

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**PERRIN H. LOWREY**

**APPELLANT**

**VS.**

**NO: 2007-CA-01988**

**CYNTHIA NELSON LOWREY**

**APPELLEE**

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On appeal from the Chancery Court of Lamar County, Mississippi  
Case No. 2002-0254-GN

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**BRIEF OF APPELLANT**

**ORAL ARGUMENT REQUESTED**

TUCKER BUCHANAN, P.A.

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### **CERTIFICATE OF INTERESTED PERSONS**

The undersigned attorney of record for Perrin H. Lowrey certifies that the following listed persons have an interest in the outcome of this case. These representations are made for the purpose that the Justices of this Court may evaluate possible disqualification or recusal:

1. Appellant, Perrin H. Lowrey
2. Appellee, Cynthia Nelson Lowrey
3. All counsel for the law firm of Chinn & Associates, PLLC
4. All counsel of the law firm of Erik M. Lowrey, P.A.
5. All counsel of the law firm Tucker Buchanan, PA
6. Hon. Johnny L. Williams, Chancellor
7. Hon. James C. Thomas, Chancellor

This the 18<sup>th</sup> day of August, 2008



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## **REQUEST FOR ORAL ARGUMENT**

The Appellant, Perrin H. Lowrey, submits that oral argument may be beneficial to the resolution of this case. This case has a unique and complex procedural history, and addresses issues of first impression.

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**STATEMENT OF THE ISSUES**

1. THE CHANCERY COURT ERRED AS A MATTER OF LAW IN ITS FAILURE TO CONDUCT A PROPER *FERGUSON* ANALYSIS AND COMMITTED MANIFEST ERROR IN ITS FAILURE TO PROPERLY ACCOUNT FOR THE WASTE OF MARITAL ASSETS BY CYNTHIA LOWREY
2. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND COMMITTED MANIFEST ERROR IN ITS AWARD OF ALIMONY, FAILURE MAKE A PROPER *ARMSTRONG* ANALYSIS AND THE USE OF A FORMULA FOR AN AWARD OF ALIMONY WHICH IS UNSUPPORTED BY ANY SUBSTANTIAL, CREDIBLE EVIDENCE
3. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND FACT IN ITS CALCULATION OF CHILD SUPPORT
4. THE DECISION OF THE CHANCERY COURT GRANTING THE PARTIES' JOINT LEGAL CUSTODY OF THE MINOR CHILDREN IS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE
5. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT DID NOT PROVIDE SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUESTED BY PERRIN

**STATEMENT OF THE CASE**  
**AND RELEVANT PROCEDURAL HISTORY**

A copy of the Chancery Court docket (CP 7-15) is contained in the Record Excerpts of Appellant (RE 1-9) as well as a copy of the Clerk's List of Papers. (CP 1-5) (RE 10-15) Cynthia N. Lowrey and Perrin Lowrey executed a Joint Complaint for Divorce, on the ground of irreconcilable differences, on July 1, 2002, which was filed with the Chancery Court of Lamar County, Mississippi, on that date. (C.P.4) The parties also executed a Child Custody, Child Support and Property Settlement Agreement. After a previous appeal that was assigned to the Mississippi Court of Appeals, that Court remanded this case back to Chancery Court on the following issues:

We remand this matter to the chancery court for a hearing on the parties' joint bill of complaint with instructions to resolve the unresolved matters of child custody, child visitation, child support, property division, and alimony and any other necessary matters not inconsistent with this opinion. (Paragraph 39)

(CP112) (RE 198)      FN Not appealed

Throughout this brief the prior appeal, which resulted in the remand, shall be referred to as "*Lowrey I*". (Court of Appeals Case # 2004-CA-00532-COA) (RE 184-199) On remand the Chancery Court permitted both parties to file pleadings consistent with the above mandate from the Court of Appeals. Accordingly a *Scheduling Order* was entered by the Chancery Court. (CP 138-139) Through counsel, Cynthia filed a *Complaint for Relief in Divorce Action* (CP 164-174) to which Perrin filed a *Response and Counterclaim*. (CP 217-277) An *Amended Scheduling Order* was entered by the Chancery Court on October 23, 2006. That Order



confirmed that the parties were divorced on the ground of irreconcilable differences on September 3, 2002, permitted amendment to the pleadings consistent with the mandate of the Mississippi Court of Appeals, appointed a Guardian Ad Litem for the children of the parties, established discovery deadlines for both parties, and set th matter for trial on March 14 and 15, 2007. (CP 210-211) Cynthia subsequently filed an Amended Complaint for Relief in FN Divorce Action, Complaint for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress, (CP 319-328) as well as a Motion and Amended Motion to Disqualify Counsel (CP 186-189) (CP 278-318). Perrin filed a Motion to Strike Amended Motion for Disqualification and to Expunge (CP 329-346) as well as an Answer to Amended Complaint for Relief in Divorce Action, Complaint for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress, Affirmative Defenses and Motion to Dismiss (CP381-389) A Temporary Order was entered by the Court on November 6, 2006. (CP 347-348) Pursuant to the provisions of Miss. Code Ann. § 93-11-65 (2004) the three minor children of the parties, Erin Lowrey, Emelie Lowrey, and Brittny Lowrey, each filed elections as to their custody preferences, which were prepared by the Guardian Ad Litem, each electing to live with their father, Perrin Lowrey. (CP 405) (RE 48) (CP 468) (CP 406) (RE 47) (RE 49) Perrin filed a Motion to Deem Request for Admissions Admitted and Motion to Compel Responses to Second Set of Interrogatories (CP 429-491) and Request for Specific Findings of Fact and Conclusion of Law (CP 547) A Motion for Continuance of the trial (set for March 14 and 15, 2007) was filed by Cynthia Lowrey on March 6, 2007, whereby counsel

Contentious

for Cindy represented that Cynthia was emotionally unstable, possibly suicidal and incapable of standing trial. (CP 495-497) The Chancellor subsequently entered an *Order* which re-set the motion to continue and admitted the MRE 1006 summary which had been furnished to Cynthia with a Request for Admissions. (CP 498-499) A *Motion for Partial Summary Judgment* was filed by Perrin seeking the dismissal of tort claims plead by Cynthia. (CP 509-532) After a trial on the merits was ultimately held on July 17 and 18, 2007 (Tr. 151-531) the Chancery Court entered *Findings of Fact and Conclusions of Law* (CP 547-555) (RE 16-24) and a *Judgment of Custody, Visitation, Support and Equitable Distribution of Marital Property* (CP 556-557) (RE 25-26) The Chancery Court entered an Order granting summary judgment to Perrin as to all tort claims and punitive damage claims filed by Cynthia and dismissed the same with prejudice. (CP 560) (RE 45) The Chancery Court also entered an Order granting the relief requested by the law firm of Erik M. Lowrey, P.A., former counsel for Perrin, in its *Amended Motion to Strike* and ordered that all references to any alleged unethical conduct and/or violations of the Rules of Professional Responsibility by Erik M. Lowrey, P.A. or any of its members be struck and expunged from the record. (CP 560) (RE 46) Perrin filed a *Motion to Reconsider, Alter and Amend Judgment and Request for Specific Findings of Fact and Conclusion of Law.* (CP 562-577) (RE 27-42) The Chancery Court entered an *Order Denying Motion to Reconsider, Alter or Amend.* (CP 580-581) (RE 43-44) Perrin then filed a *Notice of Appeal* (CP 583-581) which is now perfected and before the reviewing Court.

X X

no appeal

### STATEMENT OF THE FACTS

The parties to this divorce matter are Perrin H. Lowrey and Cynthia Nelson Lowrey who were lawfully married on the 19<sup>th</sup> day of August 1983, in Forrest County, Mississippi. (Tr. 476) They lived together as husband and wife until the date of their final separation which took place on or about June 20, 2002, in Lamar County, Mississippi. Three (3) children were born to the marriage, namely Brittny Lowrey, a female, born June 10, 1987; Erin Lowrey, a female, born May 26, 1991; and Emelie Lowrey, a female, born May 26, 1991. Cynthia has worked in florist shops and currently works full time in a grocery store. (Tr. 3) Perrin is retired from working at Hattiesburg Public Schools, where he had been working since approximately eight years prior to the marriage, and currently works part-time at the University of Southern Mississippi. (Tr. 476) The parties were divorced by Order of the Chancery Court of Lamar County, Mississippi, on the 3<sup>rd</sup> day of September 2002. (CP 28) Subsequent to the entry of the divorce decree, Cynthia Nelson Lowrey then filed a Rule 60 motion which was denied and then took an appeal to the Mississippi Court of Appeals alleging overreaching and challenging the fairness of the property settlement agreement. Though there had been no evidentiary hearings, the Mississippi Court of Appeals was furnished purported facts through a written proffer, signed by Cynthia's attorney, Mr. Mark Chinn, Esq. (CP 56-61) The matter was remanded to the Chancery Court of Lamar County, Mississippi to resolve the matters of child custody, child visitation, child support, property

division, alimony, and any other necessary matters not inconsistent with the Opinion of the Mississippi Court of Appeals. (CP 97) (RE 184) After a continuance, made at the request of Cynthia Lowrey, (CP 495) this matter was finally heard at a trial on the merits on July 17 and 18, 2007 (Tr. 151-531). [REDACTED] were offered into evidence, of which all were admitted, with the [REDACTED] of exhibit [REDACTED] which were marked for identification only. (RE 50-51) The facts that were established, as contained in the record on this appeal, and set forth below, were far different, more complete and substantiated than those tendered to the Court of Appeals in *Lowrey I* which had only the proffer authored by Cynthia's attorney.

On June 23, 2002, Cynthia told Perrin that she had "lost everything." due to a gambling addiction. For the next two weeks, both parties talked every day to address the financial quagmire they found themselves in. The parties also sought counsel from their pastor, Dr. Dick Allison. (Tr. 499) The decision was made that Cynthia would leave and get an apartment and Perrin would try and find a way to deal with the debts that had been run up by Cynthia. (Tr. 499-500) Perrin advised Cynthia that she needed to get her own attorney. (Tr. 501) In fact, Cynthia testified that she did indeed see an attorney. Cynthia testified that she picked up a first set of divorce papers from the office of Erik Lowrey, but that those papers "were destroyed" and she picked up a second set. (Tr. 267) Cynthia further testified that she did not read the papers, that she went to Erik Lowrey's office and picked them up at the window in a folder. Cynthia took the papers away from the office, drove away, came back

to the office and returned them. Cynthia then immediately took the divorce papers to the office of an attorney who reviewed them with her. (Tr. 268-269) (Tr. 314) On cross-examination Cynthia testified that she had spoken to "several" attorneys about her divorce and that no-one had prevented or discouraged her from getting legal advice. (Tr. 313) Cynthia stated that she could not afford the price to retain an attorney, and she had not sought help from Legal Services. (Tr. 113) Cynthia stated that she never spoke to Perrin's brother, Erik Lowrey, concerning her divorce, never spoke to any partner or associate at that firm and that the only person she spoke to was a lady at the window who gave her the papers. (Tr. 314)

When Cynthia left the home, she did so at a time when Perrin and the children were out of town at a conference on the coast. Cynthia was free to take any personal property that she desired to take. That time period was agreed to by both parties. Cynthia also had a yard sale to generate cash, because all of the cash from the entire marriage was gone. Cynthia kept all of the proceeds of the yard sale. The parties also agreed on a general visitation schedule with the minor children. (Tr. 502-503) Perrin testified that the time of the divorce was a "dark period" in his life and that it stayed that way for about a year. Perrin was left responsible for taking care of the children and the marital estate and family finances which were in the negatives. The family was fighting credit card companies, Perrin was trying to hold onto the house and did not know if he would be able to stop from going under. (Tr. 504-506) As of the date of the divorce, the remaining equity in the home was only \$19,000.00. (Ex. 2) (RE 63) (Ex. 3) (RE 69-77) The cars driven by the parties had a combined value of only \$5,000.00

and their personal property had a value of only \$2,600.00. There was \$600.00 left in the joint checking and savings accounts. There were no other assets, other than Perrin's state retirement from working for the school system. Meanwhile, the parties owed \$76,000.00 on the mortgage on the former marital home and \$87,463.00 in additional unsecured debts. Total assets were \$163,178.04. Total liabilities were \$163,463.00. The value of the marital estate is identified and valued as existed on September 3, 2002, the date of the parties' divorce at -\$284.96. (Ex. 2) (RE 63-68)

*Review exhibit 2*

Cynthia has a self-confessed long-term gambling problem which existed during the marriage, as well as other emotional and psychological problems. These problems put an immense strain on Perrin, the marriage, the three minor daughters of the parties, as well as on the present and future financial condition of the family. At the hearing on temporary features Cynthia testified, under oath, that she had not gambled in the last four years and had no desire to gamble. Cynthia also testified that it was her gambling addiction that had destroyed the marriage. (Tr. 6) At trial Cynthia appeared to be willing to take some responsibility for these problems, saying "It's very difficult for me to rid myself of the pain that I've caused the people I love." (Tr. 240) Cynthia further testified on direct examination that two years prior to the divorce, in the year 2000, she would secretly go to the coast to gamble at night, leaving after the children had gone to bed. (Tr. 272) Cynthia would have yard sales and would even sell items that belonged to her children, who would try and take them back, to raise extra cash. (Tr. 286) Cynthia asked her oldest daughter, Brittney, to help her hide her bank

statements, which showed the checks written to the casinos, by placing them on top of the refrigerator before Perrin could see them. (Tr. 368)

Cynthia also suffers from depression. On direct examination her daughter, Brittny, testified that Cynthia told her that it was her fault that Cynthia was depressed. Brittny stated that this accusation was the reason she stopped seeing her mother. (Tr. 399) Brittny testified that her mother said the same things to her younger sister, Erin, which had the same effect, and that one year later Erin's twin sister Emelie stopped seeing Cynthia as well. (Tr. 401) Brittny surmised "She hurt me in so many ways I just have no need to talk to her anymore." (Tr. 402) Cynthia also testified, contrary to the facts proffered on her behalf in *Lowrey I*, that she took responsibility for the divorce, that she "did not blame anyone but myself" and that she had gone to the children and told them she had wasted a lot of money. When asked if she still took responsibility for that she replied "I do, Sir." (Tr. 367) ~~These problems led Cynthia to become increasingly isolated from her three daughters and placed an immense psychological and financial toll on the family and upon Perrin. The Guardian Ad Litem appointed by the Chancellor in this case testified that there was no evidence whatsoever that Perrin was the source of discontent between Cynthia and the children. (Tr. 529)~~ <sup>\*\*\*</sup> Review

Cynthia did all that she could to conceal her gambling problem from the rest of the family. Perrin first became aware of this problem in the summer of 1996. At that time Cynthia confessed that she had been gambling and had ran up credit card debts. She also told Perrin that she was going to stop gambling. Cynthia and Perrin agreed to cut up the credit

cards, and Perrin embarked on paying off between \$12,000 and \$14,000 in credit card debts. (Tr. 212) In the summer of 2001, Perrin and Cynthia took out a home equity line of credit, something that they had never done before. The reason was that Cynthia had said there were credit card debts that were bothering her, principally on an ATT credit card. (Tr. 211) At that time the only gambling that Perrin was aware of was at an annual conference on the Mississippi gulf coast, which was attended by Perrin and the rest of the family where they would typically gamble between \$50.00 and \$100.00. (Tr. 213) Other than these trips, taken by Perrin to conferences resulting from him being employed by the public school district in Hattiesburg, Cynthia could not testify to any other times that she and Perrin had been at a casino together. (Tr. 291) At trial Cynthia denied gambling as recently as 2005 or since. (Tr. 312) This testimony was directly contradicted by the testimony of a credible rebuttal witness, Michael Slay, who testified that he personally observed Cynthia at the Imperial Palace Casino in Biloxi on Friday night, June 14, 2006, sitting in front of a slot machine. (Tr. 466)

In addition to the devastating effect that Cynthia's decisions and choices had on her relationship with her children and Perrin, they had an equally devastating effect on the family finances, and they converted any value the entire marital estate of the parties might have had to a negative figure. The amount of money that was documented to have been wasted by Cynthia at trial is truly astonishing, when considering the fact that the Lowrey family was one that supported three children on ordinary middle class income.

Prior to the divorce, and also not mentioned to the Mississippi Court of Appeals in



*Lowrey I*, Perrin paid off \$42,000.00 worth of gambling debts (Tr. 224) which included an ATT credit card and home equity line of credit, as well as debt owed to Bancorp South (Tr. 225) Perrin inherited \$15,000.00 from the estate of his grandmother between 1995-1996. Perrin put \$2000.00 of this money into savings and used the remainder to defray debts that had been incurred by Cynthia. (Tr. 486) Perrin also paid debts off with a private loan at \$500.00 per month, the last note due in the year 2013, which Perrin alone is paying. (Tr. 224) (Ex. 1) (RE 52) Exhibit 6, as admitted into evidence, shows the withdrawals made by Cynthia on the home equity line of credit between August 15, 2001, through May 16, 2002, reflecting total withdrawals by Cynthia in the amount of \$34,700.00. (Ex. 6) (RE 113) Perrin borrowed nothing on this credit line, he only paid it. (Tr. 486) At trial a summary of Cynthia's checking account, based on the documentation available, provides a two year snapshot of just how much money was dissipated and wasted by Cynthia to the likes of the Grand Casino, Treasure Bay Casino, Copa Casino, President Casino and Beau Rivage Casino. (Ex. 4) (RE 78-109) Exhibit 8, as admitted into evidence, reflects that during a 27 month period, Cynthia's checking account had deposits made in the amount of \$189,062.97. Of this amount, \$122,440.00 were paid directly to casinos. \$8,760.00 of the funds were withdrawn as cash. \$29,421.31 were payable for other payments. \$19,521.00 were used to pay the house note, leaving a remaining balance of \$8,920.66. (Ex. 4) (RE 109) Though this summary had been furnished to Cynthia with a Request for Admissions, Cynthia testified that she had not seen them until the day before trial. (Tr. 293) When questioned Cynthia could offer no credible

explanation for the disposition of these funds. (Tr. 294) In addition, Cynthia frequently wrote checks on insufficient funds, which caused overdraft protection to pull money from the parties' joint savings account, in the amount of \$4,841.00 between May 2000 and June 2002. (Ex. 7) (RE 133) (Tr. 492) Exhibit 5, as admitted into evidence, shows that in the year 2000, Cynthia wrote checks to casinos on the gulf coast for over 80 days in the year 2000, over 200 days in the year 2001 and over 100 days in 2002, the year that the parties separated. (Ex. 5) (Re110-112) (Tr. 490-491) Cynthia also inherited money, \$10,000.00 from her mother's estate in 2002, which also went into the checking account and then out to the casinos. (Tr. 495-496) (Ex. 10) Perrin started out in the marriage with \$45,000.00 in separate assets, \$25,000.00 of which were inherited from his father, and \$20,000.00 of which were the proceeds of the sale of a small business prior to the marriage. At the time of the separation, all of these non-marital assets were gone. (Tr. 495) Again, none of these facts were revealed or mentioned in *Lowrey I*.

Cynthia's gambling problems also affected her employment. Cynthia had been employed by a florist, but she denied being fired for misuse of funds. (Tr. 297) Mr. Claude Thrash, owner of the Petal Florist, was the employer who fired Cynthia. (Tr. 467-468) Mr. Thrash testified that Cynthia wrote checks out of his company business account to herself. (Tr. 469) Mr. Thrash testified that "close to \$100,000.00" was taken by Cynthia for her own use. (Tr. 475) While employed at the florist, Cynthia would sign Perrin's name, without his knowledge or consent, to credit card applications and would have the credit cards and

statements mailed directly to the florist, rather than to hers and Perrin's house. Of these cards, the only card that Cynthia ever paid was an Amoco gas card. Perrin was left to deal with the rest. Perrin neither applied for, nor used, these credit cards and did not discover the National City, Fleet or Citibank credit cards until *after* the divorce in 2002. (Tr. 299) (Tr. 493) (Ex. 7) (RE 133) Perrin has incurred thousands of dollars in legal fees as a result of this litigation. (Tr. 498) (Ex. 11). Perrin has paid temporary spousal support in the amount of \$7, 500.00 but received no temporary child support. (Tr. 498) (CP 347-348) Perrin has provided for and paid for all of the basic needs of the minor children since the separation and divorce with no financial assistance from Cynthia and has paid all of the children's medical bills, including the cost of counseling for the children which was necessitated by Cynthia's own behavior. (Ex. 9) (RE 135)

The circumstances of Cynthia's leaving were not that she was forced out of the house, or coerced to leave by Perrin. Cynthia left and went to live in an apartment which she had rented two days earlier. Cynthia got a job at another florist within a week of her being fired. Cynthia had an income and a place to live at the time of separation. (Tr. 303) In fact, for a year after her separation, Cynthia had a place to live and a schedule that permitted her to regularly visit with her children. (Tr. 305) Cynthia was also furnished another apartment in the year 2003 where she paid "some rent" to either Carol or Joe Ingram in Hattiesburg. (Tr. 309)

Dr. Dick Allison, a retired pastor and current chaplain at Forrest General Hospital in

Hattiesburg, Mississippi, testified extensively at trial under both direct and cross examination. (Tr. 425-460) Though no testimony of Dr. Allison had been furnished to the Mississippi Court of Appeals in *Lowrey I*, it is worthy of note that in the written proffer signed by Mr. Chinn, several references were made as to what Dr. Allison would say or would not say concerning the facts of this case. Again, Dr. Allison's testimony was not consistent with what was represented in that written proffer which is contained in the Court file (CP 56-61)

Dr. Allison had been a pastoral counselor to both Perrin and Cynthia and met with them at the time of their separation. (Tr. 428) Dr. Allison had no knowledge that Cynthia had taken out credit cards in Perrin's names and ran them up. He had no knowledge that Cynthia had used a home equity line of credit for gambling money and to pay off gambling debts. (Tr. 436) (RE 211) Dr. Allison was not aware that Cynthia had concealed and lied about her gambling problem to Perrin; had not been told by anyone that Cynthia had exhausted the second mortgage on the family home; had not been told that Cynthia forged Perrin's names on four credit cards and spent them to their limit; had not been told that Cynthia sent these cards to the address of her employer to conceal them from Perrin and had not been told that Cynthia enlisted Brittny to aid her to hide financial information from Perrin. (Tr. 437-438) (RE 211-212). Dr. Allison testified that it was his opinion that no actions on the part of Perrin Lowrey caused either the separation of the parties, or Cynthia's depression. (Tr. 440) (RE 215) Dr. Allison had no knowledge of how long Cynthia was working or what money she was earning. (Tr. 443-44) (RE 218-219) Dr. Allison was not able to testify as to anything



because she had been forced to leave, but rather because Mrs. Blythe “wanted her privacy.” (Tr. 279) However, on direct examination by Cynthia’s attorney, Mr. Daniel Blythe testified that Cynthia was not asked to leave, but rather that “she decided to leave, but she is still welcome here.” (Tr. 387) Parenthetically, Mr. Blythe also testified that Cynthia did not pay \$400.00 per month rent, as listed on her 8.05, (Ex. 18) (RE 169) but did contribute toward utilities (Tr. 385) On cross-examination Mr. Blythe again testified that Cynthia left his home just two weeks prior to trial, that he did not tell her to leave and that she was welcome to stay. Mr. Blythe, whose home Cynthia lived in for over one year, testified that he had no knowledge that Cynthia was taking home approximately \$2,300.00 per month while only contributing toward his utilities. (Tr. 389)

Cynthia began to work full time in 2007, with a typical work schedule of 35-37 hours per week. (Tr. 261) According to her current Rule 8.05 financial statement her net monthly income is \$1,946.81. (Ex. 18) (RE 161) At a hearing on temporary features Cynthia testified that she worked full time and earned \$9.29 per hour. (Tr. 8)

After the close of trial and post-trial submissions of proposed findings of fact and conclusions of law by both parties, the Chancery Court, entered a *Judgment of Custody, Visitation, Support and Equitable Distribution of Marital Property* (CP 556-557) (RE 25-26) which recited that the parties were divorced as of September 3, 2002. The parties were awarded joint legal custody of the three minor children, Brittny, Emelie and Erin, with Perrin awarded paramount physical custody and Cynthia awarded restricted visitation. (CP 556) (RE

25) Cynthia was ordered to pay Perrin \$200.00 per month in child support. Perrin was ordered to pay Cynthia \$900.00 per month in periodic alimony. Cynthia was awarded a judgment for \$9,500.00 for her interest in the former marital home and \$3,750.00 for her equitable interest in personal marital property, totaling \$13,250.00. Both parties were awarded their respective automobiles. Perrin was awarded the former marital home and ordered to "pay the joint marital debt accumulated during the marriage of the parties." (CP 557) (RE 26). Perrin filed a *Motion to Reconsider, Alter and Amend Judgment and Request for Specific Findings of Fact and Conclusion of Law.* (CP 562-577) (RE 27-42) The Chancery Court entered an *Order Denying Motion to Reconsider, Alter or Amend* (CP 580-581) (RE 43-44)

AGREE  
DEBT  
MARRIAGE  
EXCEEDS  
VALUE  
of  
Perrin's  
personal  
property

### SUMMARY OF THE ARGUMENT

The principal overriding issue involved in each issue before the reviewing Court is whether a person who refuses to exercise any kind of personal responsibility and engages in destructive behavior - toward themselves, their family, or their children - should be awarded relief by a Chancery Court at the expense of others who do not engage in such behavior and whether or not the innocent parties should be penalized further for such behavior.

In this case Cynthia Lowrey had a gambling addiction so severe that it alienated her from her husband and children, destroyed her relationship with her family and wiped out all of the assets of the parties that were accumulated during the marriage, as well as separate assets of Perrin Lowrey from before the marriage.

In its equitable distribution of marital assets the Chancery Court committed reversible error in its failure to account for the waste of marital assets created as a result of Cynthia's gambling addiction and concealment thereof.

The Chancery Court invented its own formula to award alimony to a person who is employed, has a record of squandering every penny she has ever had on gambling, rather than on her children, and the Chancery Court failed to properly consider the Armstrong factors in its award of alimony. \*

There was no basis established in these proceedings to justify an award of joint legal custody of the minor children to Cynthia in the face of overwhelming evidence that her actions alone have severely damaged all three children and her relationship with them. Perrin has consistently been responsible for caring for the children's emotional, physical and spiritual health and has been the person who has provided them with food, shelter, health care and counseling necessitated by Cynthia's actions. Despite this, the Chancery Court imposed hardly any burden on Cynthia to support her children and did not even impose a guideline child support award. Cynthia is an adult who made her own choices. Cynthia is not a victim needing help. Her children are. If Cynthia does need help, it is not the role of the Chancery Court to penalize the innocent in favor of the person who engages in misconduct and self-destructive behavior. Schuly Catty



## **STANDARD OF REVIEW**

Findings of the Chancellor will not be disturbed or set aside on appeal unless the decision of the trial court is manifestly wrong and not supported by substantial credible evidence, abused its discretion, or unless an erroneous legal standard was applied. *Sarver v. Sarver*, 687 So.2d 749, 753 (Miss. 1997). Where there is a question of law, the standard of review is *de novo*. *Morreale v. Morreale*, 646 So.2d 1264, 1267 (Miss. 1994).

## **ARGUMENT**

### **1. THE CHANCERY COURT ERRED AS A MATTER OF LAW IN ITS FAILURE TO CONDUCT A PROPER *FERGUSON* ANALYSIS AND COMMITTED MANIFEST ERROR IN ITS FAILURE TO PROPERLY ACCOUNT FOR THE WASTE OF MARITAL ASSETS BY CYNTHIA LOWREY**

The Chancery Court failed to analyze all of the Ferguson factors to be considered, particularly with regard to the issue of waste of marital assets and the respective contributions of the parties and erred in the calculations made, which could also have an impact on the Court's consideration of alimony, as discussed below. *Ferguson v. Ferguson*, 637 So.2d 921 (Miss. 1994); *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994); *Johnson v. Johnson*, 650 So.2d 1281 (Miss. 1995) Failure to make *Ferguson* findings of fact is reversible error. *Gray v. Gray*, 909 So.2d 1245 (Miss. Ct. App. 2005) The evidence presented at trial shows that Cynthia has had a long term and costly gambling problem. This gambling problem has

affected her relationship with her children and family and, pertinent to the discussion pursuant to the *Ferguson* criteria, has lead to a substantial waste and dissipation of the parties' joint marital assets. This gambling problem cannot in good conscience be laid at the feet of Perrin, who would visit a casino once, perhaps twice a year at work-related conferences. There is no basis in the record to support the Chancery Court's finding that Perrin "must feel some responsibility in initiating gambling activities" or that "The parties jointly began participating in gaming at casinos during their marriage as a family fun thing to do which brought on a condition of addiction by the Plaintiff to gambling." (CP 548) (RE 17) There was no evidence or testimony, expert or otherwise, that could support such findings. Cynthia herself testified that she gambled by herself and without the knowledge or presence of others between 1995 and 2002. The evidence and testimony at trial showed that Cynthia went to the coast over 300 times by herself in a 28 month period. Cynthia also admitted under oath that she alone gambled away the home equity line of credit, the savings, her inheritance and any other funds she could obtain. There was no testimony that Perrin induced Cynthia to gamble or was responsible for her gambling addiction. The evidence revealed only that Perrin, Cynthia and the family attended a summer conference once a year to the coast. There was no credible testimony, expert or otherwise, to link a recreational family trip once a year to a gambling addiction that destroyed a family and a 19 year old marriage.

What the record does show is that Perrin paid off \$42,000.00 worth of gambling debts, (Tr. 224) and that Perrin inherited \$15,000.00 from the estate of his grandmother between

1995-1996, \$2000.00 of which went into savings, the remainder used to defray debts that has been incurred by Cynthia. (Tr. 486) Perrin also paid debts off with a private loan at \$500.00 per month, the last note due in the year 2013, which Perrin alone is paying. (Tr. 224) Cynthia made withdrawals on the home equity line of credit between August 15, 2001 through May 16, 2002, in the amount of \$34,700.00. (Ex. 6) (RE 113) Perrin borrowed nothing on this credit line, he only paid it. (Tr. 486) During a 27 month period, deposits to Cynthia's checking account were in the amount of \$189,062.97. Of this amount \$122,440.00 of these funds were paid directly to casinos and \$8,500.00 of the funds were withdrawn as cash. \$29,421.31 were payable for other payments. \$19,521.00 were used to pay the house note, leaving a remaining balance of \$8,920.66. (Ex. 4) (RE 109) In addition, Cynthia frequently wrote checks on insufficient funds, which caused overdraft protection to pull money from the parties' joint savings account, in the amount of \$4,841.00 between May 2000 and June 2002. (Ex. 7) (RE133) (Tr. 492) Cynthia also inherited money during the marriage, \$10,000.00 from her mother's estate in 2002, which also went into the checking account but was paid out to the casinos. (Tr. 495-496) (Ex. 10) Perrin started out in the marriage with \$45,000.00 in separate assets. At the time of the separation all of these non-marital assets were gone. (Tr. 495) The value of the marital estate is identified and valued as existed on September 3, 2002, the date of the parties' divorce at -\$284.96. (Ex. 2) (RE 63-68)

In particular the Chancery Court failed to properly consider and evaluate two of the enumerated factors in *Ferguson v. Ferguson*, 637 So.2d 921, 928 (Miss. 1994) - "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" - and "the extent to which property division may, with equity to both partners, be utilized to eliminate periodic payments and other potential sources of friction between the parties."

DEGREE TO WHICH EACH SPOUSE HAS EXPENDED, WITHDRAWN OR OTHERWISE DISPOSED OF MARITAL ASSETS AND ANY PRIOR DISTRIBUTION OF SUCH ASSETS BY AGREEMENT, DECREE, OR OTHERWISE:

The Chancery Court did not account for the fact that Cynthia's gambling problem started well before the twenty-eight (28) month period shown at trial, or recognize that the dissipation of marital assets on gambling is certain to have been well in excess of this documented figure. The Court does not afford Perrin enough credit for the fact that *he* has not dissipated *any* marital assets, has frequently and throughout the marriage bailed out the parties' financial woes attributed to Cynthia's gambling problem, which resulted, by the time of the divorce, in the marital assets of the parties having been largely exhausted. Perrin was left to retire the remaining gambling debt. The Chancery Court failed to recognize that this debt is *in addition* to the amounts dissipated by Cynthia as documented through her checking account. Perrin has been paying off Cynthia's gambling debt since 2002 and is not expected to complete the final payment until the year 2013. Cynthia has paid nothing towards these debts. Cynthia consumed all of the incoming funds from Perrin, her employment and elsewhere, and left only debts which will take Perrin over a decade to settle. Cynthia deposited and spent over \$189,000.00 in just twenty-eight (28) months, whereas Perrin was

left with over one hundred thousand dollars worth of debts in 2002, in addition to the \$189,000.00 spent by Cynthia. Cynthia has paid nothing towards these debts. These figures were contained in the Hemsley report as admitted into evidence and were not controverted by Cynthia. Gambling has been specifically held to be a waste of marital assets to be taken into account during equitable distribution. Craft v. Craft, 825 So.2d 605, 611 (Miss. 2002) The Chancery Court did not make findings of fact and conclusions of law to give Perrin sufficient credit for these liabilities and waste when considering the equitable distribution of marital assets and issues of spousal support. Neither did the Chancery Court take into account the waste of \$45,000.00 of Perrin's separate assets, in addition to the waste of marital assets. The total amounts of the marital waste of marital and non-marital assets by Cynthia must also be credited to Perrin when considering matters of equitable distribution of marital assets. The dissipating spouse has been required to reimburse the other for one-half of the value of the dissipated funds. Dunaway v. Dunaway, 749 So.2d 1112, 1119 (Miss Ct. App. 1999) To allow the findings of the Chancery Court to stand will leave Perrin, the innocent party, with a deficit. The decision allows Cynthia to gamble away her interest in the marital estate and not be held accountable.

Ex #1  
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One spouse's dissipation of marital assets is a factor that must be considered in the equitable distribution of assets and liabilities. Childs v. Childs, 806 So.2d 273 (Miss Ct. App. 2000); Wolfe v. Wolfe, 766 So.2d 123 (Miss Ct. App. 2000) Regardless of Cynthia's direct or indirect contributions toward the marital estate, at the time of the divorce, the marital estate

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was worth nothing. Assuming, for the sake of argument, that Cynthia might be entitled to half of the marital estate, which is extremely doubtful, one half of -\$284.96 equals -\$142.48, a figure which does not account for the \$45,000.00 of Perrin's separate assets which also were wastefully dissipated as a result of Cynthia's actions. One half of zero is zero. Cynthia wasted the majority of the marital assets and should not have been awarded any further equitable distribution from a marital estate which was emaciated as a result of her actions alone. See *King v. King*, 946 So.2d 395, 404 (Miss. Ct. App. 2006) where a wife was awarded the majority of the remaining \$334,000.00 in assets after the husband had dissipated \$265,000.00 in assets.

THE EXTENT TO WHICH PROPERTY DIVISION MAY, WITH EQUITY TO BOTH PARTNERS, BE UTILIZED TO ELIMINATE PERIODIC PAYMENTS AND OTHER POTENTIAL SOURCES OF FUTURE FRICTION BETWEEN THE PARTIES:

The testimony and evidence at trial revealed that Cynthia makes an income sufficient for her to adequately support herself and to contribute toward her children, even without an award of alimony. One (1) of the minor children is in college and a full-time student. The two (2) other children are in the primary custody of Perrin who shouldered with the sole financial burden of their support, health care costs and all other costs associated with raising children. Perrin shall also continue to make payments on debts that were accrued as a result of Cynthia's gambling problems and he is essentially having to start over after an entire career with limited marital assets. Under such circumstances, an award of periodic payments to Cynthia would not be justified or prudent, and the amount of assets already dissipated by

Cynthia would greatly outweigh the amount of assets that she might be awarded in an equitable distribution and certainly does not warrant any further periodic payments to her in the nature of alimony. The lifestyle to which Cynthia has been accustomed is one of a gambling addict who disregards the needs of everyone else, including her family. It was an abuse of discretion for the Chancery Court to enable this lifestyle to continue at the expense of her children. Cynthia had been receiving periodic payments in the amount of Seven hundred fifty dollars (\$750.00) since October 2006; she received Seven thousand, five hundred dollars (\$7,500.00) in temporary support, while paying no child support for her three children, for whom Perrin has borne all of the financial burden, while at the same time Cynthia was earning a living wage.

The Court did not make findings of fact and conclusions of law to take these periodic payments into consideration when considering the equitable distribution of marital assets and issues of spousal support. The total assets of the parties at the time of the divorce were one hundred and sixty three thousand, one hundred and seventy-eight dollars (\$163,178.00), whereas the total liabilities were one hundred and sixty three thousand, four hundred and sixty three dollars (\$163,463.00). (Ex. 2) (RE 67) These figures are in addition to the other marital and non-marital assets wasted by Cynthia. Therefore there were - and are - virtually no net assets to be divided between the parties. If the current Judgment is allowed to stand, Cynthia walks away from the marriage with no debt, whereas Perrin continues to be obliged to pay debts for many years to come. In addition, Perrin has the responsibility and obligation

and is obviously willing to continue to support the three (3) minor children of the parties and has done so this far without any assistance from Cynthia, including their current and future costs of college. Because the amount of assets already dissipated by Cynthia far exceed the total value of the marital estate and far exceeds any equitable portion of the marital estate, Perrin respectfully requests that the appellate Court reverse and render the Judgment to declare that the amount of assets dissipated by Cynthia as part of the marital estate, together with those assets paid to her as temporary spousal support, as well as accounting for the waste of non-marital assets, constitutes a fair and equitable distribution of her share of the marital assets. Perrin would further show the reviewing Court that any liquid assets that could be distributed to Cynthia are likely to be wasted, as they have been done in the past, whereas Perrin has used and will continue to use those assets for the benefit of the children and family unit.

**2. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND COMMITTED MANIFEST ERROR IN ITS AWARD OF ALIMONY, FAILURE MAKE A PROPER ARMSTRONG ANALYSIS AND THE USE OF A FORMULA FOR AN AWARD OF ALIMONY WHICH IS UNSUPPORTED BY ANY SUBSTANTIAL, CREDIBLE EVIDENCE**

Perrin incorporates herein by reference his analysis of the Chancery Court's findings, rulings and judgment under the *Ferguson* discussion herein above in the context of equitable distribution of assets and liabilities.

The Chancery Court invented its own criteria to award Cynthia periodic alimony of \$900.00 per month, based on the Chancellor's determination that:



Seventy percent of Defendant's retirement over the next 23 years would total \$926,989.05. The Court determines Plaintiff is entitled to forty percent of that accumulation from a 19 year marriage which totals \$370,795.62, less the repayment of \$122,000.00 equals \$248,795.62 over the next 23 years results in an award to Plaintiff of \$901.43 monthly as her portion of that marital asset, which shall be paid as periodic alimony.

(CP 554) (RE 23)

Regardless of the mathematical underestimation in the determination of \$122,000.00 as the total of Cynthia's gambling debt, the criteria used by the Chancery Court for an award of alimony is not supported by the record and evidence at trial, nor is there any law, either cited by the Chancery Court or known to the Appellant, to support the Chancery Court's criteria. The Mississippi Supreme Court has repeatedly stated that an assignment of error will not be considered absent legal citations. *Mitchell v. Mitchell*, 823 So.2d 568, 573 (Miss. Ct, App. 2002) This precedent likewise logically requires a trial court to cite the law upon which a judgment or legal conclusion is based. If there is any law justifying the method used by the Chancery Court, that Court is obliged to set forth that law. Failure to do so was clearly erroneous, an abuse of discretion and error as a matter of law. There was no testimony by any expert concerning Perrin's health and life expectancy. There is no substantial and credible evidence in the record to support the Chancery Court's findings on this issue. The Chancery Court was also clearly erroneous in that it made calculations based on Perrin's retirement income that began in June, 2004, two years after the divorce, rather than in 2002, the time of the divorce.

Also, with regard to alimony, the Chancery Court did not conduct an analysis of the

factors set forth in Armstrong v. Armstrong, 692 So.2d 65 (Miss. 1997), nor make specific findings of facts and conclusions of law thereon, as required before an award of periodic

alimony. Failure to make an on the record Armstrong analysis is manifest error. Henderson \*\*\*

v. Henderson, 703 So.2d 262/266 (Miss. 1997); Gray v. Gray, 909 So.2d 108, 112 (Miss. Ct.

App. 2005) The Chancery Court determined the award of alimony without due regard to the

dissipation and waste of marital assets by Cynthia, or to the financial burdens with which

Perrin is left as a result, and without due regard to the fact that Perrin is supporting three

children with little or no assistance from Cynthia. Perrin would respectfully submit to the

appellate Court the following concerning the applicable Armstrong factors based on the record

as presented at trial and available to the reviewing Court on appeal:

#### Income and Expenses of the Parties:

There is a disparity in the income between Cynthia and Perrin, with Perrin earning

more monthly income and having a greater capacity to generate income; however, although

there are disparities in income, the respective expenses of the parties are also different.

Cynthia has shown minimal expenses, because she lives on her own, does not have significant

debts to pay off and does not have the financial responsibility of taking care of the parties'

three (3) minor children. On the other hand, Perrin has the financial responsibility of taking

care of all three (3) minor children and is still repaying the debts incurred during the marriage

largely as a result of Cynthia's illicit gambling activities and is expected to pay the same until

the year 2013 before he is able to once save and invest for himself and his family.

Health and Earning Capacities of the Parties:

*Exp. Some reveals*  
Both parties are in good enough health to continue to work full time.

Needs of Each Party:

*calculated* *his assets of her*  
Perrin's needs, both for the minor children and to service the parties' marital debt  
*= \$*  
incurred largely as a result of Cynthia's gambling activities, outweigh the needs of Cynthia.  
This factor would favor Perrin in an award of alimony, or the Court's decision not to award alimony to Cynthia.

Each Party's Obligations And Assets:

Perrin has a mortgage, a mortgage which is greater than it would have otherwise been, based on his being required to reconsolidate his mortgage to pay off marital debts incurred solely by Cynthia, including Cynthia's gambling debts. Cynthia does not have any significant debts at this time. Perrin also has obligations to pay for the children's health, welfare, and education, an obligation ignored by Cynthia.

Length of The Marriage:

The parties were married August 19, 1983. The testimony at trial expressly revealed that from 1995 through 2002, the last seven years of the marriage, Cynthia did not contribute *little* to the marriage as a mother or a wife. The parties have been separated since their divorce in 2002.

Presence or Absence of Minor Children in the Home, Which May Require that One or Both of the Parties Either Pay for, or Personally Provide, Child Care:

Perrin has been the sole bread winner for the minor children since the year 2002 and

has paid for all curricular and extra-curricular expenses for the minor children, as well as their clothing, food, entertainment and necessities. Cynthia has made <sup>12/10</sup> no contributions and, under the Chancery Court's child support ruling, would not even contribute the statutory minimum amount for child support.

Age of the Parties:

Perrin is 54 years of age. Cynthia is 51 years of age.

Standard of Living of the Parties, Both During the Marriage and at the Time of the Support Determination:

During the marriage the parties had a conservative standard of living, were not extravagant, and invested and saved money - but for Cynthia's propensity to gamble they would have accumulated significant marital assets; however, an award of alimony is not necessary for each party to maintain the lifestyles to which they were accustomed during the marriage and to which they have now become accustomed.

Tax Consequences of the Spousal Support Order:

If the Court declines to award alimony there should be no significant tax consequences to either party.

Fault or misconduct by the parties:

The evidence and testimony at trial did not show any fault or misconduct on the part of Perrin, because there was none. There has been fault and misconduct established on the part of Cynthia, both in fraudulently obtaining lines of credit without Perrin's knowledge or permission in terms of her concealing and dissipating marital assets for her gambling activities

and embezzlement. Cynthia also perjured herself at trial on more than one occasion.

Wasteful Dissipation of Assets by Either Party:

Perrin has not dissipated or wasted any assets. Cynthia has dissipated hundreds of thousands of dollars of marital assets through gambling, some of which has been documented, much of which has not. The small slice of time that was able to be documented revealed that Cynthia spent over \$189,000.00 in just twenty-eight (28) months, whereas Perrin was left with over one hundred thousand dollars worth of debts in 2002, *in addition* to the \$189,000.00 spent by Cynthia, and which does not account for the \$45,000.00 of Perrin's separate assets which also were wastefully dissipated as a result of Cynthia's actions. Neither Perrin or the children have received any credit or relief from Cynthia's waste and removal of marital assets.

Any Other Factor or Circumstances Bearing on the Subject That Might be Shown by the Evidence That the Court May Deem to be "Just and Equitable" in Connection With the Setting of Spousal Support:

In addition to recognizing that Cynthia has dissipated marital assets and Perrin has borne the financial burden for himself and the family since 2002, and will continue to bear this burden, the Court should also note that Cynthia was awarded temporary spousal support in the amount of Seven hundred fifty dollars (\$750.00) per month and that she has received the benefit of the same for a considerable amount of time pending trial finally being heard on the merits, without contributing any financial support to the three children. During this period of time, conversely, Perrin has received no child support, court ordered or otherwise, from Cynthia. Any lump sum or rehabilitative alimony that may have been due to Cynthia should

already have been satisfied.

For the foregoing reasons, based on the *Armstrong* criteria, Perrin respectfully requests that the appellate Court reverse and render the Judgment of the Chancery Court and decline to award Cynthia periodic alimony based on the factors set forth herein and above, due to the extreme financial obligations of Perrin which have resulted from Cynthia's gambling losses and wasteful dissipation of marital assets and based on the documented and ongoing needs of the three minor children.

### **3. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND FACT IN ITS CALCULATION OF CHILD SUPPORT**

Miss. Code Ann. § 43-19-101 (2004) provides guidelines for child support and further states that the Chancery Court is to provide written findings to support any deviation up or down from the child support guidelines. For a Chancery Court to deviate from the statutory presumption of 22% for three minor children, the deviation must be supported by written findings of fact to explain the deviation and to explain why the presumptively correct amount is not appropriate. *Thompson v. Thompson*, 894 So.2d 603 (Miss. Ct. App. 2004)

The calculations made by the Chancery Court with respect to child support payments to Perrin for the three minor children are not supported by the record and the evidence as presented at trial and they deviate substantially downward from the Mississippi child support guidelines, with no findings of fact or conclusions of law as required by the applicable law as to the reasons for the deviation. The Chancery Court has awarded child support in the amount of 14% of Cynthia's adjusted gross income, the amount customarily awarded for one

child. Perrin continues to be responsible for all expenses concerning the health, education and welfare of three children and the award should be set at a minimum at 22% of Cynthia's adjusted gross income for three children. Further, the Chancery Court applied the percentage to the incorrect amount because the Chancery Court should have included the \$750.00 in temporary support and/or the \$900.00 awarded to Cynthia as alimony in that computation. The fact that Cynthia has limited contact with her children does not relieve her of her financial obligations as a non-custodial parent because the limited contact was a product of her choices. The evidence, as presented at trial, and the report of Guardian Ad Litem, made it clear that it was Cynthia's actions that led to the alienation of her children, not the actions of the children themselves. Every additional nickel given to Cynthia is an amount that is taken away from her children. Neither the children, nor Perrin, should be penalized financially for the actions and inactions of Cynthia and their effects on the family unit. Perrin respectfully requests that the appellate Court reverse and render to award the statutory child support guideline amount of support, or in the alternative to reverse and remand this issue to the Chancery Court, with instructions to establish and apply the statutory child support guideline amount of support payable by Cynthia.

**4. THE DECISION OF THE CHANCERY COURT GRANTING THE PARTIES' JOINT LEGAL CUSTODY OF THE MINOR CHILDREN IS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE**

The polestar consideration in any custody award is the best interests of the children.

*Touchstone v. Touchstone*, 682 So.2d 374 (Miss. 1996) Miss. Code Ann. § 93-5-24 provides

chancellors the authority to grant sole legal custody to one parent. *Mabus v. Mabus*, 847 So.2d 815, 821 (Miss. 2003) Upon a finding that either party has rendered themselves mentally, morally or otherwise unfit to rear and train the child the Chancery Court may award sole legal custody to one party. Miss. Code Ann. § 93-5-24 (2004) (1) (e) The Chancery Court awarded the parties joint legal custody, finding that “The age, health and sex of the children as well as their home, school and community records are of little or no evaluation under the present circumstances.” (CP 551) (RE 20) This conclusion is not supported by any substantial or credible evidence in the record, or by the findings and recommendations of the Guardian Ad Litem (Tr. 518-524) and was an abuse of the Chancellor’s discretion. All three children have been alienated and estranged from Cynthia by her own actions and choices, placing her needs to gamble ahead of the needs of her children and family. The health, especially the mental health of the children has been adversely affected by these actions. Perrin has been the sole source of stability and dependability in terms of his time, presence, and financial support for the three children which has had a positive effect on their home, school and community records. Cynthia failed to show the Court that she is a fit and proper person to exercise custody, and she should not have been awarded joint legal custody.

The visitation exercised by Cynthia since 2002 has been minimal. This was not the fault of Perrin. In addition, all of the children expressed to the Chancery Court through their attorney and Guardian Ad Litem, that they did not wish to visit with Cynthia. The Guardian Ad Litem, as an independent attorney for the children, found that this estrangement has not



been created or fostered by Perrin. (Tr. 519) The Guardian Ad Litem reported to the Court his findings and conclusions that the feelings and emotions experienced by the children are based on the actions and inactions of Cynthia; and he would be concerned that any forced interaction between Cynthia and the children would have a severe damaging affect on Erin, both emotionally and physically, and would ultimately increase the existing animosity between all of the girls and their mother. The Guardian Ad Litem also stated that all three (3) girls opposed further counseling with Cynthia and that Erin in particular strongly opposed it. (Tr. 518-524)

At various points in these proceedings and through trial, Cynthia testified that she does not have a permanent or stable home, that she often, by her own choosing, lives in her car, and that she is depressed and suicidal. Cynthia is clearly unstable, through no fault of Perrin, and should not be given the opportunity to inflict this instability on her children. Cynthia perjured herself with regard to her Rule 8.05 financial statement claimed expenses, perjured herself when she denied that her gambling continued, perjured herself concerning her living arrangements, perjured herself with regard to the proffer upon which the Court of Appeals remanded this case, committed acts of fraud with regard to credit card applications and embezzled funds from her former employer. Cynthia admitted to using the address of her former employer to hide bills and fraudulently opened credit cards from Perrin. Cynthia is clearly not a normal parent or suitable person for legal custody of the children. The first thing that Cynthia did on news of the *Lowrey I* remand was to approach her daughter Emelie at

church the day after the Opinion was handed down and read it to her. (Tr. 242) Likewise Cynthia called Erin, an already psychologically, damaged child, to talk about the Opinion. (Tr. 244) Cynthia, who suffers from depression, told Brittany that it was her fault that Cynthia was depressed. This was the reason she stopped seeing her mother. (Tr. 399) The other two daughters also stopped seeing Cynthia for similar reasons. (Tr. 401) Regardless of any differences between the parties, the Chancery Court has the primary role of protecting the best interests, health and welfare of the minor children and to award legal custody to Cynthia under these circumstances was not supported by any substantial and credible evidence in the record.

**5. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT DID NOT PROVIDE SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUESTED BY PERRIN**

Counsel for Perrin Lowrey specifically requested, through two written motions, one pre-trial and one post-trial, that the Chancery Court state specifically and set forth separately its findings of fact and conclusions of law in this case pursuant to MRCP 52 (a) (CP 492-494) (CP 562-577) Prior to trial, Perrin submitted a *Request for Specific Findings of Fact and Conclusions of Law*. (CP 492-494) Perrin again requested that the Court provide such specific findings of fact and conclusions of law, which were not addressed in the Court's Judgment on a point by point basis, in a post-trial motion. (CP 562-577) When a party requests specific findings of fact and conclusions of law, it is error for the court to fail to make such findings. *Miss. Dep't of Transp. v. Trosclair*, 851, So.2d 408 (Miss. Ct. App. 2003). Where the

underlying facts are disputed and there are issues of credibility, the court errs in not making specific findings of fact and conclusions of law. *Patout v. Patout*, 733 So.2d 770 (Miss. 1999)

In Perrin's *Request for Specific Findings of Fact and Conclusions of Law*, Perrin requested that the Chancery Court make specific findings of fact and conclusions of law as to whether he or his former counsel committed any act of fraud or intimidation against Cynthia Lowrey, and if so, the exact facts upon which such findings are made. Perrin requested that the Chancery Court alter and amend the judgment to make these specific findings based on the evidence and testimony as presented at trial, and, as to whether the purported "Proffer" which was previously filed in this case by Mr. Chinn, (CP 56-61) is or was supported by the evidence and testimony as presented at trial.

Among a multitude of allegations made by Mrs. Lowrey, as stated in her brief in *Lowrey I*, apparently based on the written proffer authored and signed by Mr. Chinn, was that "Cynthia was left with no assets of the marriage, no support, and all of the debt, with the exception of the home mortgage." The factual basis for the Court of Appeals' remand in this case, and the basis for the published opinion issued, was the above-referenced written "Proffer" which was signed by Mark Chinn on behalf of Cynthia. Because the Court failed to make any specific findings concerning this "Proffer," and failed to point out several instances of perjury on behalf of Cynthia, which were proven by clear and convincing evidence, Perrin requested that the Chancery Court include such findings of fact and

conclusions of law in the Judgment. Perrin had the right to request these specific findings of fact and conclusions of law, which were not addressed in the Court's Judgment on a point by point basis, and some of which were not addressed at all. Perrin requests that the appellate Court make specific findings of fact and conclusions of law on the issues not addressed by the Chancery Court based on the record as submitted. Alternatively, Perrin requests that the appellate court reverse and remand this matter to the Chancery Court to make specific findings of fact and conclusions of law on the issues raised, but not addressed, in its prior Findings of Fact, Conclusions of Law and Judgment.

### **CONCLUSION**

For the foregoing reasons Perrin respectfully requests that the appellate Court reverse and render the decision of the Chancellor as to the award of further equitable distribution of marital assets to Cynthia and to reverse and render as to the award of periodic alimony to Cynthia. Perrin further respectfully requests that the appellate Court reverse and render to award the statutory child support guideline amount of support, or in the alternative, to reverse and remand this issue to the Chancery Court, with instructions to establish and apply the statutory child support guideline amount of support payable by Cynthia. Because there was no substantial evidence in the record to support vesting legal custody of the minor children in Cynthia, Perrin also respectfully requests that the Court reverse and render the decision of the Chancellor to vest joint legal custody in both parties, and render judgment to grant Perrin

sole legal custody, in addition to paramount physical custody, care and control of the minor children. Perrin had the right to request specific findings of fact and conclusions of law, and did so. Finally, Perrin requests that the Appellate Court make specific findings of fact and conclusions of law on the issues not addressed by the Chancery Court based on the record as submitted. Alternatively, Perrin requests that the appellate court reverse and remand this matter to the Chancery Court to make specific findings of fact and conclusions of law on the issues raised, but not addressed in its prior Findings of Fact, Conclusions of Law and Judgment.


RESPECTFULLY SUBMITTED this the 18<sup>th</sup> day of August, 2008

PERRIN H. LOWREY

By: 

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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**PERRIN H. LOWREY**

**APPELLANT**

**VS.**

**NO: 2007-CA-01988**

**CYNTHIA NELSON LOWREY**

**APPELLEE**

**CERTIFICATE OF SERVICE AND FILING**

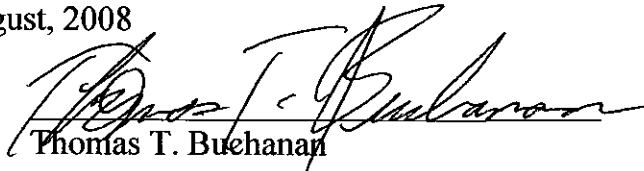
I, Thomas T. Buchanan, do hereby certify that I have this date mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following persons at their usual mailing addresses:

Mark Chinn , Esq.  
W. Matthew Thompson, Esq.  
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Hon. James H. C. Thomas, Jr.  
Lamar County Chancery Judge  
Post Office Box 807  
Hattiesburg, Mississippi 39403-0807

I, Thomas T. Buchanan, Attorney for the Appellant, hereby certify that I have actually mailed this date the Original and three copies of the Brief of the Appellant to the Mississippi Supreme Court.

THIS, the 18<sup>th</sup> day of August, 2008

  
Thomas T. Buchanan