

## IN THE SUPREME COURT OF MISSISSIPPI

JAMES CRAIG PALCULICT

APPELLANT

VS.

NO: 2007-TS-01954

LUCIANA GASCON CURTIS PALCULICT

APPELLEE

## CERTIFICATE OF INTERESTED PERSONS

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

1. James Craig Palculict, the Defendant and Appellant.
2. Lee Ann S. Turner and Charles E. Winfield, Perry, Winfield & Wolfe, P.A., Starkville, Mississippi, appellate counsel for James Craig Palculict.
3. Jay Westfaul, The Westfaul Law Firm, LLC, Oxford, Mississippi, trial counsel for James Craig Palculict.
4. Luciana Gascon Curtis Palculict, the Plaintiff and Appellee.
5. H. R. "Randy" Garner, Garner & Garner Attorneys at Law, Hernando, Mississippi, trial counsel for Luciana Gascon Curtis Palculict.
6. L. Anne Jackson, Meacham & Jackson, Attorneys at Law, Southhaven and Hernando, Mississippi, trial counsel for Luciana Gascon Curtis Palculict.
7. Chancellor Mitchell M. Lundy, Jr., the trial judge.



LEE ANN TURNER

Counsel of Record for James Craig Palculict

## STATEMENT REGARDING ORAL ARGUMENT

The Appellant does not request oral argument. However, counsel of record for the Appellant will make themselves available if the Court desires to hear oral argument on any of the issues in this appeal.

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## **APPELLANT'S STATEMENT OF THE ISSUES**

- I. THE CHANCELLOR MANIFESTLY ERRED IN GRANTING THE PARTIES A DIVORCE ON THE GROUNDS OF IRRECONCILABLE DIFFERENCES.
  - A. THE PARTIES FAILED TO FOLLOW THE STATUTORY REQUIREMENTS FOR ENTERING INTO A CONSENT AGREEMENT.
  - B. THE CHANCELLOR OVERREACHED HIS STATUTORY AUTHORITY BY ADJUDICATING ISSUES WITHOUT CONSENT.
  - C. THE CONTESTS AND DENIALS TO AN IRRECONCILABLE DIFFERENCES DIVORCE WERE NOT WITHDRAWN AND NO ORDER WAS ENTERED ALLOWING SUCH WITHDRAWAL.
- II. THE CHANCELLOR MANIFESTLY ERRED, ABUSED HIS DISCRETION, AND APPLIED AN ERRONEOUS LEGAL STANDARD IN HIS EQUITABLE DIVISION AND FINANCIAL AWARDS.
  - A. EQUITABLE DISTRIBUTION
  - B. LUMP SUM ALIMONY
  - C. PERMANENT ALIMONY
  - D. MEDICAL INSURANCE / REHABILITATIVE ALIMONY
  - E. CHILD SUPPORT
- III. THE CHANCELLOR ERRED IN HIS AWARD OF LEGAL CUSTODY.

## INTRODUCTION

This matter involves the divorce of parties who separated after nine years of marriage. The parties have a son who was ten when the judgment of divorce was entered. The wife filed for divorce on grounds of cruelty and irreconcilable differences. Denying the wife was entitled to relief, the husband answered and counterclaimed for custody of the child.

The wife had health problems during the marriage, but she was employed both before and after her treatment. The husband worked his way up through various positions in the skilled nursing field after beginning the marriage as a medic in the military. After the entry of the temporary order, the wife and child moved to California, while the husband remained in Mississippi.

The parties lived beyond their means during the marriage, paid significant medical bills for wife's treatment, incurred significant debt, and had few assets to divide at the time of trial. Nevertheless, the trial court found one asset and wife's medical debts to be marital, awarded the wife lump sum and periodic alimony, awarded guideline child support, and required the husband to provide medical insurance for the wife and child, to pay their medical expenses, and to pay all costs of travel for visitation with the child in California.

There are procedural defects in the trial court's award of a divorce under the irreconcilable differences divorce statute, including an attempted oral amendment to the parties' written consent agreement, the chancellor's ruling on matters to which the

parties did not consent, and failure of the parties to withdraw contests and denials to the entry of an irreconcilable differences divorce, with no order being entered allowing such withdrawals. Furthermore, the equitable distribution and financial awards are neither equitable nor fair, and are *per se* unreasonable. Nor is there any basis for the court's ruling denying the father joint legal custody.

This Court should reverse and remand this case in its entirety, as no divorce should have been entered. Likewise, the equitable division and financial awards should be reversed for falling outside of the acceptable range of judicial discretion for making such division and awards incident to a divorce. Similarly, the award of sole legal custody to the wife should be reversed and rendered, granting the husband joint legal custody.

## **STATEMENT OF THE CASE**

### **A. PROCEEDINGS BELOW**

The parties, Luciana Gascon Curtis-Palculict (Luciana) and James Craig Palculict (Jim), were married on January 10, 1997, in Colorado Springs, Colorado. They had one child, Anthony Carlos Palculict (Anthony), who was born on September 13, 1997. The parties separated in DeSoto County, Mississippi, on January 25, 2006. (R. 141).

Luciana filed for divorce on January 23, 2006, alleging habitual cruel and inhuman treatment and irreconcilable differences. (R. 9-15). Mississippi Civil Procedure Rule 4 and Rule 81(d) Summonses were issued for Jim on January 24, 2006. (R. 4). On January 25, 2006, Luciana filed seeking injunctive relief against Jim, and the trial court entered a



Temporary Restraining Order (TRO) that same day without notice to Jim. (R. 36-40). On January 25, 2006, after entry of the TRO, Jim was served with both summonses and a copy of the TRO. (R. 4).

On February 1, 2006, Jim filed his answer denying that Luciana was entitled to any of the relief requested in her divorce complaint. Jim also sought sanctions against Luciana for making fraudulent allegations in her application for the TRO and for having such an order entered without notice to him. Jim further alleged that Luciana left the home and took all of the personal property in the home without notice to him and was threatening to take the child out of state with her so Jim would not be able to spend time with the child. Jim further sought temporary and permanent custody of the minor child. Jim did not seek a divorce from Luciana. (R. 41-51).

The trial court entered an Agreed Temporary Order on February 15, 2006, giving Luciana temporary physical custody of the child, with the parties sharing joint legal custody. The parties also agreed to put the marital home in Southhaven and a former marital home in Monticello, Arkansas, on the market for sale. (R. 54-60).

On April 21, 2006, Luciana filed a motion requesting permission to *temporarily* take the minor child with her to the State of California for the stated purpose of having an elective preventative complete hysterectomy so she could live with cousins while recuperating from the surgery<sup>1</sup>. (R. 68).

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<sup>1</sup> In her April 21, 2006, motion, Luciana stated "the Defendant has informed her that he cannot pay for home care for her after the surgery, necessitating that she **temporarily reside along with her son** with her nearest relatives in California. That it is necessary, that although she has

A second Agreed Temporary Order was entered on July 21, 2006, to deal with proceeds from the sale of the Southhaven house and other issues. (R. 123).

The trial court conducted a trial on the merits on July 19, 2007. Prior to trial, the parties entered into a written Consent Agreement agreeing to divorce on the ground of irreconcilable differences and allowing the trial court to decide certain issues. (R. 141-144). The parties also attempted to orally amend their Consent Agreement prior to the start of trial. (Tr. 2-7). Notably, the parties never withdrew their contests and denials to a divorce on the ground of irreconcilable differences, and no order was entered by the court allowing the parties to withdraw their contests and denials. (R. 4-8).

The parties thereafter submitted proposed findings of fact and conclusions of law to the chancellor, and he entered his Findings of Fact and Conclusions of Law on August 29, 2007.

On September 17, 2007, the Court entered its Judgment of Divorce between the parties. Both parties timely filed motions to Alter or Amend the Judgment, and Jim also sought a new trial. At the hearing of the post-trial motions on October 9, 2007, Jim further raised procedural issues related to entry of the divorce judgment that were not identifiable from a review of the divorce judgment, in addition to the pled substantive matters in his motion for new trial.

On November 5, 2007, the Court entered its Order denying both post-trial

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physical custody of the parties' son, that she obtain permission of the Court to **go to California for her surgery and post-operative recuperative period**, along with her son." (R. 68, emphasis added).

motions. Jim timely perfected this appeal.

B. STATEMENT OF FACTS

The parties met while they were in the Air Force stationed in the State of Colorado. They were married on January 10, 1997. At the time of the marriage, Jim was serving as a medic at a Staff Sergeant rank, and Luciana was an Airman First Class (E-3) ranked medic in the Air Force Reserves working one weekend a month. Luciana also worked part-time three days a week in an administrative position for Lockheed Martin in Littleton, Colorado. (Tr. 60-61). The parties' son, Anthony, was born September 13, 1997.

Both parties left military service after the marriage, and Jim worked as a medic in private employment in Boulder, Colorado, while he also renovated the marital home. (Tr. 14) In November of 1996, two months before the marriage, Luciana's mother died of breast cancer at age 72, having survived 30 years after receiving her initial breast cancer diagnosis in her early 40's. (Tr. 75).

Luciana inherited some money from her mother prior to the marriage, while receiving the bulk of the proceeds from her mother's estate after the marriage. Those funds (approximately \$70,000) (Tr. 66-67) were used to help pay for the building supplies and other items for Jim's improvements to the marital home in Colorado (the parties eventually received approximately \$80,000 as proceeds from the sale of this home), and for some of the parties' living expenses after moving to Arkansas in 1999. Jim and Luciana moved to Arkansas to be closer to Jim's daughters from his first

marriage, who had been unexpectedly moved to that state by Jim's ex-wife. (Tr. 33-35; 69-70). Luciana testified that she and Jim were devastated by Jim's children relocating so far away, so they agreed to move to Arkansas with their son to be closer to the girls. (Tr. 69-70).

Jim obtained an associates degree in health care services while working part time and has worked in the skilled nursing field for various employers since September 1999. Jim eventually obtained an Arkansas nursing home administrator license through his employment. (Tr. 12-13; 36).

Luciana worked at various jobs after the parties' child was born, but she was unable to get along with her supervisors and invariably was asked to leave after a period of time. (Tr. 15). Luciana has completed over three years toward a college undergraduate degree (Tr. 63), received training through the military nursing school to become a medic (Tr. 61), and, after the parties' separation, attended insurance courses in the state of California. (Tr. 63).

In Arkansas, Luciana had a benign lump removed from her breast. She was diagnosed with breast cancer nine months later in June 2003. (Tr. 75-76). Luciana had surgery to remove a cancerous growth from her left breast, and then had a second surgery to remove her left breast. (Tr. 76). Luciana's treatment included chemotherapy and radiation, which ended the first week of April 2004. Luciana has been in remission and free of any recurrence of her cancer since April 2004. (Tr. 76, 79).

Luciana subsequently had her right breast removed as an attempt to prevent any

recurrence of cancer upon physician recommendation. (Tr. 80). Luciana testified she had some complications after her breast implant surgery in the summer of 2004. (Tr. 80). In August 2004 the parties moved to Southhaven, Mississippi, due to Jim's new job with Beverly Health Care as director of operations for a group of ten Mississippi Nursing Homes. (Tr. 9-10; 82).

Although Luciana testified that she put off a scheduled elective hysterectomy due to the parties' move to Mississippi in August 2004, Luciana did not reschedule that elective procedure during the year and a half the parties lived in Southhaven prior to their separation. (Tr. 80). Instead, Luciana testified that she worked "almost full-time" in public and private schools in the area during that time. (Tr. 97; 85-86).

It wasn't until February 2006, after the parties' late January 2006 separation, that Luciana stopped working "almost full-time." In June of 2006, Luciana "temporarily" moved to California with the parties' son in order to have an elective hysterectomy that could possibly help cut the risk of a future recurrence of cancer. (Tr. 89-91). Jim's company paid the \$55,000 insurance cost of this elective procedure. (Tr. 115). During the marriage and even after the separation and entry of the temporary order, Jim paid all of the rather substantial costs of Luciana's medical treatment that were not covered by insurance.

Both parties contributed financially during the marriage, but they lived beyond their means. Consequently, there were few assets for the parties to divide in the divorce. They agreed to sell the marital home and divide the proceeds. Luciana took

over \$16,000 from Jim's bank account and from an available credit card balance when she filed for divorce that she testified she used for attorneys fees, psychologist fees, and to live on after the separation. (Tr. 120) Luciana disposed of nearly all the parties' personal property when she filed for divorce, leaving only a few tools, Jim's grandmother's table, clothing, and a few small items, such that he virtually had to start over when furnishing and setting up his rented home. (Tr. 122; 38-39; 54).

Since the date of the first temporary order the parties had been trying to sell the former marital home that they still owned in Monticello, Arkansas. However, the home, which was over one hundred years old, had not sold by the time of trial and had fallen into such disrepair that it was no longer habitable by tenants. (Tr. 45-47). The Arkansas home had two mortgages, and the parties differed in the values they assigned to the property on their 8.05 financial affidavits. (Exh. 1, Nos. 1 & 2)<sup>2</sup>. Jim valued the home at a negative value after the debt was taken into account, while Luciana gave it a value of over \$33,000. It is quite telling of the home's true value, however, that while Luciana gave the property a positive value, she did not want the property to be awarded to her because it would not "afford her financial security," but could benefit Jim as a "tax advantage if it is sold at a loss." (R. 174-75).

At the time of trial, Jim was driving a leased vehicle and living in a rental home in Brandon, Mississippi, where he had been employed since February or March 2006, as

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<sup>2</sup> Citations in Appellant's Brief to Exh. 1 refer to Exhibits from the trial held on July 19, 2007. Citations in Appellant's Brief to Exh. 2 refer to Exhibits from the post-trial motion hearing on October 9, 2007.

Senior Vice President of Operations for Health Care Management, Inc. (R. 26). At that same time, Luciana and Anthony were still living in California where Luciana was working as a licensed insurance agent. Luciana also worked at her church part-time, but she mainly did volunteer work there. (Tr. 63-64, 66). Luciana further testified that she planned on continuing her education in the fall of 2007, to become a California licensed securities broker, likely becoming fully employed within 15-18 months. (Tr. 64). Luciana stated that her only needed medical treatment at that time consisted of taking Boneva to improve bone density and an insert as a result of the preventative hysterectomy. (Tr. 91-92).

#### **SUMMARY OF THE ARGUMENT**

The trial court erred by entering its judgment for divorce on the ground of irreconcilable differences because the necessary statutory requirements were not met. The parties inappropriately attempted to orally amend their Consent Agreement regarding the issues to which they agreed and the issues which they consented to have tried by the court in relation to an irreconcilable differences divorce. The chancellor further erred by overreaching his statutory authority when he ruled on matters outside of those agreed upon by the parties. And the statutorily required withdrawal of any contests and denials to an irreconcilable differences divorce under leave and order of the court was not done.

Secondly, the trial court further erred in its equitable division and financial awards by not considering all of the marital property (including those items divided by

agreement), and all of the debt of the parties (both marital and separate) in its division, improperly classifying and valuing certain assets, awarding lump sum alimony in excess of the total assets of the parties, and in awarding periodic alimony, rehabilitative alimony in the form of payment of existing medical bills and providing health insurance coverage, and excessive child support obligations in light of its other awards.

Lastly, the Court erred in awarding sole legal custody of the minor child to Luciana when she had misled the court and Jim about the duration of the period of time in which she and the child would be living in the state of California, the parties had agreed to temporary joint legal custody, and there was no evidence indicating that an award of joint legal custody was in the child's best interest.

### ARGUMENT

"The chancellor's decree of divorce will not be reversed unless it is manifestly wrong as to law or fact." *Cook v. Cook*, 725 So.2d 205, ¶ 3 (Miss. 1998)(citing *Benson v. Benson*, 608 So.2d 709, 710-11 (Miss. 1992). Appellate court "review of domestic relation matters is limited." *Engel v. Engel*, 920 So.2d 505 ¶ 10 (Miss. App. 2006)(citing *Carrow v. Carrow*, 741 So.2d 200, 202 ¶ 9 (Miss.1999)("We will not reverse the decision of a chancery court unless the chancellor abused his or her discretion, was manifestly in error, or applied an erroneous legal standard." (citations omitted); "This is especially true when dealing with divorce, alimony, or child support." (citations omitted)).



**I. THE CHANCELLOR MANIFESTLY ERRED IN GRANTING THE PARTIES A DIVORCE ON THE GROUNDS OF IRRECONCILABLE DIFFERENCES**

In the case at bar, the chancellor manifestly erred in entering a divorce judgment. The statutory requirements for an irreconcilable differences divorce were not met, and the Chancellor overreached his authority for adjudicating issues between the parties under the statute.

**A. The parties failed to follow the statutory requirements for entering into a consent agreement.**

The award of divorce on the ground of irreconcilable differences is governed by Mississippi Code Annotated Section 93-5-2. The parties in this case were not able to reach a written agreement for the custody and maintenance of their child and for the settlement of all property rights between them, as allowed under Miss. Code Ann. § 93-5-2 (2). Therefore, the parties attempted to proceed under Miss. Code Ann. § 93-5-2 (3) by entering into a consent agreement to a divorce on grounds of irreconcilable differences and submitting certain unresolved issues regarding child custody and maintenance and distribution of marital property for adjudication by the court.

The requirements for a valid mutual consent under Miss. Code Ann. § 93-5-2 (3) are clearly set forth in the statute as follows:

- (1) **The consent must be in writing and signed personally by both parties;**
- (2) The consent must state that the parties voluntarily consent to permit the court to decide the issues upon which the parties cannot agree;

- (3) **The consent must specifically set forth the issues upon which the parties are unable to agree; and**
- (4) The consent must state that the parties understand that the decision of the court shall be a binding and lawful judgment.

No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce.

*Cook*, 720 So.2d 205; (emphasis added) (citing Miss. Code Ann. § 93-5-2 (3) and *Massingill v. Massingill*, 594 So.2d 1173, 1177 (Miss. 1992)).

In the subject case, the parties entered into a written Consent Agreement on the date of trial. However, at the beginning of the hearing, the parties attempted to orally modify and add to their written consent agreement by reading into the record additional agreement terms regarding several unresolved issues. (Tr. 2-7). After the initial verbal "stipulation," modifying the written Consent Agreement, the court inquired of the parties as to whether they were in agreement with the stated verbal terms. Luciana indicated that some of the "stipulated" terms were not what she had agreed upon and stated that she was "confused" and "d[id]n't understand." (Tr. 5). The chancellor then took a brief recess, after which additional specified verbal agreement terms were read into the agreement. (Tr. 6-7).

In *Cook*, the case of first impression regarding "whether a written consent agreement under 93-5-2 may be modified orally rather than by written agreement," the

Mississippi Supreme Court held:

[W]e have held that the statutory dictates for an award of divorce on grounds of irreconcilable differences must be "strictly followed." *Massingill v. Massingill*, 594 So.2d 1173, 1178 (Miss.1992) (*Kergosien v. Kergosien*, 471 So.2d 1206, 1210 (Miss.1985)). . . .

**[W]e find nothing in 93-5-2 or the case law interpreting the statute indicating that an oral agreement by the parties is sufficient to satisfy its requirements. To the contrary, the plain language of the statute dictates that the consent agreement be written and signed by both parties.**

Miss.Code Ann. § 93-5-2(3) (1994). "These elements are required by statute. It must be emphasized that the language of the statute is framed in mandatory rather than permissive terms." *Gardner v. Gardner*, 618 So.2d 108, 113 (Miss.1993).

Furthermore, both alternatives set out in *Massingill* for meeting the statutory guidelines involve written documents, not oral modifications. *Massingill*, 594 So.2d at 1178.

**Because the parties failed to follow the statutory requirements for entering a consent agreement in this case, we find that the chancellor was manifestly wrong in awarding a divorce upon grounds of irreconcilable differences.**

*Cook* at ¶¶ 6-7 (emphasis added).

As in *Cook*, the chancellor here manifestly erred in granting the parties a divorce on the ground of irreconcilable differences without strict compliance with the statutory requirements. Accordingly, the judgment in this case should be reversed.

**B. The chancellor overreached his statutory authority by adjudicating issues without consent.**

Through their written consent agreement, the parties agreed to submit the following issues to the court for resolution:

- The physical custody of the child, Anthony Carlos Palcuict,

a male child, born 09-13-1997, presently 9 years of age, shall be with the wife. The Court shall decide if joint legal custody shall be awarded.

- An equitable division of all marital property assets and debts accumulated or acquired during the parties' marriage.
- The awarding of Lump Sum Alimony to Husband or Wife.
- The awarding of Permanent Alimony to Husband or Wife.
- The awarding of child support for the support and maintenance of the parties' minor child from the Husband.
- The awarding of designated visitation with the parties minor child, and who should pay for travel involved from the Husband or wife.
- Whether or not Husband should be required to maintain medical insurance and cancer insurance for the parties' minor child and wife, who is in remission at the present time from breast cancer.
- The awarding of attorney fees to Wife.

(R. 141-144; R. E. 42-45). In the parties' oral stipulations, which are asserted above to be invalid and violative of the statutory requirements, the parties further agreed for the court to address the following additional issues:

- To certain visitation provisions (but *not* who would be responsible for costs of transportation) (Tr. 2-4);
- That the cancer policy would be transferred to Luciana and she would pay all premiums thereon (Tr. 4);
- To file a joint tax return for 2006, with Jim paying any owed taxes and the parties equally splitting any refund; (Tr. 5) and
- For the chancellor to determine who would be allowed to claim the child for tax purposes each year. (Tr. 4).

In his findings, the chancellor stated that the parties had agreed upon the

following, although these items were not included in either the written consent agreement or the oral stipulation at trial:

- More specific visitation provisions than had been read into the record (R. 259-61; R. E. 17-19);
- That Jim would be responsible for picking Anthony up from Luciana for visitations and that Jim would pay for all airline travel for visitation (R. 261; R.E. 18);<sup>3</sup> and
- That the parties had also agreed that Luciana would receive the parties' vehicle, a 1999 Dodge truck. (R. 262; R.E. 20).

The Chancellor further listed the issues to be determined by the court to be as follows, although they differed from the parties' written Consent Agreement as indicated:

- Whether joint legal custody should be awarded.
- An equitable division of all marital property assets and debts accumulated or acquired during the parties' marriage.
- The awarding of Lump Sum Alimony to Wife.<sup>4</sup>
- The awarding of Permanent Alimony to Wife.<sup>5</sup>
- The awarding of child support for the support and maintenance of the parties' minor child from the

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<sup>3</sup> The only indication in the record of any alleged "agreement" for Jim to pay all visitation expenses while the child resides in California was in Luciana's testimony. (Tr. 108). There is no written agreement, stipulation by the attorneys, or testimony by Jim where he agreed to that provision in the record.

<sup>4</sup> In the parties' consent agreement this issue was stated as, "The awarding of Lump Sum Alimony to **Husband or Wife**."

<sup>5</sup> In the parties' consent agreement this issue was stated as, "The awarding of Permanent Alimony to **Husband or Wife**."

Husband.

- Whether or not Husband should be required to maintain medical insurance and cancer insurance for the parties' minor child and wife, who is in remission at the present time from breast cancer.
- The awarding of attorney fees to Wife.<sup>6,7</sup>

Yet although the chancellor did not indicate in his findings that the parties had agreed for him to rule upon any life insurance obligation or an award of rehabilitative alimony, the chancellor ordered Jim to provide a life insurance policy on his own life naming Luciana as the sole beneficiary (R. 271; R. E. 29), and he made an award of rehabilitative alimony (R. 271; R.E. 29) to Luciana. Furthermore, the chancellor's ruling regarding the purported agreed upon provisions regarding visitation was far in excess of the stipulations read into the record, and there is nothing to support the purported agreement that Jim pay for all travel costs associated with visitation. Neither is there

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<sup>6</sup> The parties' consent agreement also included the following issue that the judge did not include: "The awarding of designated visitation with the parties' minor child, and who should pay for travel involved from the husband or Wife."

<sup>7</sup> The record reflects confusion on the part of both trial attorneys and the chancellor as to just what exactly was agreed upon by the parties and what issues the parties agreed to submit to the court. The two proposed findings of fact and conclusions of law submitted by the attorneys (R. 145-146; and 156-161) and the court's own findings (R. 223-228; R.E. 16-21) contain differing versions of what was supposedly agreed upon. The parties' written consent agreement matches no one's list of areas of agreement and issues for submission to the court (R. 141-44; R.E. 42-45). And the oral stipulation at trial (Tr. 2-7) is very sparse and non-detailed compared to what was later reduced to writing by Luciana's attorney and the chancellor as what they believed to have been stipulated upon at trial. It would appear that this is exactly the type of situation the legislature intended to avoid by mandating that these issues be specifically agreed upon in writing.

anything in the record indicating an agreement for Luciana to be awarded the parties' truck beyond the agreed upon temporary award of the vehicle to her in February 2006. (R. 56).

In the case *sub judice*, the irreconcilable differences divorce statute was not strictly complied with and "the consent to adjudicate did not specifically set forth the issues to be decided by the court." *Engel v. Engel*, 920 So.2d 505 (¶ 14) (Miss. App. 2006). There is no authority in the irreconcilable differences divorce statute for the Court to rule on any matter not consented upon by the parties. Miss. Code Ann. § 93-5-2.

These procedural errors by the trial court resulted in prejudice to Jim in the chancellor's award of rehabilitative alimony and life insurance benefits to Luciana and in holding that Jim be solely responsible for all of the costs and responsibility for transportation for visitation with the minor child, when Jim did not consent to the chancellor's ruling on those issues or agree to the specified provisions in writing. *Engel*, at ¶¶ 15-16.

"'Divorce in Mississippi is a creature of statute,' and we must maintain the integrity of the statutory guidelines. . . . Thus, we must 'wipe the slate clean and put the parties back where they were prior to trial.'" *Engel*, at ¶ 17 (internal citations omitted).

The chancellor was without authority to decide *any* issues between the parties, much less issues the parties had *not* agreed to submit to the court for resolution, without strict compliance with the statute. Accordingly, the chancellor exceeded the

authority granted to him under the statute and erred in granting a divorce based on irreconcilable differences in this matter.

**C. The contests and denials to an irreconcilable differences divorce were not withdrawn and no order was entered allowing such withdrawal.**

Mississippi Code Ann. § 93-5-2 (5) provides as follows:

Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.

Miss. Code Ann. § 93-5-2.

Jim denied in his answer to Luciana's complaint that Luciana was entitled to a divorce on either the ground of irreconcilable differences or habitual cruel and inhuman treatment. Jim's denial in his answer and his counterclaim for custody amounted to a contest or denial to an irreconcilable differences divorce until same was withdrawn or cancelled by leave and order of the chancery court. *Massingill v. Massingill*, 594 So.2d 1173, 1178 (Miss. 1992) ("Although both parties requested a divorce on the ground of irreconcilable differences, both parties also denied that the other party was entitled to a divorce on this ground. . . . Finally, nothing in this record indicates the contest or denial had been withdrawn or cancelled by either party filing same by leave and order of the lower court." *Massingill v. Massingill*, 594 So.2d 1173, 1178 (Miss. 1992)).



In this matter, although the Judgment of Divorce entered in this cause contains a recitation that a motion to withdraw contest or denial was filed by both parties and an order sustaining the motion to withdraw contest or denial was entered, there is absolutely nothing in the record supporting that statement. The parties did not withdraw their contests and denials to an irreconcilable differences divorce. Nor was any order entered permitting a withdrawal of contests of denials as required under the statute. "[This marriage] must be given the last rites in accordance with the dictates of the Mississippi Legislature. Divorce is a creature of statute; it is not a gift to be bestowed by the chancellor based upon a perception that declining to grant the divorce will not restore the couple to a harmonious relationship. *It is a statutory act and the statutes must be strictly followed as they are in derogation of the common law.*" *Id.*, (citing *Kergosien v. Kergosien*, 471 So.2d 1206, 1210 (Miss.1985)) (emphasis in *Massingill*).

Because the statutory requirement that any contest or denial to an irreconcilable differences divorce be withdrawn or cancelled by leave and order of the court was not met, the chancellor erred in granting the divorce.

Due to the numerous procedural errors with prejudice resulting to Jim in this matter, the granting of a divorce to the parties on the ground of irreconcilable differences should be reversed. The divorce should be set aside and the slate wiped clean, with the parties put back where they were prior to trial.

## **II. THE CHANCELLOR MANIFESTLY ERRED, ABUSED HIS DISCRETION, AND APPLIED AN ERRONEOUS LEGAL STANDARD IN HIS EQUITABLE DIVISION AND FINANCIAL AWARDS**

The Judgment should be set aside in its entirety, as the Judgment and its provisions incorrectly apply the facts and Mississippi law thereby resulting in a gross inequity to Jim in the Equitable Distribution and financial awards.

### **A. Equitable Distribution**

The first analysis required under *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), is a determination of marital assets or marital property. In *Helmsley v. Helmsley*, 639 So.2d 915 (Miss. 1994), the Mississippi Supreme Court defined marital property as any and all property acquired or accumulated during the marriage.

"The supreme court has set up a number of guidelines for chancellors to follow during equitable distribution. The chancellor must: (1) classify the parties' assets as marital or separate, (2) value those assets, and (3) divide the marital assets equitably." *Marshall v. Marshall*, 2005-CA-00436-COA (Miss.App. 2008).

The Chancellor erroneously found that the only marital asset was the house and lot in Monticello, Arkansas, and the only marital debts were the wife's outstanding medical bills. (R. 228; R.E. 21).

The Court failed to take into account: 1.) the 1999 Dodge truck valued at an averaged value of \$4,305 by the parties on their 8.05 financial statements (\$5,000 by Jim and \$3,610 by Luciana) that Luciana received; 2.) the proceeds from the sale of the marital home in Southhaven that the parties' divided equally (approximately \$3,400

each) (Tr. 48); 3.) the \$17,000 Luciana took from Jim's bank account and from an available credit card balance when she filed for divorce<sup>8</sup> (Tr. 117-18; 120); 4.) the substantial amount of marital debt that Jim paid after the entry of the temporary order; (Tr. 48-52; 113-15; Exh. 1, No. 1); and 5.) the personal property and household contents, the majority of which Luciana testified that she gave away.<sup>9</sup> (Tr. 122; 38-39).

The chancellor was obligated to consider all of these things when making his Equitable Distribution, even if the assets were not to be included in his distribution. *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994). The *Ferguson* factors for the court to consider in dividing the marital property include: "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.**" *Id.* (emphasis added).

The Chancellor further failed to consider in making his Equitable Distribution all of the marital debt that Jim had paid since the date of the entry of the temporary order, including: 1.) \$7,000 in Luciana's medical bills (Tr. 48); and 2.) \$1,957 toward the USAA loan (Exh. 1 No. 1); and 3) the marital debt that was still in existence, such as the CitiBank Master Card debt in the amount of \$7,200 and the Capital One card debt in the amount of \$1,600. (Tr. 43-44).

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<sup>8</sup> Jim testified that Luciana took \$17,000. (Tr. 117-18). Although Luciana admitted to taking only \$10,000, she testified that she "used \$5,000 of it to pay for [trial counsel] to represent me. And then the other \$5,000, I used for an (sic) Anne L. Jackson to represent me in the summer, and then another \$1,000 to pay for the forensic psychologist, Dr. Hutt. And then **the rest of it I lived on.**" (Tr. 120, emphasis added).

<sup>9</sup> Luciana testified, "If you could use them I gave them to the Salvation Army, the shelter, whatever they could use. And the stuff they couldn't use, they took and made parts out of it? (sic)" (Tr. 122).

The chancellor also erred in finding that Luciana's medical bills in California that were incurred after the date of the parties' temporary order were marital debt, instead of Luciana's separate debts. *Pittman v. Pittman*, 791 So.2d 857 (Miss. App. 2001).

Normally, the course of the marriage runs from the marriage date until the final judgment of divorce. There is an exception that has arisen due to the fact that Mississippi does not recognize legal separation. In *Godwin v. Godwin*, 758 So.2d 384,386 (¶7) (Miss. 1999), the supreme court held that: **'[a]ssets acquired after an order for separate maintenance should be considered the separate property of the parties,** absent a showing of either (1) contribution to the acquisition of the asset by the other spouse as contemplated in our decisions in *Ferguson v. Ferguson*, 639 So.2d 921, 928-29 (Miss. 1994), and *Magee v. Magee*, 661 So.2d 1117, 1123 (Miss. 1995) or, (2) acquisition of the asset through the use of marital property.'

This Court has **extended this principle to temporary support orders.** *Barnett v. Barnett*, 908 So.2d 833, 841 (¶17) (Miss.Ct.App.2005) citing *Pittman v. Pittman*, 791 So.2d 857, 864 (¶¶ 17-18)( Miss.Ct.App.2001).

*Marshall*, 2005-CA-00436-COA, at ¶ 9. (emphasis added).

Furthermore, the chancellor erred in valuing the home in Monticello, Arkansas. The chancellor purported to average the parties' values of the marital home, but he failed to consider the second mortgage of \$13,400 on the home in Jim's valuation of the property.

Jim's estimated value for the home (\$85,000) minus the first (\$75,000) and second mortgages (\$13,400) leaves a negative net equity of <-\$3,400>. Luciana valued the home on her 8.05 at \$123,500, subtracting first mortgage debt (\$76,990) and second mortgage debt (\$13,389.73), with total equity of \$33,120.09. The average of the parties' two values

is \$14,860, compared to the Chancellor's incorrectly averaged value of \$21,120. But most telling of the value of the Arkansas home is that although Luciana estimated that the home had a significant value of more than \$33,000, she did not want to be awarded the property.<sup>10</sup> Plus, the Court failed to consider the costs of needed repairs to the home that was no longer habitable by renters at the time of trial. (Tr. 46-47). Both parties testified that the home needed repairs to the chimney and the roof. The home was no longer even suitable for renting to tenants. The Arkansas home had been on the market for sale since the date of the temporary order and still had not sold by the time of trial, a year and a half later.

In addition, the chancellor did not itemize or assign a value to Luciana's separate medical debts that he ordered Jim to pay. The Judgment of Divorce does not specify how Jim is to perform this ordered obligation, which specific debts he is to pay, nor did the chancellor consider the total value of the ordered debt in the total equitable distribution.

The chancellor found only one marital asset (the Arkansas home), valued it at \$21,120 and awarded it to Jim. But in reality the "asset" that was awarded to Jim was two mortgage debts and a very old home in disrepair that the parties had not been able to sell after the home had been on the market for over a year and a half. Jim was also

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<sup>10</sup> In his proposed findings of fact and conclusions of law, Luciana's attorney wrote that an award of the house and its equity to Luciana would afford her no financial security. (R. 175). He also stated that if the house is awarded to Jim and it is sold at a loss, Jim could use same as a tax advantage. (R. 174).

ordered to pay unspecified medical debt of Luciana's that she incurred after the separation. The chancellor failed to consider other marital debt that Jim was still paying. The chancellor further failed to consider the vehicle, home sale proceeds, money from Jim's bank account and credit card, and personal property Luciana received.

The Court's ruling regarding the Equitable Distribution between the parties is not equitable, is based upon incorrect and incomplete information, and does not fall within the bounds of judicial discretion allowed by Mississippi law in such cases. *Ferguson*, 639 So.2d 921. All of the parties' marital assets and debts were not included in the Court's determination and division of marital property, and the *Ferguson* factors were not properly applied in making said division.

#### **B. Lump Sum Alimony**

After making his distribution of marital assets and debt, the chancellor found that since he had awarded the "sole asset" to Jim, that award "would create an economic deficiency in the marital assets, whereby Luciana . . . would receive nothing . . . and this deficiency shall be adjusted in the award of alimony." (R. 268; R.E. 26). The chancellor then ordered Jim to pay Lump Sum Alimony to Luciana in the amount of \$60,000, payable by an initial payment of \$11,560, followed by monthly payments of \$807.34 for 60 consecutive months.

The award to Luciana of lump sum alimony in an amount nearly three times the total value of the marital estate, where neither party had a separate estate, as

determined by the trial court in this case is clearly an abuse of discretion under applicable law.

Following the adoption of the equitable distribution form of marital property division in Mississippi, lump sum alimony became nothing more than a tool to assist a chancellor in equitable distribution as an adjustment to marital property division, i.e., a method of dividing property under the guise of alimony. *Haney v. Haney*, 907 So.2d 948 (Miss. July 21, 2005).

The lump sum award to Luciana in excess of the total amount of marital assets in this case is in essence an award of lump sum alimony from Jim's separate assets or, more specifically, since Jim had no separate assets, a lump sum award from his potential future income. There is no authority in this state for an award of lump sum alimony or an equitable distribution of non-marital assets (Jim's future income) based upon nothing more than one spouse's need and a finding by a court of the other's ability to pay (which is strictly denied). *Id.*

Although we continue to refer to certain payments as "**lump sum alimony**," **these payments are really no more than equitable distribution in the form of lump sum cash**, rather than an equitable portion of certain property which cannot be divided equitably. . . .

We find no case, however, which authorizes the award of lump sum alimony or an equitable distribution of non-marital assets based upon nothing more than one spouse's need and the other's ability to pay. More justification is needed.

Id. at ¶¶ 26-28 (emphasis added).

In addition, any type of award as a form of reimbursement that Luciana may have claimed for her contribution of inherited funds to the marriage were offset by the extraordinary medical expenses she incurred during the marriage that were paid by Jim. Luciana's inherited funds were long ago commingled beyond tracing by use in home renovations by Jim and for living expenses for the family. In addition, the parties were living above their means, as indicated by the amount of debt the parties had and the fact that they had not accumulated more assets during their marriage, despite Jim's increasing income.

Furthermore, Jim contributed more financially to the marriage, although both contributed through their employment income. *Pittman v. Pittman*, 791 So.2d 857, 862 (Miss. App. 2001) ("Regardless of whether one spouse purchased the majority of the interest in the home with inherited money or, as here, actually inherited the interest itself, the home is marital property . . . During [the marriage] Mr. Pittman's income was the principal source of funds for the household. The chancellor found it to be equitable to have the proceeds of the sale of the home divided evenly. We find no error in that exercise of discretion." *Id.*))

The Chancellor's award to Luciana of \$60,000 in lump sum alimony when he found the total marital estate to be valued at \$21,120, and without any consideration of his award of Luciana's separate debts to Jim, is clearly an abuse of discretion. There simply was no marital or separate property to be "divided" by such a lump sum award.



Jim had no separate estate and was required to pay significant debt on the one asset he was awarded, which asset was also in a significant state of disrepair and had not sold after being on the market for over a year and a half.

Furthermore, as discussed above the chancellor's requirement that Jim provide a life insurance policy to secure the lump sum payments was in excess of the statutory authority, as there was no consent by the parties to submit the issue to the court for resolution.

### **C. Permanent Alimony**

While the chancellor made findings under *Armstrong v. Armstrong*, 618 So.2d 1278 (Miss. 1993), when he awarded \$1500 a month in permanent periodic alimony to Luciana, his award was excessive and manifest error given the totality of the circumstances.

The agreed upon temporary alimony payments to Luciana were \$750 a month. But when making the award of permanent alimony the Chancellor considered the high cost of living in California and awarded twice the amount of temporary support. (R. 274; R.E. 32). However, the parties lived in Mississippi for over a year and a half prior to the separation and lived in Arkansas before that. The parties never lived in California, and Luciana represented to the court and Jim that her relocation there was only temporary and for purposes of surgical recovery.

In considering whether to award alimony the court should consider the wife's reasonable needs and the right of the husband to lead as normal a life as possible with a

decent standard of living. *Yelverton v. Yelverton*, 961 So2d 19 (Miss. July 26, 2007).

Luciana had no reasonable need for a California-based standard of living, nor could Jim's Mississippi salary support such a cost of living for Luciana while leaving him the ability to have any funds for his own living expenses.

The total amount of the payments of the debt and normal maintenance on the Arkansas home, the lump sum payments, the periodic alimony payments, the life insurance premium, the medical insurance premiums for Luciana and the child, the child support, Luciana's medical bills, and visitation transportation costs that Jim was obligated to pay under the divorce judgment, in addition to the previously ordered child support for his children from his first marriage, leave Jim with less than a \$1,000 income each month. Under the current financial awards ordered by the Chancellor, Jim is left approximately \$875 to pay his separate debt payments (which exceed \$1,000 a month) and all of his own living expenses. (Exh. 2, No. 1; R.E. 41).

In addition, Luciana's work history during the marriage is extensive and includes marketing and Public Relations work for Beverly Health Care for six weeks at an annual salary of \$30,000 (Tr. 71); a year as executive assistant/interim director for the Economic Development Commission in Monticello, Arkansas, making \$11,000 (Tr. 72); part-time Public Relations and training for Court Appointed Special Advocates making \$15.00 an hour plus travel for a few months (Tr. 74); from October 2004 through February 2006, Luciana was working almost full time as a substitute teacher and volunteer, very active with her church and her son's school, Sacred Heart Southern

Mission, making \$8.50 an hour, (Tr. 85-86); Luciana also testified that she worked "almost full-time" at Desoto County High School, and also in the junior high and elementary schools in Desoto County.<sup>11</sup>

The award of permanent alimony to Luciana is an abuse of discretion in this case, as the marriage was not a long one and Luciana testified at trial to her employment at that time as an insurance agent and at the church, her volunteering at the church, and to her efforts to be certified for additional future employment within 15 to 18 months of the trial. Furthermore, there was no proof that Luciana was not currently able to work and earn more than she was making, nor was there any proof that Jim has the ability to pay permanent alimony in combination with the other financial obligations imposed upon him by the Court (which is strictly denied).

In making an equitable distribution and considering other financial awards, all financial obligations and needs are to be considered together by the court to arrive at an equitable and fair result, and where one obligation increases, the other obligations are to recede. *Lauro v. Lauro*, 847 So.2d 843 (Miss. 2003). The findings and final obligations imposed by the Court leave Jim destitute and subject to being in hopeless, continuous contempt of court. Furthermore, the award is not equitable and fair and is *per se* unreasonable.

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<sup>11</sup> In contrast to her testimony at trial, Luciana submitted a sworn statement to the Court on May 26, 2006, stating that since September 2005, she had been working part-time approximately one day a week. (R. 98).

#### **D. Medical Insurance / Rehabilitative Alimony**

The chancellor ordered Jim to provide medical insurance coverage to Luciana for a period of 24 months after the divorce as rehabilitative alimony. (R. 271-72; R.E. 29-30). As discussed above, there was no consent by the parties for the court to try the issue of rehabilitative alimony. Further, the court made no finding regarding Jim's ability to actually provide such medical coverage for Luciana at the expiration of the period of COBRA coverage (and same is strictly denied). Nor did the chancellor make a finding as to what that coverage would cost and consider same in his total financial award to Luciana. In addition, the Court ordered Jim to provide medical coverage for the minor child and to pay all of his uncovered medical expenses.

The Court's award of rehabilitative alimony to Luciana in the form of payment of all of her medical bills as of the time of the entry of the Judgment and the requirement that Jim maintain medical insurance coverage on Luciana for a period of 24 months are a further abuse of discretion under Mississippi law, as the issue was not properly before the Court since the parties did not include rehabilitative alimony in their list of issues for the Court to decide. Further, such award is excessive and indefinite in nature, both as to the amount of said medical debt owed (as the chancellor made no finding of the specific amount he ordered Jim to pay) and the cost to Jim of insurance coverage for Luciana (the chancellor likewise made no finding as to the cost of coverage for Luciana after the divorce).

As such, the requirement to provide medical insurance coverage and ordered

payments are neither equitable nor fair, and are *per se* unreasonable. *Tillman v. Tillman*, 791 So.2d 285 (Miss. App. 2001)(“[W]e hold that the chancellor was without authority under existing case law to burden Mr. Tillman with a support obligation that had the potential to vary widely from month-to-month in a never-ending series of modifications without any upside limit and without consideration of one of the critical factors in a modification proceeding, i.e., the obligor's ability to pay.” *Id.*).

### **E. Child Support**

Lastly, the amount of the chancellor’s award of child support of \$980 a month (R. 280; R.E. 38), in addition to the requirement to provide medical insurance and pay all medical and visitation transportation expenses for the child, is excessive given the other financial obligations required of Jim under the Judgment. In addition, such a high amount of monthly support in addition to the other financial awards to Luciana actually hampers Jim’s ability to exercise his visitation rights with his son.<sup>12</sup> (Tr. 38).

Jim’s adjusted gross income at the time of trial was greater than \$50,000. Accordingly, under Mississippi law the chancellor was required to make a written finding as to whether the application of the statutory guidelines was appropriate under the circumstances. The chancellor found that the guidelines were appropriate to apply in this matter despite the other significant financial awards he ordered Jim to pay, in addition to ordering that Jim also provide medical insurance and pay all non-covered

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<sup>12</sup> Jim testified that he had purchased “4 or \$5,000 worth of plane tickets in the last 18 months.” (Tr. 38).

medical expenses for the child. (R. 281; R.E. 39).

The parties had agreed upon temporary child support of \$500 a month, with Jim also paying for the child's school tuition and up to \$40.00 a month for school lunches. (R. 55-58). Although the parties' son attended Sacred Heart School in Southhaven, the parties had agreed for him to attend that school due to the low quality of the public school he would otherwise attend. (Tr. 21-22; 86) After Luciana moved to California in the summer of 2006 (which was supposed to be for a temporary period of time), she enrolled the child in a private parochial school there without consulting with Jim. Luciana testified that she didn't even talk to Jim about the school tuition payments until December of 2006. (Tr. 96). Jim testified that he never agreed to send their son to private school in California. The cost of the school there is more than twice the cost of Sacred Heart's tuition, and the public schools that Anthony could attend while living in California are good schools. (Tr. 21-22).

It is impossible under the financial awards of the current Judgment for Jim to be able to afford to pay the obligations as ordered and purchase airline tickets for travel for visitation with his son. (Exh. 2, No. 1; R.E. 41). The chancellor's awards effectively prevent Jim from being able to spend time with his ten-year-old son. Luciana's living expenses in California are further cited in the Judgment and the Findings of Fact and Conclusions of Law as a reason for increased financial support from Jim for the minor child. However, the parties resided in Mississippi for years before their divorce and had never resided in the state of California during the marriage.

Luciana's unilateral decision to move with the child to California should not be rewarded by the Court by assessing the resultant costs of that move against Jim. An award to Luciana of the former marital residence in Arkansas would have reduced her living expenses and allowed the child to live within a reasonable distance of his father. Jim's travel expenses and other financial obligations would be reduced and both parties would have been allowed to maintain a reasonable standard of living within their means.

In making an equitable distribution, all financial obligations and needs are to be considered together by the court to arrive at an equitable and fair result, and where one obligation increases, the other obligations are to recede. *Lauro v. Lauro*, 847 So.2d 843 (Miss. 2003).

The Court's equitable distribution and financial awards as a whole are grossly one-sided and inequitable, and Jim does not have the means to perform the financial obligations ordered by the Court and maintain even a minimal standard of living. Likewise, portions of the awards are impossible for Jim to perform as ordered. As such, the division of assets and debts and other financial awards in the Judgment of Divorce should be reversed.

### **III. THE CHANCELLOR ERRED IN HIS AWARD OF LEGAL CUSTODY.**

The chancellor's award to Luciana of sole legal custody simply because of the distance between the parties' residences and the fact that she has physical custody of the child is inequitable, an abuse of discretion, based upon an erroneous legal standard,

and is not in the child's best interest.

The chancellor stated in his Findings of Fact and Conclusions of Law that he "believes that based upon the fact that the parties live several hundred miles away and the mother has paramount custody it would not be in the parties' or the child's best interest to award joint legal custody and therefore it is denied." (R. 228; R.E. 21). Those are the chancellor's findings and ruling on this issue in their entirety.

The parties agreed in writing in their Consent Agreement for the Court to decide if joint legal custody should be awarded, and the parties had previously agreed upon joint legal custody in their Agreed Temporary Order. The Court made no finding that the parties were incapable of sharing joint custody cooperatively. *Crider v. Crider*, 904 So.2d 142 (Miss. 2005).

The Chancellor's ruling contains no analysis nor any indication of consideration of the applicable factors necessary in order to make a ruling on custody under *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983).

We reaffirm the rule that the polestar consideration in child custody cases is the best interest and welfare of the child. The age of the child is subordinated to that rule and is but one factor to be considered. Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law;



stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

*Albright* at 1005.

The Chancellor's focus on the distance between the parties' homes and the fact that Luciana has physical custody of the child in awarding legal custody is erroneous and an abuse of discretion. Luciana's move to California was represented to Jim and the Court to be temporary and just for the summer in order to allow Luciana to have elective surgery (that she had willingly put off for two years) so she could recover with help from relatives.

Despite her representation to the Court of a temporary absence from Mississippi, Luciana elected to stay in the State of California with its very high cost of living and where Jim is effectively prevented from seeing his son on any regular basis. Luciana's move to California also caused the costs of Jim's visitation to be extremely high for airfare, lodging, food and transportation.

Furthermore, Luciana chose to move with the child across the country and away from his father despite her testimony at trial that she and Jim were both distraught when Jim's daughters from his first marriage moved far away from them during the marriage. Luciana knew that her choice of moving so far away would be extremely painful for Jim and would deny him a close relationship with his son.<sup>13</sup>

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<sup>13</sup> Luciana testified, "We moved to Arkansas because his wife - his previous wife, ex-wife had left with her children, the two children from his previous marriage unannounced and left us surprisingly. We weren't expecting that, we had custody with the children and we visited them

An award of joint legal custody would give Jim and Luciana shared decision making authority with regard to their son's health, education, and welfare, and would further obligate them to exchange information related to the child and confer with each other in making decisions. Miss. Code Ann. § 93-5-24 (5)(e) (2004).

Luciana's unilateral decision to move to the State of California and thereby remove the child from his father should be considered by the chancellor, as well as the *Albright* factors, in terms of the impact of a legal custody ruling on the child and his ability to maintain a close and loving relationship with both parents. An award of joint legal custody would allow Jim equal decision-making rights regarding the child and access to information about the child as decisions regarding him are being made. An award of joint legal custody will, likewise, require Luciana to allow Jim to be more fully involved in the child's life, despite Luciana's unilateral decision to move the child such a far distance from his father.

The award of sole legal custody to Luciana is an abuse of discretion, was achieved by applying an erroneous legal standard, and should be reversed and rendered, granting the parties' joint legal custody.

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every other weekend and we visited them a lot of times. And he was very sad and upset about the whole thing, and he cried a lot about it and I cried a lot about it because we missed the girls. And he wanted to move over there, and I believed that he wanted to move. So, we did, we moved because my heart went out to my husband, and the children and we wanted to be together as a family." Luciana agreed when asked whether she and Jim agreed to move to Arkansas to allow him to be near his children. (Tr. 69-70).



## CONCLUSION



The chancellor manifestly erred in awarding a divorce on the ground of irreconcilable differences when the clear mandates of the statutory requirements were not met. Furthermore, the chancellor's division of assets and debts in addition to the other ordered financial awards constitute reversible error as they result in a gross inequity to Jim, making his performance of the obligations impossible. Additionally, the chancellor clearly failed to make the necessary findings in his award of legal custody, and same is reversible error.

The judgment of divorce should be reversed and remanded in its entirety for further proceedings pursuant to applicable Mississippi law.

Respectfully submitted,

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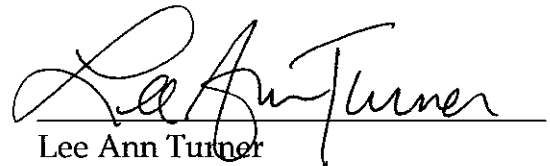
**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that this day a true and correct copy of the Appellant's Brief and Record Excerpts have been sent via U.S. mail, postage prepaid to:

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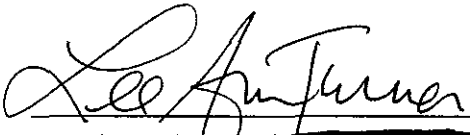
So certified, this the 14<sup>th</sup> day of May, 2008.

  
Lee Ann Turner

**CERTIFICATE OF FILING**

Comes now, the undersigned, pursuant to Miss. R. App. P. 25(a) and hereby certifies that I have personally caused the foregoing *Brief of Appellant and Record Excerpts of Appellant* to be filed with the Clerk of the Supreme Court of Mississippi by placing the original and three (4) copies of said Brief and Record Excerpts in the mail, post prepaid, or other more expeditious form of delivery.

This the 14<sup>th</sup> day of May, 2008.

  
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Lee Ann Turner 