. The extent to which property division may, with equity to both parties, be utilized to make periodic payments and other potential sources of future friction between the parties:

Here, the trial court simply noted that it would be easiest to divide the marital properties by awarding the assets in whole rather than dividing each of the individual assets. Reyna makes no argument to the contrary in her Brief.

7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity:

This is the primary factor with which Reyna takes issue (See Page 35 of Brief of Appellant). The entire thrust of Reyna's argument, however, is that Forrest has generated significant income after the Temporary Order (emphasis added). The Chancellor noted that Forrest's earning capacity is substantially greater than Reyna's. However the Chancellor also noted that Reyna has a good earning capacity and is capable of supporting herself in a comfortable lifestyle. Specifically, the trial court determined that each of the parties has the ability to earn income sufficient to provide financial security without any contribution from the other (CP 388). Moreover, when the marital estate is equitably divided, it contributes to the financial security of Forrest and Reyna equally.

8. Any other factor which in equity should be considered:

During the approximate two and a half years while the instant litigation was proceeding toward trial, Forrest either paid to Reyna, or for her benefit, more than $80,000.00 per year. The

trial court's ruling understated that amount, by referring to it as $80,000.00 in the aggregate (CP 388). Reyna had the benefit of living in the marital home with no housing cost, no utility cost, no automobile note or insurance cost, no health insurance cost, while she was receiving $1,500.00 per month in temporary alimony. She also received from Forrest more than $650.00 per month for grocery money and household supplies, even though Jeb and Josh lived with Forrest during alternate weeks. Moreover, she took $6,300.00 worth of marital cash from the family safe, and combined it with the $4,500.00 in cash that Forrest initially gave her before the litigation started. In spite of all of this, Reyna incurred more debt. For the majority of the time that the litigation has been pending, Reyna did not even seek employment, even though she is capable of maintaining a full-time job as a nurse. Then, when she did finally obtain full-time employment, she voluntarily cut her hours in half prior to trial.

With all of this as a background, the Chancellor still decided that the marital estate should be split equally between Forrest and Renya. To do so is certainly not reversible error. Forrest was directed to pay Renya one-half of the marital equity in the home ($41,878.00), and the $25,000.00 worth of value for the marital furniture, appliances and household furnishings was split equally between Forrest and Reyna. Reyna was required to reimburse Forrest for one-half of the $6,300.00 in cash which she took from the safe, and Forrest was ordered to pay Reyna one-half of the marital value of Gulf Coast Plastic and Reconstructive Surgery, PLLC. The

Chancellor also elected to make Forrest responsible for all of the marital liabilities rather than subtracting Reyna's portion of the liability from her share of the marital assets (CP 390).

It cannot be genuinely argued that the division of the marital assets and liabilities, under an abuse of discretion/manifest error standard, is reversible error.

ISSUE E.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING ALIMONY AND ATTORNEY'S FEES TO REYNA WELLS

If there are sufficient marital assets which, when equitably divided, and considered with each party's non-marital assets, will adequately provide for both parties, no more need be done. Johnson v. Johnson, 650 So.2d 1281, 1287 (Miss. 1994). Alimony is considered only after the marital property has been equitably divided and the Chancellor determines that one spouse has suffered a deficit. Lauro v. Lauro, 847 So.2d 843, 848 (Miss. 2003).

The trial court in the instant case found that both parties are adequately provided for, and that neither party has suffered a deficit. Accordingly, alimony is not appropriate.

In her Brief, Reyna argues, not that the trial court should have awarded periodic alimony, but that the trial court incorrectly denied Reyna lump sum alimony. She cites as authority Miller v. Miller, 874 So.2d 469, 472 (Miss. Ct. App. 2004). Miller stands for the proposition, however, that lump sum alimony is an equalizer, and it only is required in cases where the property

distribution has left the spouse's assets imbalanced. In the case sub judice, as already noted above, Reyna has received a larger portion of the net marital assets. In today's practice, an award of lump sum alimony has become, essentially, a form of property division, since it awards to the payee a portion of the other's accumulated estate. Retzer v. Retzer, 578 So.2d 580 (Miss. 1990).

A Chancellor's failure to provide an on-the-record analysis of alimony factors does not require reversal on appeal. Dorsey v. Dorsey, 972 So.2d 48 (Miss. Ct. App. 2008).

In the recent case of McIntosh v. McIntosh, 977 So.2d 1257 (Miss. Ct. App. 2008), the trial court was found not to be in error in denying alimony in light of the fact that the Chancellor had essentially split the marital estate equally. In McIntosh, each party had net assets, after the division, of approximately $52,000.00. In the case sub judice, Reyna has net assets well in excess of $100,000.00 (one-half the value of the professional practice, one-half the home equity, the Toyota Sequoia, and one-half the furniture, household goods and furnishings) (and none of the debt).

Further, under the terms of the Temporary Order, which has been in force essentially two and one-half years, until the Court's Judgment of April 17, 2007, Reyna has had either paid to her directly, or for her benefit, more than $200,000.00.

As part of this issue, Reyna also contends that it was error for the Chancellor to deny her an award of attorney's fees. Once again, however, she cites no authority in support of her argument,

and her failure to do so precludes appellate review. Price v. Clark, supra at page 38.

Regardless, in a divorce proceeding, it is only if a party is financially unable to pay his or her own attorney that an award of fees is appropriate. Martin v. Martin, 566 So.2d 704 (Miss. 1990). In fact, it is an abuse of discretion for a trial court to award attorney's fees without a showing that one party is unable to pay the fees in question. Heigle v. Heigle, 771 So.2d 341 (Miss. 2000); Hankins v. Hankins, 729 So.2d 1283 (Miss. 1999). Not having a cash reserve is not reason enough to order attorney's fees to be paid by the other party. Young v. Young, 796 So.2d 264 (Miss. Ct. App. 2001).

It is practically inconceivable that Reyna could plead poverty while enjoying the benefits that she received during the two and a half years of trial litigation, while she remained voluntarily unemployed. Moreover, she received more than half of the marital assets worth well over $100,000.00, and none of the marital liability. Her argument here is disingenuous.

CONCLUSION

The Chancery Court's Ruling leaves only one area that is proper for legal examination on appeal, i.e., the inexplicable decision to require Reyna to pay child support at essentially half of what the Mississippi child support guidelines suggest. Such a Ruling is all the more disturbing in light of the fact that Reyna had been working full time, then suddenly, upon the first day of trial, announced that she would be working only a twenty hour week, in order to "spend more time with her children". Since she was not awarded custody of Jeb and Josh, and since she shortly thereafter filed notice of her relocation to Troy, Alabama, she will not be spending more time with the only two children at issue here.

Accordingly, this Court should adjust the child support upward, based upon Reyna's income generating capacity. Jeb and Jose deserve it.

In all other respects, the Judgment should be reaffirmed.

Respectfully submitted,

FORREST SIMPSON WELLS

BY: _____
GARY L. ROBERTS

CERTIFICATE OF SERVICE

I, GARY L. ROBERTS, do hereby certify that I have mailed by U.S. Mail, postage prepaid and properly addressed, a true and correct copy of the above and foregoing **Brief of Appellee/Cross Appellant** to counsel opposite, Calvin Taylor, Esq. and to the Chancellor, Hon. Jaye Bradley, on this the 1st day of September 2009.

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