IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LAURIN JONES KAY	**APPELLANT**
V.	**NO. 2007-CA-02258**
GREGOR THOMAS KAY	**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 in order that the justices of the Supreme Court and/or judges of the Court of Appeals 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, Attorney for Appellant on Appeal
7. David A. Pumford, Attorney for Appellee
8. Alexander Ignatiev, Attorney for Appellee
9. Honorable James H.C. Thomas, Jr., Chancellor of Lamar County Chancery Court

L. Anne Jackson
Attorney for Appellant

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS iii

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

ARGUMENT 9

I. Standard of Review 9

II. The Chancellor Deviated from the Child Support Guidelines Without Providing Adequate Justification for the Deviation. 10

III. Division of the Marital Estate and Alimony 13

A. Laurin Should Not Have Been Ordered to Pay Approximately 20% of Greg's Student Loan Debt 16

B. The Debt on the Equinox Should Have Been Paid with Proceeds from Selling the House 19

C. Laurin Should Have Been Awarded Alimony Under a Proper Consideration of the Armstrong Factors 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Albright v. Albright, 437 So. 2d 1003 (Miss. 1983) 9, 13
Armstrong v. Armstrong, 618 So. 2d 1278 (Miss. 1993) 9, 15, 20, 22, 23
Brekeen v. Brekeen, 880 So. 2d 280 (Miss 2004) 9
Brendel v. Brendel, 566 So.2d 1269 (Miss. 1990) 21
Brennan v. Brennan, 638 So. 2d 1320 (Miss 1994) 13
Cumberland v. Cumberland, 564 So. 2d 839 (Miss. 1990). 21
Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994) 9, 13, 14, 15, 22, 23
Guy v. Guy, 736 So. 2d 1042 (Miss. 1999) 17, 18, 19
Hammonds v. Hammonds, 597 So. 2d 653 (Miss. 1992) 9, 20
Haney v. Haney, 907 So. 2d 948 (Miss. 2005) 10
Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994) 9, 16
Lauro v. Lauro, 847 So. 2d 843 (Miss. 2003) 10, 13, 16
Magruder v. Magruder, 881 So. 2d 365 (Miss. App. 2004) 13
McManus v. Howard, 569 So. 2d 1213 (Miss.1990). 20
Pearson v. Pearson, 761 So. 2d 157 (Miss. 2000) 10
Robinson v. Irwin, 546 So. 2d 683 (Miss., 1989) 17, 19
Rudder v. Rudder, 467 So.2d 675 (Miss. 1985) 21
Saucier v. Saucier, 830 So. 2d 1261 (Miss. App. 2002). 9
Singley v. Singley, 846 So. 2d 1004 (Miss. 2002) 14, 15
Strack v. Sticklin, 959 So. 2d 1, ¶ 9 (Miss. App. 2006) 9
Watson v. Watson, 882 So. 2d 95 (Miss. 2004) 14, 15
Weiss v. Weiss, 579 So.2d 539 (Miss. 1991). 21
Yelverton v. Yelverton, 961 So. 2d 19 (Miss. 2007) 10, 14, 20

Statutes

Miss. Code Ann. § 43-19-101(3)(b) (Rev. 2000) 13

STATEMENT OF THE ISSUES

1. Whether the child support award complied with the statutory guidelines.
2. Whether it was error to require Laurin to repay 20% of Greg's student loan debt.
3. Whether the Chevy Equinox debt should be paid from the proceeds of the sale of the house.
4. Whether it was error to deny Laurin alimony after splitting the marital estate evenly.

STATEMENT OF THE CASE

On April 20, 2007, Laurin Jones Kay (Laurin) sued her husband Gregor Thomas Kay (Greg) for divorce alleging fault claims of adultery and cruelty seeking temporary relief, custody of the couples' two children, alimony or separate maintenance, and an equitable division of their marital property. (R. 7-17) Greg answered admitting Laurin had statutory grounds for divorce based on adultery, denied the remainder of the complaint and counterclaimed for divorce based on cruelty. (R. 18-29) Laurin answered and denied the counterclaim. (R. 31-34). The Chancellor entered a temporary order on May 30, 2007 awarding Laurin temporary custody of the two children with Greg having substantial visitation. Both parties were ordered not to have any overnight visitors of the opposite sex other than blood relatives during the periods the children were in their custody or visiting. The Chancellor ordered that the children should have no contact with Greg's paramour.

Greg was ordered to pay child support of $500 a month. Laurin was granted temporary use and possession of the marital home. The parties were each to pay ½ the mortgage with Greg being ordered to pay his half to Laurin by the 5th of each month. Laurin was ordered to continue to pay for health insurance for both children. Greg was ordered to continue to provide dental insurance for both children, to purchase and pay for a 2007 tag on the automobile Laurin was

driving, and to be solely responsible for paying his Sallie Mae student loans. The Chancellor encouraged the parties to get credit counseling immediately and to immediately develop a plan for presentation to the court on how their considerable marital debt could be paid so the Chancellor could authorize payment of the debt on a temporary basis. Both parties were also prohibited from disposing of marital assets without written approval of the other party or by Order of the Court. (R. 35-37)

On July 23, 2007, Laurin filed a motion for contempt based primarily on violation of the court order in regard to having overnight visitors of the opposite sex during his periods of visitation. The motion also alleged Greg violated the temporary order by taking property from the marital home without Laurin's written consent or a court order, disposing of martial assets and failing to meet his financial obligations under the temporary order. The contempt motion sought sanctions in the form of attorney's fees and suspension of visitation or requiring supervision of visitation. (R 42-47)

On October 11, 2007, following trial, the Chancellor granted Laurin a fault based divorce, finding Greg had committed adultery. The parties were granted joint legal custody of the children with Laurin having paramount physical custody. Greg was granted liberal visitation. The order enjoined both parties from having someone of the opposite sex to whom s/he was not married staying with them overnight when the children are present. The Chancellor found Greg had net take home pay of approximately $3,200 a month, which supported a child support award of $650 a month to Laurin. The provisions of the temporary order concerning insurance and payment of uninsured expenses were continued from the temporary order to the final judgment.

The Chancellor ordered the marital home to be sold with the first $2,500 of the sale proceeds to be distributed to Laurin as a contribution toward her attorney's fees and an additional

$2,500 of the proceeds to be distributed to Laurin as a relocation allowance. The remainder of the proceeds were ordered to be used to pay off the joint debt owed to Bancorp South, Bancorp South ODL, a Bank of America debt in Laurin's name, and a Bank of America debt in Greg's name. If any proceeds remained after payment of these debts, it was to be divided equally between Laurin and Greg. Greg was ordered to be responsible for payment of his Sallie Mae student loans, but Laurin was ordered to contribute $100 a month to paying off Greg's student loans. Laurin and Greg were each awarded the vehicle in his or her possession at the time of the judgment. (R. 62-64; RE 4-6)

The Chancellor denied alimony relying on *Hubbard v. Hubbard*, 656 So.2d 124 (Miss. 1995) finding that after deduction of his support obligations, Greg would have $2,550.00 a month to live on and pay the bulk of the marital debt while Laurin would have a total of $2,625.00 a month to live on from a combination of her own income and the child support she would receive from Greg. He then granted Laurin the tax exemption for both children since she would bear the major expense of their daily upkeep. (R. 64; RE 6)

On Laurin's motion for reconsideration, the Chancellor again denied alimony. He ordered that if the debt on Laurin's Chevy Equinox was in the name of both parties, it was to be paid from the proceeds of the sale of the home, but if the note was in Laurin's name alone, she would be responsible for its payment from her own funds. He also stated that his original order did not deviate from the child support guidelines and that he had calculated child support based on the amounts shown to be Greg's income. The Chancellor found Greg to be in contempt for violation of the temporary order by allowing his girl friend to stay overnight when the children were present, but he denied sanctions at the time pending compliance with the judgment making the prohibition permanent. On the issue of payment of Greg's student loans, the Court denied

reconsideration stating that because the evidence showed some of the student loan funds were expended for family needs, the "allocation of the loan repayment between the parties correctly reflects their participation in repayment." (R. at 82-83; RE 7-9)

Laurin timely filed her notice of appeal. (R. 78)

STATEMENT OF FACTS

Laurin Jones and Gregor Thomas Kay (Greg) were married on October 3, 1992. Their first child, Hardin Thomas Kay was born on August 6, 2001. Two weeks before the December 20, 2006 birth of their second child, Keller Grant Kay, Greg left his pregnant wife to live with his current paramour, Lisa Diggetts. (R. 7-8, 18, T. 4-5, 12-13) This was Greg's third admitted adulterous affair during the course of his 15-year marriage with Laurin. One affair lasted at least 18 months, and the current affair with Lisa Diggetts began while Laurin was pregnant in the fall of 2006 and had lasted several months through at least the trial in October of 2007. (T. 10-12, 44, 66; RE 22-24, 37, 48)

During the marriage, Greg left the marital home, his wife and his children several times. He repeatedly came back leading Laurin to believe each time that he wanted to mend their marriage only to leave yet again. His most recent efforts to head off the divorce with such returns occurred in April and June of 2007. He readily admitted that these repeated desertions of his family to participate in adulterous relationships contributed to instability for his family. (T. 25-27; RE 25-27) Laurin also testified that Greg's repeated desertions and returns coupled with promises to reform which he did not keep created an unstable home atmosphere which adversely affected their older son as well as herself. (T. 86; RE 53) Laurin testified that she did not want a divorce, but that Greg's repeated affairs left her no choice but to file for divorce. (T. 96) Greg testified that he had made up his mind that he would not reconcile with Laurin and live with her.

(T. 107-108)

At the time of trial, Greg had been living with his current paramour Lisa Diggetts since he left the marital home in December of 2006. Despite a court order prohibiting anyone other than a blood relative of the opposite sex from staying overnight with Greg when he had visitation with the children, Lisa had stayed overnight when the children were with Greg, and she and Greg had allowed Hardin to see them together in bed. (T. 5-6, 9, 53)

At the time of trial in October of 2007, Greg was 38 years old, and in good physical health. (T. 19) Greg works as a professor at USM with separate compensation for the 9-month academic year and the summer terms. At the time of trial in October of 2007, he had worked all five of the previous five summers. (T. 15-16, 62) During the spring of 2007, Greg testified that he also received an increase in pay for overload teaching. While he claimed that this particular increase in salary was temporary based on an empty faculty position, he also testified he had recently been appointed to an additional position as recreation coordinator which would result in a similar amount of overload pay on an ongoing basis. (T. 33-34; RE 28-29)

Greg testified during his base nine month salary had reached $45,000 at the time of trial which is considerably more than the $33,750 ($3,750 gross nine month salary) he reported on his financial disclosure earlier that same year. (T. 35, Ex. 1; RE 30, 60-76) He also admitted that his W-2 statement for the previous year, which reflects social security gross wages of $51,460 for 2006, was accurate. (T. 35-36, Ex. 3; RE 30-31, 77-79)

Greg and Laurin both testified that Greg now makes more money than Laurin. (T. 44, 90; RE 37, 54) Laurin testified that she works as a kindergarten teacher in the school year in the same school that her 6 year old son attends. During the school year, the school where she works provides after school care for the school age children of teachers. She cares for her 9 month old

and 6 year old boys during the summer to avoid the extra costs of summer child care. In order to have a level income, she is paid her 9 month salary over a 12 month period. (T. 60-61; RE 46-47) Laurin testified that based on what other teachers she knows have received that if she went back to school and got a master's degree, her salary would increase approximately $50 a month which would be only a very small increase in salary for the cost. (T. 91, RE 55)

During the periods when Greg deserted Laurin during his affairs and after the separation, Laurin has had difficulty in supporting herself and the children. She has been assisted by at least one friend financially in providing for the needs of her children during an affair in 2005 and again following the divorce filing after the desertion prior to Keller's birth. (T. 73-75; RE 49-51)

Laurin is 39 years old. She has had a blood pressure problem since her pregnancy with Keller that continues to require medication. She also has mental health issues as a result of Gregor's conduct during and after the marriage for which she is incurring expenses for counseling and care by a psychiatrist. (T. 82; RE 52)

Greg and Laurin accumulated substantial debt and few assets during the marriage. Although Greg's car was paid off, a substantial amount was still owed on the vehicle Laurin was driving and using to provide transportation for the children when they were with her the majority of the time. (T. 37; RE 32) Greg admitted that part of the Kays' credit card debt was the result of him charging expenses for business travel to their credit cards and then using the reimbursement funds he received for other purposes instead of paying off the debt related to the reimbursement checks. (T. 38; RE 33)

Greg and his paramour, Lisa, claim they split the expenses for the apartment they shared while Greg was still married to Laurin. (T. 6-7). While still married to Laurin, Greg also took some pleasure trips with Lisa, including a trip to Orange Beach and a trip to Arkansas. (T. 7-8)

He admitted that he used marital assets, charging at least his share of the expenses of these trips with his paramour to the Kays' joint credit cards. He could not deny that he might have also charged at least part of his paramour's expenses for these trips to the Kays' joint credit cards. (T. 47-49; RE 38-40)

Greg also admitted to running up the debt on the marital credit card with charges such as a $34 monthly charge for a web site for people looking to meet other people. (T. 50; RR 41) He also used martial funds to purchase a Valentine's Day present for his paramour from Victoria's Secret, for a pleasure trip to Jackson, and for an outing with his girlfriend at Beau Rivage. (T. 51-53; RE 42-44) And while he claimed Laurin had agreed that the couple's 2006 tax refund could be used to pay his hospital bill for kidney stones, he also admitted that after paying that bill, over $1000.00 of the refund remained which he put in his personal bank account. (T. 51 and Ex. 9; RE 42, 80-87) Laurin testified that she only found out after the fact that he used the refund to pay his hospital bill and that when she asked for part of the remainder, he promised to give her some of it but never did. (T. 91-92; RE 55-56)

During the marriage, Greg took out in his own name alone, substantial student loans, so that he could quit work and pursue his education. While he was earning his degrees, including a Masters Degree from the University of Southern Mississippi, and a PhD degree from the University of Georgia, he testified Laurin worked full time. (T. 37-38, 44; 32-33, 37) In addition to contributing her earnings to support the family while Greg furthered his education, Greg testified that Laurin also cashed in her retirement account with the State of Georgia and used those funds to support the family, including Greg, while Greg was in school. She also received an inheritance of between five and ten thousand dollars which she also contributed to support the family, including Greg, while he was in school. Part of this money was used for a

down payment on a vehicle. (T. 40-41; RE 35-36)

Although Laurin worked throughout the marriage to provide support for the household, including Greg, while he quit work decreasing the earnings available to support the family while he pursued his education to increase his future earning power, Greg asked the Chancellor to order Laurin to repay 40% of his student loans because a portion of the loan proceeds were used in addition to Laurin's earnings, retirement, and inheritance to support the family while Greg was in school. (T. 38; RE 33) He testified that what small amounts of income he did earn from graduate assistantships while he was pursuing his graduate education were used to pay his tuition instead of contributing to his own support and that of his family. (T. 60; RE 46)

Greg testified that the Kays' only substantial asset was the equity in the marital home. He testified that both he and Laurin had contributed to the mortgage payments on the home. He testified that based on the debt counseling the couple had participated in under the Court's order, he was willing to have the home sold, that he believed the equity in the home was sufficient to pay off all of his and Laurin's debt except for his student loan, and that he was asking the court to apply the equity in the home to pay off all the debt except for his student loan and then to divide any remaining equity equally between himself and Laurin. (T. 39-40, 58; RE 34-35, 48) He also admitted that many items of personal property in the marital home including some of the furniture and the silver either belonged to Laurin's family or were gifts to her from her family. (T. 42)

Laurin testified that she had been unable to pay her attorney's $3,500.00 fee for the divorce and had only been able to contribute $500.00 toward the expenses and $1,000.00 toward the fee. (T. 93-94; RE 57-58)

ARGUMENT

I. Standard of Review

An appellate court will not disturb the factual findings of the chancellor unless those factual findings are manifestly wrong or clearly erroneous. But if the chancellor improperly considers and applies the law, an appellate court is obligated to find the chancellor in error. *Strack v. Sticklin,* 959 So. 2d 1, ¶ 9 (Miss. App. 2006) Decisions concerning equitable division of the marital estate must apply the factors set out in *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994). Decisions concerning alimony must apply the factors set out in *Armstrong v. Armstrong*, 618 So. 2d 1278 (Miss. 1993) and *Hammonds v. Hammonds*, 597 So. 2d 653, 655 (Miss. 1992) Where a Chancellor fails to review or overlooks some of the designated factors, our appellate court will not hesitate to reverse a chancellor's judgment. *Saucier v. Saucier*, 830 So. 2d 1261, ¶¶ 4-5 (Miss. App. 2002).

In recent years, our Supreme Court has adopted a number of other sets of factors for various issues arising in divorce cases. See *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983) (factors to be considered in child custody cases); *Cheatham v. Cheatham*, 537 So. 2d 435, 438 (Miss. 1988) (factors to be considered in lump sum alimony cases); *Hammonds v. Hammonds*, 597 So. 2d 653, 655 (Miss. 1992) (factors to be considered in periodic alimony cases); *Armstrong v. Armstron*g, 618 So. 2d 1278, 1281-82 (Miss. 1993) (discussion of various awards incident to divorce - periodic alimony; lump sum alimony; division of jointly accumulated property; and, award of equitable interest in property); *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994) (factors to be considered in equitable division of marital property); *Hemsley v. Hemsley,* 639 So. 2d 909, 915 (Miss. 1994) (definition of marital property to aid chancellor in applying Ferguson factors); *Pearson v. Pearson*, 761 So. 2d 157, 165-66 (Miss.

2000) (application of the Hammonds factors with minor revised language); Lauro v. Lauro, 847 So. 2d 843, 846-50 (Miss. 2003) (discussion on application of Hemsley factors in determining marital or non-marital assets, application of Ferguson factors in equitably distributing marital assets, and application of Armstrong-Hammonds factors in determining if an award of alimony is necessary so as to avoid one spouse suffering a deficit distribution); *Haney v. Haney*, 907 So. 2d 948 (Miss. 2005) ("Cheatham factors are really nothing more than an earlier version of the Ferguson factors, and both are used for the same purpose." Id. at 954, see also, Id. at 955, P26). A failure to review or properly apply the appropriate factors is a reversible error of law. *Yelverton v. Yelverton*, 961 So. 2d 19 (Miss. 2007)

II. The Chancellor Deviated from the Child Support Guidelines Without Providing Adequate Justification for the Deviation.

In his initial ruling from the bench, the Chancellor set child support for two children at $650 a month. He did not make a finding as to adjusted gross income, but did rule that the $650 a month was the amount required by the guidelines. (T. 117, 120; RE 16, 19) Thus, he implicitly found Mr. Kay's income after adjustments required by the statute to be $3,250 per month or $39,000 per year. The Court's implicit finding of Mr. Kay's adjusted gross income to be $39,000 per year is further supported by the court's statement on reconsideration of alimony and debt payment.

> With Defendant's support obligation deducted from his net income he will have about $2,550.00 monthly to live, plus the bulk of the marital debt to pay as set forth herein.

(R. 64; RE 6) Mrs. Kay's attorney pointed out during the initial oral ruling that she calculated the guideline amount to be $850 per month which would be the equivalent of $42,500 per year and stated that she was confused as to how the Chancellor reached the $650 amount. The

Chancellor admitted the he was also confused as to how the $650 figure was reached and took the matter under advisement. (T. 120; RE 19) However, on reconsideration, he stuck to the $650 amount with no explanation stating only that it was the guideline amount. (R. 82-83; RE 7-8)

The Chancellor's calculations appear to be based on Greg's 2006 W2 without any adjustments instead of evidence in the record of his higher 2007 income. Greg's social security statement showed he paid FICA taxes on $51,460 in 2006 and $52,670 in 2005. His USM W2 for 2006 showed gross wages of $51460.25, which after mandatory deductions would yield an adjusted gross income of $39106 and guideline child support of $651.00.[1] (Ex. 6; RE 88) However, even for 2006, the evidence shows that the figures used for tax withholding must be adjusted because Greg had an additional $50.00 per month voluntarily deducted for federal taxes. When this adjustment is made the guidelines yield an amount of $662 per month for child support. Greg also admitted in his testimony that the couple received a tax refunds in February

[1]The table below shows adjusted gross income and guideline support levels for 2 children based upon various assumptions for Greg's summertime, overload teaching and grant income. All except the first line are 2007 figures. The first line is based on 2006 income from his Social Security statement. State and Federal tax withholding amounts were calculated using IRS Publication 15 (2007) and (2006) and tables published by the Mississippi State Tax Commission.

Gross Yr	Fed Tax	State Tax	Medicare	Social Sec	Adjusted Gross / Yr	Adjusted Gross/mth	Guidelines 2 children
$52,670.00	$5,955.00	$2,058.00	$764.00	$3,266.00	$40,627.00	$3,385.00	$677.00
$51,460.00	$6,719.56	$1,697.00	$746.10	$3,190.54	$39,106.00	$3,258.00	$651.00
$51,460.00	$6,120.00	$1,697.00	$746.10	$3,190.54	$39,706.00	$3,308.00	$662.00
$56,460.00	$5,988.00	$2,247.00	$819.00	$3,501.00	$43,905.00	$3,659.00	$732.00
$61,244.00	$6,708.00	$2,486.00	$888.00	$3,797.00	$47,365.00	$3,947.00	$789.00
$63,444.00	$7,068.00	$2,596.00	$920.00	$3,934.00	$48,926.00	$4,077.00	$815.00

of 2007 for the 2006 calendar year of $4,121.00 from the federal government and $86.00 from the state which were also apparently not accounted for in the Chancellor's calculations based on Greg's 2006 W-2 form. (T. 50; RE 41)

Greg's pretrial paycheck stubs for 2007 showed a base nine month salary of $45,000 plus an additional $4,500.00 from overload pay without accounting for summer school pay. The 9 month base part of Greg's income had undisputedly increased by $5,000 a year from 2006 to 2007. By the time of trial, his July 2007 paycheck stubs showed he was on track to earn gross salary in 2007 from USM totaling $63,444 assuming he carried the same course load in the fall as he had in the spring. This would yield an adjusted gross of $47,365 with child support at $815.00 a month according the guidelines. (Compare attachments to Ex 1 and Ex 7; RE 60-76, 89) Even if Greg only earned his base salary for the remainder of the year, the figures on his July paycheck stub show he would earn a gross salary of a minimum of $61,444 in 2007 which would yield a monthly adjusted gross income of $3947 with child support at $789 a month for two children under the guidelines.

Even if one were to assume Greg would get no more grants or overload pay supplements[2], the evidence showed and the court found, his summer employment income could be expected to continue into the future. It is also undisputed that Greg's base salary for the 9 month academic year had increased $5,000 from $40,000 to $45,000 by the time of trial. Adding this solid $5,000 increase to the 2006 W-2 figures and making adjustments for the excess voluntary deductions for taxes would yield a gross income of $56,460, monthly adjusted gross income of $3,659.00, and child support for two children of $732.00 a month.

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[2]Such an assumption, however, is not supported by the record as Greg testified he had recently been

When there is evidence in the record of the actual income for half or more of the year of trial which exceeds the amount the defendant claims for his current income, the trial court should not base the child support award on the previous year's lower income as reflected in a W2 form for the prior full year. *Brennan v. Brennan*, 638 So. 2d 1320, 1325 (Miss 1994). Furthermore, the defendant is not entitled to an allowance for voluntary increases to federal and state mandatory withholding amounts for taxes. *Magruder v. Magrude*r, 881 So. 2d 365 (Miss. App. 2004); Miss. Code Ann. § 43-19-101(3)(b) (Rev. 2000).Based on these errors, the $650 per month award of child support should be reversed and the amount should be increased to $815.00 a month, or at the very least $789.00 a month.

III. Division of the Marital Estate and Alimony

Equitable division of the marital estate and non-rehabilitative alimony are separate issues, but they must be considered together. The Chancellor must make specific findings as to the classification of assets and liabilities and must also make specific findings based on the factors set out in various decisions by our Supreme Court.[3] The parties and the reviewing court are entitled to more than generalities. The first step is the classification of assets and liabilities followed by an equitable division of the marital estate and then a consideration of non-rehabilitative alimony. *Lauro v. Lauro*, 847 So. 2d 843 (Miss. 2003)

When addressing the division of the marital estate, including assets and liabilities, the Chancellor must consider, and make findings, based on the *Ferguson* factors, which include

1. Substantial contribution to the accumulation of the property (see Cheatham

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appointed to an additional position which would result in an ongoing overload pay supplement equal to what he had earned in the spring of 2007 from overload teaching. (T. 33-34)

[3]The Chancellor obviously understood the process of placing findings on specific factors in the record. In stark contrast to his rulings on division of the marital estate and alimony, he engaged in a detailed balancing of the 13 *Albright* factors on child custody.

factor No. 1).
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
3. The market value and the emotional value of the assets subject to distribution.
4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as [non-marital assets].
5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution.
6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties.
7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity (See Cheatham factors Nos. 3 & 4).
8. Any other factor which in equity should be considered (See Cheatham factor No. 2).

Yelverton at ¶ 9.

When one of the parties has been found to be at fault by committing adultery on multiple occasions, the court should not divide the marital property equally and deny alimony. In *Watson v. Watson*, our Supreme Court stated:

> This Court has long recognized the concept that alimony and equitable distribution should be considered together so as to prevent inequity. "Alimony and equitable distribution are distinct concepts, but together they command the entire field of financial settlement of divorce. Therefore, where one expands, the other must recede." Ferguson v. Ferguson, 639 So. 2d 921, 929 (Miss. 1994) (citing LaRue v. LaRue, 172 W. Va. 158, 304 S.E.2d 312, 334 (1983) (Neely, J., concurring)). "In the final analysis, all awards should be considered together to determine that they are equitable and fair." Id. ...
>
> A recitation of all the facts surrounding Mike's affair and conduct is not necessary. It is sufficient to say that Mike's adultery was not a "slip-up," peccadillo, or occasional indiscretion. He moved out of the marital home he had shared with his wife for twenty years, and began an open, continuous, adulterous affair. He began to invest his time, society, companionship and assets into the nurturing and development of another home, leaving Patricia to her own emotional survival. This is the stuff of "marital fault" which led the Singley court to reverse the chancellor for dividing the marital property equally, a division which obviously placed "minimal weight" upon fault.
>
> The central question is whether the adulterous conduct "impacted and burdened the stability and harmony of the marriage." Singley, 846 So. 2d at 1009.

> See also Ferguson, 639 So. 2d at 928. Because the trial court obviously ignored conduct and equally divided the assets, Singley was remanded for a recalculation of the percentages. The same is required here.

Watson v. Watson, 882 So. 2d 95, ¶¶67-68 (Miss. 2004).

The holdings of *Watson* and *Singley v. Singley*, 846 So. 2d 1004 (Miss. 2002), clearly require reversal in this case. As in *Watson* and *Singley*, Greg's adultery was "no "slip-up," peccadillo, or occasional indiscretion." Greg admitted his conduct caused instability in the marital home environment. (T. 25-27; RE 25-27) The court clearly recognized Greg's repeated affairs had an impact upon the stability and harmony of the marriage when discussing child custody, saying:

> The moral fitness, I think, clearly tilts in favor of Mrs. Kay under the circumstances. I mentioned earlier that what a family needs is a commitment to stay together and work through problems that you have, and Mr. Kay has not demonstrated the ability to do that, if he has had three or four affairs over the course of the marriage and has gone back and given indication he was going to stay and reverts himself again and do that. He needs some counseling on what it takes to make a commitment in a relationship. ... That probably is the largest element that favors custody to Mrs. Kay. I mention here also, the testimony that I heard on his violating the court order of having the children in the company of somebody he is not married to -- I don't know whether he realizes the negative effect that has on the children or not.

(T. 114-115; RE 13-15).

Yet when it came to dividing the marital estate and deciding upon alimony, there was no specific consideration of the *Ferguson* and *Armstrong* factors by the Chancellor, and certainly no adjustment for the factor of fault.

> Now, as to the real property, I will direct that, based on the testimony that I have heard and the intent and request of the parties, that the homestead be sold and that of the sale proceeds, the first $2,500 be applied to the attorneys fees of the Plaintiff. And the next $2,000 be given to Plaintiff as a relocation fee, since she is the one that will have to find other housing and make other arrangements for someplace to live.
>
> And the balance of those funds be applied to the debts on Exhibit 5 other

than the Sally Mae account, which would be Bancorp South, Bancorp South ODL, and Bank of America Laurin and Bank of America Gregor and Chase credit card and the Discover credit card. If there are any proceeds left after that, I will direct they be equally divided between the parties.

As to personal property, I am going to direct they keep the personal property they presently have in their possession with the exception that -- as I heard it, the table belongs to the parents. Is that right? That would be returned to them. And that Mr. Kay gets the guns and branding iron. I think that he can replace kitchen ware and a lawn mower a lot easier than Mrs. Kay can do without it, so I will let her keep those items.

The vehicles, each will keep the same vehicle they have presently. The other major item that I have to deal with is the payment of debts. That leaves, I think, one major debt as I read Exhibit 5 and that is the Sally Mae. ... Right now I see there is a $512 payment structured toward that. ... I think what I will do is let that continue to be paid at that rate and let Mrs. Kay contribute $100 a month toward the payment of that, and let that be her portion of that to pay, since most of that was your school loans. And there again, you have the flexibility and the most income to deal with that. ... Since they are both working, I will give her the attorney fees and the relocation allowance. I don't think that I will grant alimony under the circumstances, based on her income and ability to make income too since she is getting those amounts on top of that.

(T. 117-119; RE 16-18)

The findings of the Chancellor in this case were similar in level of detail to those found to be insufficient for failure to adequately weight and make findings on the proper factors in *Lauro*. Accordingly, they are insufficient to support his assignment of 20% of Greg's student loan debt to Laurin, the assignment of the Equinox debt to Laurin, or the denial of alimony to Laurin.

A. Laurin Should Not Have Been Ordered to Pay Approximately 20% of Greg's Student Loan Debt.

Item C6 of Exhibit 5, the Hemsley Summary stipulated to by both parties, lists the total unsecured marital debt at $146,925.64 and the total unsecured non-marital debt at $104,980. There is an obvious error in that the first item listed is not unsecured debt. It is the $117,000 balance on the mortgage secured by the marital home. It is equally obvious that the unsecured non-marital debt consists solely of Greg's student loan debt to Sallie Mae. Both the Sallie Mae

line and the non-marital debt line use the same amount of $104,980.00. (Exhibit 5; RE 91-95)

There are no cases where one party to a marriage has been required to pay a portion of the other party's student loans on the theory that the student loans are marital debt or were used in part to replace the support previously provided by a party's earnings which were given up so that party could pursue further education. While this particular issue has not been addressed by our appellate courts, our Supreme Court has made it clear that when the parties to a marriage agree that one of them will go to school in order to better the financial prospects of the family at some later date and then the party receiving the education causes the breakup of the marriage so that the supporting spouse does not reap the benefits of the sacrifices made by lowering their standard of living and continuing to work to support the family while the other spouse obtained an education that will increase his income, the supporting spouse is entitled to be compensated for the lost investment in a better future earning capacity for the family. See *Guy v. Guy*, 736 So. 2d 1042, 1044 (Miss. 1999) and *Robinson v. Irwin*, 546 So. 2d 683, 686 (Miss., 1989).

> We recognize the potential inequity of a situation such as the present one, where one spouse works full-time to put the other spouse through school where they obtain a college degree. After obtaining this degree at the expense and sacrifice of the supporting spouse, the supported spouse leaves the supporting spouse with nothing more than the knowledge that they aided their now ex-spouse in increasing his/her future earning capacity. ... Furthermore, it is realistic to recognize that . . . a supporting spouse has contributed more than mere earnings to her husband [**8] with the mutual expectation that both of them - she has well as he - will realize and enjoy material improvements in their marriage as a result of his increased earning capacity. Also, the wife has presumably made personal sacrifices, resulting in a reduced or lowered standard of living. Additionally, her husband, by pursuing preparations for a future career, has foregone gainful employment and financial contributions to the marriage that would have been forthcoming had he been employed. He thereby has further reduced the level of support his wife might otherwise have received, as well as the standard of living both of them would have otherwise enjoyed. In effect, through her contributions, the supporting spouse has consented to live at a lower material level while her husband has prepared for another career. She has postponed, as it were, present consumption and a higher standard of living, for the future prospect of greater

> support and material benefits. The supporting spouse's sacrifices would have been rewarded had the marriage endured and mutual expectations of both of them been fulfilled. The unredressed sacrifices - loss of support and reduction of the standard of living - coupled with the unfairness attendant upon the defeat of the supporting spouse's shared expectation of future advantages, further justify a remedial reward. ... While we agree . . . that marriage is not a business enterprise in which strict accountings are to be had for moneys spent by one spouse for the benefit of the other, it appears to us that this case does not involve strict accountings, but gross accountings. Supporting spouses in these cases feel entitled to reimbursement, we believe, not because they have sacrificed to support the other spouse, but because they are, to use a strong word, 'jettisoned' as soon as the need for their sacrifice, albeit in part a legal obligation, comes to an end. In retrospect, perhaps unintentionally, the supporting spouse in such a case can be said to have been 'used.' At least this is the perception of the supporting spouse, and we believe that this perception is not totally without foundation in all cases . . . The supporting spouse in a case such as this should be awarded equitable reimbursement to the extent that his or her contribution to the education, training or increased earning capacity of the other spouse exceeds the bare minimum legally obligated support . . . Marriage should not be a free ticket to professional education and training without subsequent obligations . . . One spouse ought not to receive a divorce complaint when the other receives a diploma.

Guy at 1044-1046.

Given the reasoning of *Guy* and the fact that Greg's PhD degree cannot be equitably divided, it is clear that Laurin should not be penalized further by being required to contribute to the loans which paid for Greg's education and through which he borrowed against his future to provide a portion of what he would have contributed to support of the family during a time when he chose to discontinue earning a salary to provide his share of the legal obligation to support his family. Had the marriage endured, the loans would have been repaid by Greg's increased earning capacity and his increased financial contribution to the family. But in the classic case of string along the marriage until the degree was done and then run, Greg cheated on Laurin repeatedly while lying to her about reforming his ways and using her for support until he finished school. Then he left her and their newborn baby and older child to spend his time and devote his resources and increased earning capacity to another woman after she contributed her earnings,

her retirement savings from the State of Georgia and even her inheritance to the support of the family, including Greg, so he could give up his employment and pursue his masters and doctorate degrees.

There is no way that any equitable distribution of marital liabilities can result in her having to pay $100.00 a month for the life of the loan to pay off her husband's student loans. That would be completely contrary to the reasoning expressed in *Guy* and *Robinson.* Unlike the supporting spouses in *Guy* and *Robinson*, Laurin is not asking for an equitable distribution of a share of Greg's PhD or for reimbursement of specific sums she spent supporting Greg while she is in school. She is simply asking not to be saddled with the debt for the degree which gives Greg increased earning ability when she has already made sacrifices during the marriage for him to acquire that increased earning potential.

B. The Debt on the Equinox Should Have Been Paid with Proceeds from Selling the House

Greg testified that when the Chancellor ordered him and Laurin to consult a debt counselor about all the debts, the only plan they could agree upon was to sell the house and to pay all the existing debt except for his student loans from the proceeds. He testified that he and Laurin agreed that the only other option of taking out an additional loan with a balloon payment was not workable because they would be unable to make the balloon payment when it came due. (T. 39-40, 58; RE 34-35, 48) Both Greg and Laurin stipulated to the contents of Exhibit 5 which classified the Equinox as one of those marital debts in Section B under Automobiles. (Ex 5; RE 91-95)

Agreements between the parties made in the process of terminating a marriage through divorce are contracts on the issues covered by the agreement and should be enforced as such. *McManus v. Howard*, 569 So. 2d 1213, 1215 (Miss.1990). Laurin and Greg had agreed that the

house would be sold and all the debts except for Greg's student loan would be paid from the proceeds of the sale. The fact that the loan on the vehicle Laurin was driving was not in both her name and Greg's name did not except it from the agreement. Thus, the Chancellor erred when he ordered that Laurin assume responsibility for the payments on the Equinox instead of having the Equinox paid off with the proceeds of the sale of the home before splitting any remaining proceeds equally between Laurin and Greg.

C. Laurin Should Have Been Awarded Alimony Under a Proper Consideration of the Armstrong Factors

In considering whether alimony should be awarded and how much, the Chancellor should review each of the *Armstrong/Hammond* factors and make specific findings of fact on the factors. *Yelverton* at fn 5. Those factors are:

> 1. The income and expenses of the parties;
> 2. The health and earning capacities of the parties;
> 3. The needs of each party;
> 4. The obligations and assets of each party;
> 5. The length of the marriage;
> 6. The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care;
> 7. The age of the parties;
> 8. The standard of living of the parties, both during the marriage and at the time of the support determination;
> 9. The tax consequences of the spousal support order;
> 10. Fault or misconduct;
> 11. Wasteful dissipation of assets by either party; or
> 12. Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.

Hammonds v. Hammonds, 597 So.2d 653, 655 (Miss. 1992)

There was uncontroverted proof that Laurin earns less than Greg, that she has a lower earning capacity and some health issues where he has none, that her retirement savings are less than his at least in part because during the marriage she cashed in part of her retirement to

support the family while he furthered his education, that Greg used marital funds for pleasure trips with his girlfriends and to give them gifts, that his repeated adulterous affairs had a negative impact on the stability of the marital home environment, and that Laurin has greater needs in that Greg has a girlfriend who is sharing his living expenses while Laurin must provide for both herself and her children without anyone to share expenses. (See specific citations to the record in the fact section). Yet the Chancellor considered none of these factors or that there were no marital assets which could be assigned to Laurin as an equitable adjustment for her contributions to Greg's education or the effects of his fault in denying alimony. Instead, he denied alimony based solely on the fact that Laurin was employed and had an income and his erroneous consideration of the child support she would receive as being available to meet her needs.

An award of periodic alimony flows from the duty of the husband to support his wife. *Weiss v. Weiss*, 579 So.2d 539 (Miss. 1991). The husband is obligated to support his wife in the manner to which she has become accustomed, to the extent of his ability to pay. *Brendel v. Brendel*, 566 So.2d 1269 (Miss. 1990). The value of the wife's assets and income should be determined in order to ascertain her needs to maintain her position in life to which she had become accustomed, and such value is considered by the trial court in assessing both alimony and support. *Rudder v. Rudder*, 467 So.2d 675 (Miss. 1985).

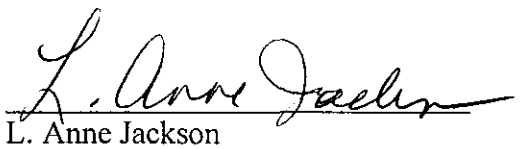
In comparing resources the chancellor incorrectly included child support as an asset available to Laurin to meet her needs. Child support vests in the child. It is not an amount available to the receiving parent to support herself. *Cumberland v. Cumberland*, 564 So. 2d 839 (Miss. 1990). It follows that child support is not an amount that can be considered as available to the receiving spouse in addressing alimony to adjust for inequity resulting from the division of marital property based on the *Ferguson* factors.

The bottom line here is that the marital estate was heavily encumbered at least in part as a result of Greg's expenditures for his own pleasures with the women with whom he engaged in adulterous affairs during the marriage. The parties' only true asset surviving the dissolution of the marriage was Greg's increased earning capacity because of his PhD. But that increased earning capacity was not "property" that could be divided in a way that would balance the inequity resulting from what Laurin gave up in order for Greg to acquire that education and the impact of Greg's repeated affairs and returns to the marriage with false promises to reform upon the stability and harmony of the marriage. The only way to address that inequity was to provide Laurin with some sort of alimony from Greg. Because his assets were not liquid and there was no source of immediate funds from which to make such an equitable award to Laurin, the only way it could be made was through some amount of periodic alimony payments other than rehabilitative alimony. Because its purpose would be to adjust the equities and not to put Laurin back into the work force, the fact that she was working and had an ability to earn some income is not dispositive of the issue. Her earning capacity was far less than Greg's which had been substantially increased by her sacrifices during the marriage in order for him to increase his earning capacity by earning his PhD. The marriage was a long one of 15 years , which ended because of Greg's repeated acts of adultery culminating with him leaving Laurin and their older child while she was pregnant with their second child. The children would be present most of the time in Laurin's home as she had paramount physical custody. The *Hammond/Armstrong* factors, had they been properly considered by the Chancellor, weighed heavily in Laurin's favor. But the Chancellor did not apply those factors. Thus, his denial of alimony was based on an error of law and must be reversed.

CONCLUSION

Although a Chancellor has considerable discretion in weighing the evidence and making his findings on equitable distribution and alimony, his analysis must still be supported by substantial evidence and must properly consider the *Ferguson* and *Hammond/Armstrong* factors. He cannot make a decision based on a single factor ignoring all the others, particularly fault.

Respectfully submitted,



L. Anne Jackson
Attorney for Appellant

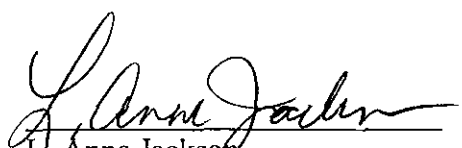
CERTIFICATE OF SERVICE

I, L. Anne Jackson, attorney for Appellant, Laurin Kay Jones, hereby certify that I have this day caused to be delivered by United States Mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellant Laurin Kay Jones to:

Honorable James H. C. Thomas, Jr
Chancellor
P.O. Box 807
Hattiesburg, Mississippi 39403

Honorable Alexander Ignatiev
206 Thompson Street
Hattiesburg, MS 39401

CERTIFIED, this the 22nd day of July, 2008.



L. Anne Jackson
Attorney for Appellant