

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-CA-02258

LAURIN JONES KAY

APPELLANT

VERSUS

GREGOR THOMAS KAY

APPELLEE

**APPELLEE'S BRIEF**

ORAL ARGUMENT NOT REQUESTED

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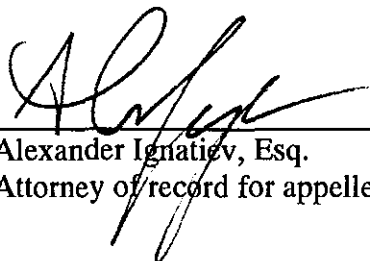
GREGOR THOMAS KAY

APPELLEE

**CERTIFICATE OF INTERESTED PARTIES**

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

1. Laurin Jones Kay, Appellant
2. Gregor Thomas Kay, Appellee
3. Hardin Kay, minor child of the parties
4. Keller Kay, minor child of the parties
5. Sheila H. Smallwood, Trial Counsel for Appellant
6. L. Anne Jackson, Appellate Counsel for Appellant
7. David A. Pumford, Trial Counsel for Appellee
8. Alexander Ignatiev, Appellate Attorney for Appellee
9. Hon. James H.C. Thomas, Jr., Chancellor of the Lamar County Chancery Court

  
\_\_\_\_\_  
Alexander Ignatiev, Esq.  
Attorney of record for appellee

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### **STATEMENT OF THE ISSUES**

The Chancellor's decision is supported by substantial evidence.

The Chancellor properly considered the *Armstrong/Ferguson* factors on the record, and incorporated them into the Judgment of Divorce by reference.

The Chancellor did not materially deviate from the child support guidelines.

### **STATEMENT OF THE CASE**

This matter arises from a suit for divorce on the grounds of uncondoned adultery, filed by Laurin Jones Kay against her husband Gregor Thomas Kay in the Chancery Court of Lamar County, Mississippi.

### **COURSE OF PROCEEDINGS**

This matter came up for trial before the Chancery Court of Lamar County, Mississippi, on October 11, 2007. Transcript, p. 1. After a full trial on the merits, the Chancellor granted Laurin Jones Kay ("Laurin") a divorce from Gregor Thomas Kay ("Gregor") on the grounds of uncondoned adultery, granting joint legal custody and primary physical custody to Laurin, and ordered that Gregor pay child support in the amount of \$650.00 per month for the two children. Record, p. 62. The Chancellor ordered that the parties retain their individual personalty from the marriage, and that the marital home be sold, with the proceeds from the sale to be divided as follows: \$2,500.00 to Laurin for attorney's fees, \$2,000.00 to Laurin for a relocation allowance, the remainder of the proceeds to be applied to four specific marital debts owed by the parties, and the debt of Laurin's vehicle, if it should prove to be a marital debt. R. 62-4, 82-3.

After that, if any proceeds remained, they are to be divided equally between the parties. R. 62-4. Gregor was to assume the sole legal responsibility for the joint student loan debt of the parties, with Laurin to reimburse him \$100.00 per month on that debt, holding Gregor liable for more than 80% of that marital debt. R. 62-4.

Laurin timely appealed the judgment of divorce. Her appeal is being prosecuted by the law partner of her best friend, who was a witness at the trial of this matter.

## STATEMENT OF FACTS

Gregor and Laurin were married on or about October 3, 1992, and separated on or about December 6, 2006. Record, p. 62. They had two children: Hardin Thomas Kay, age seven, and Keller Grant Kay, age one. R. 7. Gregor had three affairs during the marriage, but only the third affair was uncondoned. T. 85-6.

During the marriage, Laurin worked as a school teacher, and Gregor pursued an academic career, resulting in his eventually receiving a PhD from the University of Georgia ("UGA"). T. 38, 44. During the time that Gregor was attending UGA, he accumulated substantial educational debt, in the amount of \$105,000.00. *Id.* Evidence at trial indicated that a portion of that debt was used to defray family expenses while Gregor was attending UGA. *Id.* Gregor and Laurin each had exclusive use of their own vehicles, which were otherwise marital assets. T. 90, Exhibit 5. The sole remaining marital asset to be divided by the Court was the marital home, which was worth \$169,000.00, with \$117,000.00 of debt encumbrance, leaving an equity interest of \$52,000.00. Exhibit 5, T. 117.

The Chancellor determined that based upon the testimony at trial, the Sallie Mae debt which was solely in Gregor's name, was a marital debt, inasmuch as the family had used a portion of it to live off of while Gregor was attending school at UGA. T. 118-9. The Chancellor ordered that Laurin have the use of the marital home until it is sold; the proceeds of the marital home to be apportioned as follows: the first \$2,500.00 to pay Laurin's attorney; the next \$2,000.00 as a relocation allowance for her; the further proceeds to be applied to the marital debt held by BancorpSouth, BancorpSouth ODL,

and the Bank of America debts of the parties, with any remaining proceeds to be split between the parties. T. 117-8. The Chancellor ordered Gregor to assume sole responsibility for the Sallie Mae debt of the parties totaling approximately \$105,000.00, with Gregor paying \$512.00 monthly, and Laurin reimbursing him \$100.00 monthly, based upon the fact that a portion of the loan was used to pay for family expenses. T. 118-9. Additionally, the Court ordered that if the note on Laurin's vehicle was in the name of both parties, it would be adjudged a marital debt and subject to payment from the proceeds of the marital home before distribution of the remaining proceeds. R. 82-3.



### SUMMARY OF THE ARGUMENT

The findings of fact of a Chancellor are reviewed for manifest wrong or clear error. This means that if the findings of the Chancellor are supported by substantial evidence, they will stand. The conclusions of law of the Chancellor are reviewed de novo.

In this case, the Chancellor made extensive findings on the record regarding the marital assets of the parties. His findings are supported by substantial evidence. The Chancellor is not required to issue a complete, step by step analysis of the *Armstrong/Ferguson* factors. If the Chancellor has fully addressed the *Armstrong/Ferguson* factors such that the reviewing court may understand his findings of fact and conclusions of law, those findings and conclusions will stand. Finally, the Chancellor did not deviate from the statutory guidelines for child support to Laurin's detriment.

## ARGUMENT

### STANDARD OF REVIEW

The factual findings of a chancellor must stand undisturbed absent manifest or clear error. *Milligan v. Milligan*, 956 So. 2d 1066, 1071 (11) (Miss. Ct. 2007). The conclusions of law of the chancellor are subject to *de novo* review. *Gillespie v. Kelly*, 809 So. 2d 702, 705 (9) (Miss. Ct. App. 2001). Laurin argues that as the chancellor did not make written findings of fact and conclusions of law regarding the division of the marital estate and provision of alimony. The *Ferguson* factors are to be considered when deciding which party should receive certain assets in the division of the marital property, and to justify any inequitable distribution. *Johnson v. Johnson*, 823 So. 2d 1156, 1160 (9) (Miss. 2002).

Laurin filed a Motion to Reconsider, which asked for reconsideration of the court's alimony decision, but did not request specific findings of fact and conclusions of law on that issue, which request she was entitled to make. Absent such a request, the chancellor's factual decision must be upheld if supported by substantial evidence. *Milligan, supra*.

1. The Chancellor's decision is supported by substantial evidence.

The decisions of a Chancellor regarding matters of fact presented in the course of trial are subject to review only for manifest wrong or clear error. *Milligan, supra*. This means that if the Chancellor's decision is supported by substantial evidence, this Court may not reverse the decision, even if it would have ruled differently given the same facts and circumstances. *Id.*

Laurin argues that because the learned Chancellor did not expressly set forth in his Judgment of Divorce the individual analysis of each element of the *Armstrong/Ferguson* factors regarding the equitable division of marital property and provision of alimony, the decision to not award alimony was clear error. However, Laurin does not identify the inequitable result that she is appealing. She claims that the Chancellor's refusal to give her any alimony makes the distribution of marital assets inequitable, but does not provide an alternative that would be equitable. Alternatively, she argues that the Chancellor requiring her to pay for any of the marital debt is grossly inequitable, even though the express finding of the Chancellor was that

The facts of the marital distribution are well illustrated in the *Hemsley* report in this matter. The majority of the marital property is tied up in the marital home. Both parties contributed to the home equally, according to the findings of the Chancellor. The Chancellor ordered that Laurin have the use of the marital home until it is sold; the proceeds of the marital home to be apportioned as follows: the first \$2,500.00 to pay Laurin's attorney; the next \$2,000.00 as a relocation allowance for her; the further proceeds to be applied to the marital debt held by BancorpSouth, BancorpSouth ODL, and the Bank of America debts of the parties, with any remaining proceeds to be split between the parties. The Court ordered Gregor to assume sole responsibility for the Sallie Mae debt of the parties totaling approximately \$105,000.00, with Gregor paying \$512.00 monthly, and Laurin reimbursing him \$100.00 monthly, based upon the fact that a portion of the loan was used to pay for family expenses. Additionally, the Court ordered that if the note on Laurin's vehicle was in the name of both parties, it would be

adjudged a marital debt and subject to payment from the proceeds of the marital home before distribution of the remaining proceeds.

2. The Chancellor properly considered the *Armstrong/Ferguson* factors on the record, and incorporated them into the Judgment of Divorce by reference.

The *Armstrong/Ferguson* factors regarding marital property division and alimony were not individually and expressly addressed by the Chancellor in his Judgment. "A failure to explicitly recite each and every Ferguson guideline does not mandate reversing a chancellor's judgment. However, a chancellor's findings must be specific enough to allow this Court to find that the factors were considered, and the chancellor determined what he considered to be the "key" factors." *Pulliam v. Smith*, 872 So. 2d 790, 796 (¶15) (Miss. Ct. App. 2004), citing *Glass v. Glass*, 857 So.2d 786 (¶10) (Miss.Ct.App.2003). The Chancellor found that the parties had largely similar incomes after deducting child support from Gregor's pay: Gregor's income after child support was \$2,291.64, and Laurin's monthly income is \$2,002.22. In addition, the Chancellor required that Gregor pay more than 80% of the marital debt after sale of the marital home, by requiring Gregor to pay \$512.00 monthly of the Sallie Mae debt, and require Laurin to only pay \$100.00 monthly.

The factors that the Chancellor should consider in evaluating the award of alimony follow:

The income and expenses of the parties; The health and earning capacities of the parties; The needs of each party; The obligations and assets of each party; The length of the marriage; The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care; The age of the parties; The standard of living of the parties, both during the marriage and at the time

of the support determination; The tax consequences of the spousal support order; Fault or misconduct; Wasteful dissipation of assets by either party; or Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.

*Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993).

In this case, while the Chancellor made findings that explained his understanding of the *Armstrong/Ferguson* factors, such that they should not be overruled. *See Pulliam, supra*. The Court clearly decided that based upon Gregor's adultery, Laurin would be entitled to receive the first \$4,500.00 of proceeds from the sale of the marital home. The Court ordered that the parties keep the marital personal property that they had at the time of the divorce, with the exception of Gregor receiving his guns and branding iron, as designated in the *Hemsley* report. While the Court found that the Sallie Mae debt was a marital debt, the Chancellor ordered Gregor to assume sole legal responsibility for that debt, pay the whole payment for the debt with Laurin to reimburse him \$100.00 per month for the Sallie Mae debt, and that he was to pay 80% of the remaining debt of the parties, with Laurin to pay 20%.

The evidence is substantial that the entire wealth of the parties is buried beneath a mountain of debt. There simply is very little to divide between the parties, except the proceeds of the marital home and the responsibility for the debt of the parties. The Chancellor put a debt burden of at least 80% of the marital debt upon Gregor, after the proceeds from the sale of the marital home. This distribution of "assets" is far from equitable, and substantially inures to the benefit of Laurin.

3. The Chancellor did not materially deviate from the child support guidelines.

Child support is based upon statutory guidelines. Miss. Code Ann. 43-19-101

(Rev. 2004). According to the statute, the Chancellor need not make a written finding of fact regarding to the reasonableness of applying the statutory guidelines in this case, as Gregor's adjusted gross income as defined in the section did not exceed \$50,000. *Id.* In addition, the Chancellor is required to arrange the provision of reasonable medical care for the children by seeking their best interests. *Id.* In this case, Gregor's employment at USM provided him the best opportunity to afford health insurance coverage to the children, and the Chancellor required him to do so.

The Chancellor heard testimony regarding Gregor's earning capacity and wages, as well as his potential for course overload income. Course overloads are optional and based upon enrollment, and there is a minimum number of students that must enroll in a course that is being taught on that basis before Gregor can earn the money. His only guaranteed income for the year are his wages for his normal courseload. The Chancellor nevertheless determined that Gregor's wages would include the summer pay as reported in his 2006 W-2, when the Chancellor found that his net income on a monthly basis was \$3,200.00. This amount resulted in an award of child support of \$650.00 per month, slightly higher than 20% of \$3,200.00.

Based upon Gregor's Rule 8.05 disclosures, he had a gross monthly income of \$3,750.00. After his allowable deductions, his net income is \$2,511.47, and twenty per cent of this figure is \$502.29. Laurin argues that Gregor's pay stub reflects a much higher income; however, the evidence before the Chancellor indicated without any impeachment or rebuttal that this included one time monies; specifically, a grant of \$5,000.00 and an overload class. The Chancellor also considered prior years' W-2 of Gregor's in reaching

his conclusion on the Motion to Reconsider that child support should not adjusted from the \$650.00. Based upon all the evidence considered, the Chancellor in fact engaged in an upward departure from the guidelines; however, under the statute, he was not required to engage in any fact-finding regarding the reasonableness of the guidelines.

## CONCLUSION

Laurin argues that the Chancellor erred in dividing the marital estate equitably and in his decision to not award her alimony. The Chancellor found that, after Gregor paid his mandated child support, the parties' incomes would be roughly equalized, limiting the utility of periodic alimony. The Chancellor also saddled Gregor with over 80% of the marital debt. Considering the debt load of the parties, there was no opportunity for the Chancellor to award lump-sum alimony under the guidelines.

This appeal is an attempt to punish Gregor by Laurin. Laurin makes an impassioned appeal, recounting the numerous sins of Gregor. The bottom line on Gregor's adultery is that Laurin condoned it twice, and the third time she did not. Thus, all the prior adultery is irrelevant. With respect to the issues of division of property, child support, and alimony, the Chancellor engaged in an exhaustive evaluation of the facts before reaching his determination.

The pertinent facts are that Gregor engaged in uncondoned adultery. He was found to be less morally fit as a parent than Laurin, and Laurin received primary custody of the children. In addition, Laurin received exclusive use of the home until the end of the 2007-2008 school year, and the lion's share of its proceeds upon the successful sale. Gregor is liable for over 80% of the Sallie Mae debt, which the Chancellor found to be marital debt. This distribution is hardly down the middle; it is at worst inequitable towards Gregor, but he has not appealed it.

There is no reason to doubt the judgment of the learned Chancellor. The findings are numerous and thorough. This is merely an attempt by Laurin, and her attorney,



whose law partner testified at the trial of this matter, to further punish Gregor. This Court should affirm the sound judgment of the Chancellor of Lamar County.

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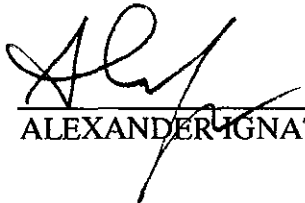
APPELLEE

CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellee, do hereby certify that I have this day mailed for filing, via United States mail, postage prepaid, the original and four (4) copies of the foregoing Brief of the Appellee, as well as an electronic copy, to the Clerk of the Supreme Court of Mississippi, Ms. Betty Sephton, Post Office Box 249, Jackson, Mississippi, 39205-0249.

THIS the 25<sup>th</sup> day of August, A.D. 2008.

ALEXANDER IGNATIEV, ESQ.  
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ALEXANDER IGNATIEV

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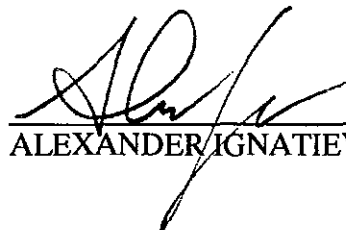
CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellee, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a copy of the foregoing Brief of the Appellee to the following:

Hon. James H.C. Thomas, Jr.  
Chancery Judge of Lamar County  
P.O. Box 807  
Hattiesburg, MS 39403

L. Anne Jackson, Esq.  
P.O. Box 566  
Hernando, MS 38632

THIS the 25<sup>th</sup> day of August, A.D. 2008.

  
\_\_\_\_\_  
ALEXANDER IGNATIEV