

CERTIFICATE OF INTERESTED PERSONS

Billy J. Cossey v. Nancy L. Cossey, No. 2008-^{CA}TS-00829 ^{SCT} E

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

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Plaintiff-Appellant:

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Defendant-Appellee

Nancy L. Cossey

B. Judges:

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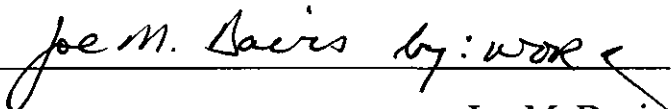
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RESPECTFULLY SUBMITTED, this the 19th day of March, 2009.


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STATEMENT OF THE ISSUES

I. Issue No. 1:

The Chancery Court of Pontotoc County, Mississippi granted a divorce on the ground of irreconcilable differences pursuant to the plain language of Miss. Code Ann. § 93-5-2(3) (Supp. 2008). The first issue in this appeal concerns whether the issuance of the divorce pursuant to Mississippi statute is valid. Moreover, did the Chancery Court of Pontotoc err in granting a divorce on such ground.

II. Issue No. 2:

In accordance with the statutory power granted to the court by Miss. Code Ann. § 93-5-23 (2004), the court has the discretion to make decisions concerning the custody of the children of the two parties to the divorce proceeding. The second issue in this appeal concerns whether the Chancery Court properly granted Billy J. Cossey reasonable visitation rights in light of the circumstances of the case.

III. Issue No. 3:

The statutory language of Miss. Code Ann. § 93-5-23 (2004) grants the court the discretion to make decisions concerning the support of a child. The third issue in this appeal concerns whether the Chancery Court erred in allocating to Billy J. Cossey fifty percent of the higher educational expenses of his son Tyler Cossey until Tyler becomes emancipated by attaining the age of twenty –one or otherwise.

IV. Issue No. 4:

The fourth issue in this appeal concerns whether the Chancery Court properly determined the marital assets of the parties to the proceeding and whether the Chancery Court properly distributed such assets in an equitable manner.

STATEMENT OF THE CASE

Nature of the Case. This case stems from the marriage relationship between Nancy L. Cossey and Billy J. Cossey. The Chancery Court of Pontotoc County, Mississippi, entered a Corrected Judgment of Divorce on July 15, 2008. This appeal arises from the judgment of the Chancery Court of Pontotoc County, Mississippi.

Course of Proceeding. On September 6, 2007, Billy J. Cossey filed a Complaint for Divorce. Nancy L. Cossey then filed an Answer and Counter-Complaint for Divorce. Billy J. Cossey then filed an Answer to Nancy L. Cossey's Counter-Complaint for Divorce.

A consent agreement was entered complying with Mississippi Code Section 93-5-2(3). The Court proceeded to hear evidence and rule on all issues contained within the consent agreement.

The Court then issued a Judgment for Divorce on March 31, 2008, and corrected Judgment for Divorce on July 15, 2008.

Statement of Facts. On March 4, 1977, Nancy L. Cossey and Billy J. Cossey were married for a second time. They lived together until separating on July 2, 2002. At that time, one (1) of their three (3) children remained a minor, Tyler Cossey, born July 18, 1988. The actions of the father caused Nancy first and then Tyler to leave the marital home. Tyler and Billy became severely strained to the point that Billy questioned whether Tyler was his child at the hearing and requested a paternity action.

SUMMARY OF THE ARGUMENT

The Chancery Court of Pontotoc County, Mississippi properly granted a divorce on the ground of irreconcilable differences pursuant to Mississippi Code § 93-5-2(3). In 1990, the statute was amended allowing the parties to petition the court for a divorce on the ground of irreconcilable differences if the parties first consent to a divorce on the ground of irreconcilable differences and then agree to submit undecided issues of custody, child maintenance, and property rights to the court for consideration. Based on interpretation provided by the Mississippi Supreme Court in *Massingill v. Massingill*, 594 So. 2d 1173, 1175 (Miss. 1992), divorce in Mississippi is governed by statute, and in granting a divorce, a chancellor may only exercise such power as specifically granted to him by the Mississippi legislature. The parties to the divorce, Billy J. Cossey and Nancy L. Cossey, both filed a consent agreement pursuant to § 93-5-2(3) of the Mississippi Code Ann. In the agreement, signed by both parties and their respective counsel, the parties acknowledged that irreconcilable differences existed between them and consented to a divorce on the ground of irreconcilable differences. Further, the parties defined and submitted to the court issues concerning the custody and maintenance of their minor child, Tyler Cossey, and specific property rights. Additionally, the parties acknowledged that the Court's decision as to these issues would be lawful and binding. The issuance of the divorce on the ground of irreconcilable differences strictly adhered to the statutory language of Mississippi Code Ann. § 93-5-2(3). For this reason, the divorce granted to Billy J. Cossey and Nancy L. Cossey on the ground of irreconcilable differences is valid.

Second, the Chancery Court of Pontotoc Country, Mississippi was not in error granting Billy J. Cossey liberal visitation rights with his son, Tyler Cossey. At the time of the divorce decree, Tyler Cossey was nineteen years of age. The court specifically encouraged "regular and frequent" visitation between the father and son. Due to the advanced age of Tyler Cossey and his

occupation as a student, the visitation rights were reasonable in light of the facts of this case.

Third, the Chancery Court did not err in allocating the educational expenses of Tyler Cossey. The chancellor mandated that both Billy and Nancy would bear fifty percent of Tyler's higher educational expenses until Tyler attained the age of majority (twenty-one-years-old). Based on interpretation by the Mississippi Supreme Court in *Pass v. Pass*, a parent's financial duty of a minor child includes college educational expenses if the child is qualified for the higher education and the parent is financially able to provide such support. 118 So. 2d 769 (Miss. 1960). Although Nancy Cossey's monthly adjusted gross income is somewhat greater than Billy Cossey's monthly adjusted gross income, the facts suggest that Billy has both sufficient assets and monthly income to financially provide fifty percent of Tyler's educational expenses without undue hardship. Further, based on the divorce decree, Billy Cossey was compelled to assume financial obligation only until Tyler attains the age of twenty-one and becomes emancipated under Mississippi law. Therefore, evidence suggests that Billy has the financial wherewithal to assume the fifty percent college support obligation without undue hardship.

Finally, the Chancery Court correctly defined the property of Billy Cossey and Nancy Cossey marital assets. The Mississippi legislature has granted the chancery court the discretion to make such decisions regarding the division of marital property. According to *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994), which provides explicit guidelines for the court to follow in such circumstances, the court's subsequent distribution of such marital assets was equitable. The court correctly categorized and equitably divided such marital property.

For the reasons outlined above, Nancy Cossey respectfully requests that this Court reserve the order of the Chancery Court of Pontotoc County.

ARGUMENT

Standard of Review

The standard of review employed by the appellate court is governed by the substantial evidence/ manifest error rule. *Samples v. Davis*, 904 So. 2d 1061, 1064 (Miss. 2004). The appellate court will not reverse the ruling of the chancellor unless “the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied.” *Holloman v. Holloman*, 691 So. 2d 897, 898 (Miss. 1996).

I. THE CHANCELLOR DID NOT ERR IN GRANTING A DIVORCE ON THE GROUND OF IRRECONCILABLE DIFFERENCES BECAUSE THE DIVORCE WAS PROPERLY GRANTED PURSUANT TO THE STATUTORY LANGUAGE OF MISSISSIPPI CODE § 93-5-2(3).

A divorce on the ground of irreconcilable differences requires strict compliance with the statutory provisions of § 93-5-2 of the Mississippi Code of 1972 as amended. Although Mississippi Code Annotated § 93-5-2(5) prohibits a divorce to be granted on the ground of irreconcilable differences if a party to the divorce has contested or denied the ground of divorce, the statutory language provides that if the parties fail to reach an agreement, they may consent to submit the issues to the court for resolution. Miss. Code Ann. § 93-5-2(3) (Supp. 2008). The plain language of § 93-5-2(5) explicitly provides that withdrawal of contest or denial is necessary **only** if the terms of § 93-5-2(3) have not been met. Therefore, the point of contest or denial is moot because the terms of § 93-5-2(3) have been satisfied by the consent agreement entered into by the parties. Based on the statutory language of Mississippi Code Annotated § 93-5-2, the chancellor did not exceed his statutory authority, and thus, properly granted the divorce between Billy J. Cossey (Billy) and Nancy L. Cossey (Nancy) on the ground of irreconcilable differences pursuant to § 93-5-2(3) of the Mississippi Code.

The Mississippi Supreme Court has stated that divorce in Mississippi “is a creature of statute” and has required strict compliance with the statutory language of Mississippi Code § 93-5-2 for the granting of a divorce on the ground of irreconcilable differences. *Massingill v. Massingill*, 594 So. 2d 1173, 1175 (Miss. 1992). Mississippi Code Annotated § 93-5-2(5) states in significant part:

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

Miss. Code Ann. § 93-5-2(5) (Supp. 2008) (*emphasis added*). The statute clearly provides that withdrawal of denial or contest is necessary only if the requirements of subsection (3) have not been met.

Subsection (3) of Mississippi Code Section 93-5-2 provides:

If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree...

Miss. Code Ann. § 93-5-2(3) (Supp. 2008) (*emphasis added*). Moreover, subsection (3) of Mississippi Code § 93-5-2 allows the parties to mutually consent to a divorce on the ground of irreconcilable differences. In defining consent, the Mississippi Supreme Court stated that “[w]hat is important is that the agreement be validly expressed on the day that the chancellor is deciding the issue.” *Sanford v. Sanford*, 749 So. 2d 353, 356 (Miss. 1992). The parties provided their consent in accordance with § 93-5-2(3) by executing and adopting the consent agreement signed on March 17, 2008. (Consent Agreement, Page 5). The agreement expressly stated that “[w]hereas the parties have agreed that there are irreconcilable differences between them and

agree and consent that a divorce be granted to them on ground of irreconcilable differences.”

(Consent Agreement, Page 1) (*emphasis added*). Therefore, the issue of whether the parties explicitly withdrew their contest or denial is moot because both parties mutually consented to a divorce on the ground of irreconcilable differences.

Further, the statute provides that the following requirements must be satisfied for a divorce on the ground of irreconcilable differences, stating in pertinent part that:

Such consent of the parties must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment.

Miss. Code Ann. § 93-5-2(3) (Supp. 2008). Mississippi case law has further stressed the importance of the parties’ strict compliance with the statutory language of Miss. Code Ann. § 93-5-2. In the absence of such compliance, a divorce on the ground of irreconcilable differences will not be upheld. *Massingill v. Massingill*, 594 So. 2d 1173, 1178 (Miss. 1992). In *Massingill*, the court ruled that the chancellor had exceeded his authority in granting a divorce on the ground of irreconcilable differences when the parties had failed to strictly comply with the statutory requirements of Mississippi Code Annotated § 93-5-2(3). In *Massingill*, the parties had both claimed irreconcilable differences as an alternate ground to divorce in their original pleadings. *Id.* However, the parties failed to provide a signed and written consent agreement required by Mississippi Code § 93-5-2(3). *Id.* Due to the absence of such agreement, the parties failed to expressly adhere to the plain statutory language of § 93-5-2(3). *Id.* Moreover, the court ruled that even if the claim of irreconcilable difference in the alternate had constituted consent under § 93-5-2(3), the pleading failed because it lacked the requisite language required by the statutory guidelines of Mississippi Code § 93-5-2(3). *Id.* The court acknowledged and stressed that

divorce “is a statutory act and the statutes must be strictly followed as they are in derogation of the common law.” *Id.* (quoting *Kergosien v. Kergosien*, 471 So. 2d 1206, 1210 (Miss. 1985).

Billy’s argument based on *Engel v. Engel*, 920 So. 2d 505 (Miss. Ct. App. 2006), fails for similar reasons. The *Engel* court stated that the parties failed to satisfy the statutory requirements for a divorce on the ground of irreconcilable differences as provided in Mississippi Code § 93-5-2(3). *Id.* at 509. While the parties to the proceeding had provided consent to a divorce on the ground of irreconcilable differences, they failed to define the issues to be decided by the court. *Id.* The parties merely “tentatively identified” personal property in the order; moreover, the document provided to the court failed to state that the parties “voluntarily” agreed to allow the court to decide such issues. *Id.* Finally, the document provided to the court by the parties failed to expressly state the statutory language of § 93-5-2(3), acknowledging that “the parties understand that the decision of the court shall be a binding and lawful judgment.” *Id.*

Finally, the *Engel* court recognized the statutory language of §93-5-2(5) stating: “Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial.” *Id.* (quoting Mississippi Code Ann. § 93-5-2(5)). However, the court emphasized that §93-5-5 provides that such a divorce may be granted if there has been such contest or denial that “has been withdrawn or cancelled by the party filing same *by leave and order of the court.*” *Id.* (quoting Miss. Code Ann. §93-5-2 (Rev. 2004) (emphasis added)). The court stated, “[p]rocedural errors in divorce proceedings, however, have been held to be harmless under the facts.” *Id.* (citing *Rounsaville v. Rounsaville*, 732 So. 2d 909, 912 (Miss. 1999)).

The consent agreement entered into by the parties on March 17, 2008, explicitly adhered to the statutory requirements provided in Mississippi Code § 93-5-2(3). First, the consent

agreement appeared in writing and was personally signed by both Billy J. Cossey and Nancy L. Cossey, the parties to the divorce proceeding. (Consent Agreement, Page 5). Second, a list of issues not resolved by the parties was submitted to the court for resolution. Moreover, the parties expressed their voluntary consent, ultimately allowing the court to decide and render a final judgment as to the specific disputed issues. (Consent Agreement, Page 1-5). The parties' voluntary consent is explicit in the language of the agreement stating "the parties do further state that they are unable to agree on the following issues which are submitted to the Court by agreement of the parties." (Consent Agreement, Page 2). Further, the final statement of the consent agreement reiterated the consent of the parties' to a divorce on the ground of irreconcilable differences, the agreement to submit specific issues to the court for resolution, and the fact that the decision of the court was final. (Consent Agreement, Page 5).

As stated previously, a divorce granted on the ground of irreconcilable differences requires strict compliance with the statutory provisions as provided in the Mississippi Code. The consent agreement entered into by the parties on March 17, 2008, strictly adhered to the statutory language of Miss. Code. Ann § 93-5-2(3). The parties have satisfied the statutory requirements of § 93-5-2(3); therefore, the divorce granted on the ground of irreconcilable differences is valid as a matter of law.

II. DUE TO THE FACTUAL CIRCUMSTANCES OF THE CASE, THE CHANCELLOR DID NOT ERR IN GRANTING LIBERAL VISITATION RIGHTS TO THE FATHER

The Mississippi legislature has granted the court the power "in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage." Miss. Code Ann. § 93-5-23 (2004). The statute clearly

indicates that all orders of the court concerning children of the parties to the divorce proceeding must comply with the statutory provisions of Miss. Code Ann. § 93-5-24 (2004). *Id.* Further, the statutory guidelines of § 93-5-24 (1) provide that custody of the child shall be awarded “according to the best interests of the child.” Miss. Code Ann. § 93-5-24(1) (2004). The power of the court to grant orders concerning the visitation of the child can be inferred by the statutory language of Miss. Code Ann. § 93-5-24 (9)(d)(ii) (2004) which sets forth specific actions the court may take in a visitation order. The Mississippi Supreme Court has stated that “the polestar consideration in child custody cases is the best interest and welfare of the child.” *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). Similarly, the Mississippi Supreme Court has stated that in awarding visitation “[t]he best interests of the minor child should be the paramount consideration.” *Chalk v. Lentz*, 744 So. 2d 789, 792 (Miss. Ct. App. 1999). Based on the factual circumstances of involved parties, specifically the age of the child and the attitude of the plaintiff toward the child, the chancellor properly awarded physical and legal custody of Tyler Cossey (Tyler) to the mother, Nancy and properly awarded reasonable rights of visitation to Billy as the child desires.

In determining physical and legal custody, the Chancellor, as required by law, properly considered the factors set forth by the Mississippi Supreme Court in *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983). The Chancellor stressed the factual circumstances of this case in its ultimate decision awarding custody to the defendant. (Corrected Judgment, Page 15). In determining the amount of time a child spends with the noncustodial parent, the Chancellor has ultimate discretion. *Clark v. Myrick*, 523 So. 2d 79, 83 (Miss. 1988) (stating the determination of visitation is “committed to the broad

discretion of the chancellor”). In divorce proceedings, the chancellor generally grants custody and visitation rights in the best interest of the child. *McWhirter v. McWhirter*, 811 So. 2d 397 (Miss. 2001).

Mississippi Courts have been reluctant to grant visitation rights at the discretion of the child, and the Courts have generally specified the visitation rights of younger children. In 1986, the Mississippi Supreme Court stated that a child’s wishes concerning visitation are “clearly insufficient as a matter of law.” *Cox v. Moulds*, 490 So. 2d 866, 870 (Miss. 1986). However, the Court based its finding on the fact that children are possibly “more interested in the desire of the moment than in considering their long range needs for the development of a healthy relationship with both parents.” *Id.*

Based on the facts of the case at hand, it is important to note the advanced age of Tyler. At the commencement of the proceedings, Tyler, born on July 15, 1988, was nineteen years of age and a college student at Itawamba Community College. Although Tyler is not emancipated, based on his advanced age, the visitation rights granted to his father Billy were reasonable under the facts of this specific case.

The judgment of divorce states, “The Plaintiff has questioned Tyler’s paternity, has agreed to let the Defendant have Tyler Cossey’s custody, and have such visitation as Tyler Cossey wants.” (Corrected Judgment, Page 15). In determining both custody and visitation, the Court considered the evidence defining the relationship between the plaintiff and child. After Billy questioned the paternity of the minor child, the court ordered all interested parties to submit to paternity testing. (Corrected Judgment, Page 17). The court stated, “[T]he actions of the Plaintiff toward Tyler Cossey, since he went to live with his Mother, who both parties have raised as the Plaintiff’s natural son since

his birth until the time of such move ... constitutes *neglect*.” (Corrected Judgment, Page 14) (*emphasis added*). The court further stated that the action of the Plaintiff “is reprehensible in the eyes of the Court, particularly so when the educable future of Tyler Cossey is at stake.” (Corrected Judgment, Page 14).

While the Mississippi Supreme Court has recognized that it is not limited to the wishes of a child in deciding matters of custody and visitation, the court has also defined that its interest rests in fostering a “healthy relationship with both parents where that is possible.” *Cox v. Moulds*, 490 So. 2d 866, 869 (Miss. 1986). In regards to visitation rights, Billy affirmed that Tyler was “old enough to come and go and do as he wishes.” (Direct Examination, Billy Cossey, Page 11, Line 14-15). Therefore, the Court awarded the father, Billy, “reasonable rights of visitation with Tyler Cossey, as Tyler Cossey desires.” Additionally, the Court urged that the visitation between the father and son should “be regularly and frequently exercised.” (Corrected Judgment, Page 15).

The facts indicate that Tyler has the ability to provide transportation to and from his father’s home and there is no evidence suggesting the refusal of Tyler to allow his father visitation. Although the relationship between the father and son has been strained since Billy denied paternity of his son Tyler, evidence suggests that the two had a strong relationship prior to the fact and that Tyler lived with Billy for a time. (Direct Examination, Billy Cossey, Page 6, Line 15-20). Based on the aforementioned factors, the Court properly awarded liberal visitation rights at the discretion of the minor child and properly encouraged regular and frequent visitation.

III. THE CHANCELLOR PROPERLY ALLOCATED THE EDUCATIONAL EXPENSES OF THE MINOR CHILD EQUALLY BETWEEN THE TWO PARENTS THEREFORE THE APPORTIONMENT SHOULD BE AFFIRMED.

The Chancellor has the broad authority to apportion the higher educational expenses of a minor child among the child's parents with the financial ability to adequately satisfy such burden; therefore, the Court properly apportioned fifty percent of the educational expenses of the minor child, Tyler to his father, Billy based on Billy's ability to satisfy the financial obligation. Financial evidence submitted to the court on behalf of Billy Cossey supports the fact that he has both sufficient assets and sufficient income to financially satisfy the educational support obligation of the minor child; therefore, this Court should affirm the chancellor's allocation of fifty percent of Tyler's higher educational expenses to Billy.

The Mississippi Code states in pertinent part: "[W]here proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each." Miss. Code Ann. § 93-5-23 (2004). This Court has extended a parent's duty of financial support beyond the basic child support award and included in the financial obligation costs related to the minor child's higher educational pursuit. *Lawrence v. Lawrence*, 574 So. 2d 1376, 1382 (Miss. 1991). The Court may hold a parent financially responsible for all or a portion of the tuition costs of a minor child plus expenses resulting from the child's college attendance. *Wray v. Langston*, 380 So. 2d 1262, 1264 (Miss. 1980) (increasing the father's child support obligation to account for additional expenses incurred by the minor child while attending college). More importantly, however, under Mississippi law, the duty of a parent to provide for the furtherance of the child's education results when the child is qualified for the higher education and the parent is financially able to meet the additional support obligation. *Pass v.*

Pass, 118 So. 2d 769, 773 (Miss. 1960). In *Pass*, the Court held that “where the minor child is worthy of and qualified for a college education and shows an aptitude therefore it is the primary duty of the father, if in reason financially able to do so, to provide funds for the college education of his minor child.” *Id.*

The duty of a father to provide for a child’s college education is not absolute; instead, the duty of continued support in furtherance of the child’s education is dependent on the facts of each case. *Hambrick v. Prestwood*, 382 So. 2d 474, 477 (Miss. 1980). In *Hambrick*, the Court reaffirmed the factors set forth in *Pass* stating that the duty of a father to provide for the furtherance of his child’s education is dependent on child’s “aptitude and qualifications for college” and the financial ability of the parent. Additionally, the *Hambrick* court stated that the child’s relationship with the father must make “the child worthy of the additional effort and financial burden” to be placed on the father. *Id.* In *Hambrick*, the Court ultimately released the father from any financial burden resulting from his daughter’s college education because the child refused to have contact with her father, categorized her dislike for her father as “hate,” and maintained her attitude toward her father for a period at a minimum of six years. *Id.*

The facts of the case at hand satisfy the factors set forth by this Court in *Pass* and further support the Chancellor’s apportionment of Tyler’s higher educational expenses. First, Tyler has exhibited the qualifications necessary for a college education. As of the date of Tyler’s deposition on March 18, 2008, evidence supported his continued enrollment at Itawamba Community College for a period of four consecutive semesters. (Direct Examination, Tyler Cossey, Page 290, Line 2). Additionally, he has maintained an approximate grade point average of 2.7 which represents a B average. *Id.* These factors provide evidence of Tyler’s ability to further his education.

Second, Billy has the wherewithal to financially provide for fifty percent of Tyler's educational expenses. Mississippi statutory guidelines for determining the appropriateness of support obligations allow consideration of "[t]otal available assets of the obligee, obligor, and the child." Miss. Code Ann. § 43-19-103 (2004). Based on the evidence presented before the Court, Billy has both sufficient assets and income to bear a one-half portion of Tyler's educational expenses.

Billy's argument based on *Fancher v. Pell*, 831 So. 2d 1137 (Miss. 2002), fails. In *Fancher*, the father was ordered by the chancery court to pay seventy percent of his son's higher educational expenses. *Id.* at 1139. In affirming the seventy percent college support award made by the chancellor, the Supreme Court of Mississippi recognized that the facts in *Fancher* supported the increased obligation due to the divorce agreement that was entered into by the parties on that date of their divorce. *Fancher v. Pell*, 831 So. 2d 1137 (). The decree stated "that all three children will be provided with a college education ... in keeping with the means and ability of Husband and Wife." *Id.*

Although the father argued that the total amount of support, including both his regular child support obligation and his seventy percent college support obligation, was "unfair" based on the statutorily mandated child support guidelines of Mississippi Code Ann. § 43-19-101 (2000), the *Fancher* court noted that Mr. Fancher's child support obligation, in regard to the college enrolled child, had been reduced by seventy percent while the child was duly enrolled in college. *Id.* at 1140. The court found that after taking into account the child support obligation reduction of seventy percent, the total financial support obligation owed to the college student was merely eight percent higher than the statutory mandated award. *Id.* Further, the court acknowledged "that 'payment such as college tuition will seldom qualify' to diminish child

support payments.” *Id.* (quoting *Varner v. Varner*, 588 So. 2d 428, 435 (Miss. 1991)).

The court determined Billy Cossey’s monthly adjusted gross income to be \$2,555.00 per month. (Corrected Judgment, Page 15). However, the court determined that the nature of Billy Cossey’s work often “resulted in, much unreported, untaxed income.” (Corrected Judgment, Page 3). Based on the amount of his monthly adjusted salaried gross income of \$2,555.00, Billy Cossey was ordered to pay 14% of this amount in child support equal to \$357.77 per month. Assuming the estimates quantified in the divorce agreement are accurate, Billy Cossey will be responsible for expenses equal to \$375.00 per month for the 2008-2009 school year if the expenses are allocated equally over a period of twelve months. (one half tuition expense \$2,400; one half room and board expense \$2,400; one half travel expense \$3,200; one half of book expense \$1000). The \$375.00 estimated monthly educational support obligation represents approximately 14.67% of Billy Cossey’s monthly adjusted gross income. In total, the amount of child support obligation and estimated college support represents 28.67% of Billy’s monthly adjusted gross income. The chancery court explicitly stated that all support obligations of Billy Cossey, including that of Tyler’s higher educational expenses, would terminate when Tyler Cossey reached the age of twenty-one on July 15, 2009. (Corrected Judgment, Page 19). Therefore, Billy Cossey is ultimately responsible for *only* two years of Tyler’s higher educational expenses and has sufficient assets and income to reasonably bear such financial obligation. By reviewing the total amount of fifty percent of the possible college expense obligation and the duration of such financial obligation, Billy has sufficient income and assets to reasonably afford such financial burden without undue hardship.

Additionally, Billy Cossey provided testimony that he would agree to pay one-half of Tyler Cossey’s educational expenses if he were “provided information concerning him attending

school, making adequate grades, putting forth adequate effort in a state [institution]...” (Direct Examination, Billy Cossey, Page 8, Line 19-23). Therefore, based on this statement, the Court was within reason to order Bill to pay merely fifty percent of Tyler’s educational expenses.

The Court should examine Billy’s financial obligation under the *Pass* standard without reference to *Hambrick*. First, Tyler has both the aptitude and qualifications for a college education evidenced by his continued enrollment at Itawamba Community College. Additionally, he has maintained a satisfactory grade point average. The standard applied in *Hambrick* does not apply to the facts of this case for two reasons. First, as a matter of public policy, a father cannot be released from his financial support obligation by merely questioning paternity of his son. Second, testimony of both Billy and Tyler Cossey support the existence of a strong relationship that existed between the father and son prior to Billy’s demand for paternity testing. Billy characterized his relationship with his son as “very close” in court. (Billy Cossey, Direct Examination, Page 6, Line 15). The facts of this case do not support the complete lack of a congenial relationship between Billy and Tyler for an extended period of time. In fact, evidence supports the existence of a strong relationship between the father and son until approximately one year ago at which time Billy Cossey questioned the paternity of his son Tyler. For these reasons, *Hambrick* is not controlling. Applying the factors as set forth in *Pass* and evidence as to the amount of Billy’s gross income and assets, the Court should affirm the apportionment of fifty percent of Tyler Cossey’s higher educational expenses to his father Billy Cossey.

IV. THE CHANCELLOR DID NOT ERR IN DESIGNATING THE MARITAL ASSETS OF THE PARTIES TO THE DIVORCE PROCEEDING IN ACCORDANCE WITH THE FERGUSON FACTORS MOREOVER THE COURTS SUBSEQUENT EQUITABLE DIVISION OF SUCH ASSETS WAS VALID.

The Mississippi Supreme Court has adopted factors to guide the court in the equitable distribution of the marital assets of the parties to the divorce proceeding. *Ferguson v. Ferguson*, 639 So. 2d 921, 925 (Miss. 1994). The Court has further acknowledged the discretion of the chancery court in making such designation and distribution of the marital assets. *Id.* More importantly, the Mississippi legislature has expressly vested statutory authority in the chancery court to make such decisions concerning property owned by the parties to the proceeding. Mississippi Code § 93-5-23 (2004) states in pertinent part that the court has the authority to “make all orders touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him.” The chancery court, in its discretion, properly considered such factors in determining the marital assets of Billy Cossey and Nancy Cossey; further, the court properly divided the marital assets.

First, in Mississippi, there is a presumption that the property acquired by the parties to the divorce during the duration of their marriage is marital property. *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss. 1994). The *Hemsley* court defined “[a]ssets acquired or accumulated during the course of a marriage” that are not classified as belonging to “one of the parties’ separate estates prior to the marriage or outside the marriage” as marital assets subject to equitable division. *Id.* at 915. Moreover, the *Hemsley* court stated that specific proof is required to classify property accumulated during the duration of the marriage as belonging “to one of the parties’ separate estates prior to the marriage or outside the marriage.” *Id.* Based on this presumption, the chancery court properly classified the marital assets of Billy Cossey and Nancy Cossey. There

was no evidence that either party sought such assets to be classified as belonging to one party individually. Therefore, absent such evidence, the court properly classified those assets that were explicitly provided to them for distribution as marital assets.

Second, the chancery court has the discretion to make an equitable distribution of marital assets. As previously stated, the Mississippi Supreme Court has provided guidelines to aid the court in making an equitable distribution of property. *Ferguson*, 639 So. 2d at 925. In *Ferguson*, the Court defined the following guiding factors: substantial contribution to the accumulation of the property; the degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distributions by agreement; the market and emotional value of the assets; the value of each spouse's individual estate; the tax and economic consequences of such distribution to third parties; the extent to which property division may eliminate the need for alimony; the financial needs of the parties; and any other factors which in equity should be considered. *Id.* at 928-29.

It must be noted that the marriage between Nancy Cossey and Billy Cossey, which lasted approximately twenty-five years, was the parties' second marriage to each. Moreover, the parties were separated for almost six years prior to filing for divorce. Therefore, the chancellor was faced with the task of properly dividing the marital assets of two parties who had been separated for an extended period of time prior to filing divorce. The chancellor properly considered testimony of multiple witnesses including Billy Cossey, Nancy Cossey, Tyler Cossey, and acquaintances of the parties to the proceeding.

In the Corrected Judgment for Divorce entered by the Chancery Court of Pontotoc County, Mississippi, the court recognized the eight *Ferguson* factors outlined above. Within its discretion, the court then proceeded to distribute the marital assets in an equitable manner. In the

Corrected Judgment, the court specifically identified such marital assets. Moreover, the Mississippi Court of Appeals has stated that a court's failure to exhaust each *Ferguson* factor does not warrant a reversal of the chancellor's decision. *Glass v. Glass*, 857 So. 2d 786, 790 (Miss. Ct. App. 2003). Instead, the findings of the court must merely provide evidence that the *Ferguson* factors were considered by the chancellor. *Id.*

In the Corrected Judgment of Divorce, the chancellor specifically referenced the *Ferguson* factors and provided sufficient evidence that such factors were considered in his ultimate decision. The court heard testimony of the parties to the divorce to aid in such distribution. Finally, the court proceeded to distribute the marital assets in its discretion.

In conclusion, the court first properly considered the character of the assets and properly classified them as marital in accordance with *Hemsley*. Second, the martially property was divided equitably among the parties to the proceeding in accordance with the guiding factors set forth by the Mississippi Supreme Court in *Ferguson*. Due to the extenuating circumstances of the marriage and the subsequent six-year separation between the parties to the proceeding, the court properly designated and distributed the marital assets.

CONCLUSION

Mississippi Code Ann. § 93-5-2 (Supp. 2008) explicitly sets forth the statutory requirements that that must be satisfied for a divorce on the ground of irreconcilable differences to be granted. Because the parties to the proceeding expressly complied with the plain statutory language, the judgment of the Chancery Court of Pontotoc County, Mississippi, granting a divorce on the ground of irreconcilable differences, should be affirmed.

For the reasons outlined above, the chancellor, within his discretion, properly awarded Billy J. Cossey reasonable visitation rights with his son, Tyler Cossey. Due to the facts of the

case and the advanced age of Tyler Cossey, liberal visitation rights were in the best interest of the parties to the proceeding. Furthermore, the facts and evidence presented prove that Billy J. Cossey has sufficient assets and income to support fifty percent of the higher educational expenses of his son, Tyler Cossey until he attains the age of twenty-one. Finally, the chancery court properly determined the martial assets of the parties to the proceeding and subsequently divided these marital assets in an equitable manner in accordance with the factors set forth in *Ferguson*. For the foregoing reasons, the divorce in its entirety should be affirmed by this Court.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BILLY J. COSSEY

APPELLANT

VS.

NO. 2008-TS-00829

NANCY L. COSSEY

APPELLEE

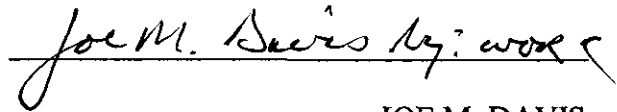
CERTIFICATE OF SERVICE

This is to certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellee to the following interested parties:

Hon. John A. Hatcher
Chancery Court Judge
Post Office Box 7395
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Hon. Adam A. Pittman
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RESPECTFULLY SUBMITTED, this the 19th day of March, 2009.

A handwritten signature in cursive script that reads "Joe M. Davis" followed by a flourish.

JOE M. DAVIS

ATTORNEY FOR APPELLEE

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BILLY J. COSSEY

APPELLANT

VS.

NO. 2008-TS-00829

NANCY L. COSSEY

APPELLEE

CERTIFICATE OF MAILING

This is to certify that I shall on this day deposit in the United States Mail, postage prepaid, an original and three (3) true copies of the Brief of Appellee to the Clerk of the Supreme Court of the State of Mississippi.

This the 19th day of March, 2009.

Joe M. Davis by: warr

JOE M. DAVIS

ATTORNEY FOR APPELLEE