

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BILLY J. COSSEY

APPELLANT

VS.

NO. 2008-~~TS~~<sup>CA</sup>-00829 1

NANCY L. COSSEY

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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

- 1) Billy J. Cossey  
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- 2) Nancy L. Cossey  
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- 3) Honorable John A. Hatcher  
Chancery Court Judge  
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RESPECTFULLY SUBMITTED, this the 29<sup>th</sup> day of December, 2008.



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### **STATEMENT OF ISSUES**

**1. The Chancery Court exceeded its authority in granting a divorce on the ground of irreconcilable differences.**

**2. The Chancery Court erred by not specifically directing visitation between Billy and the parties' remaining minor son Tyler, but instead only awarding visitation to Billy at the whim of the child.**

**3. The Chancery Court erred in requiring Billy to pay one-half of Tyler's college expenses, both in failing to consider Billy's ability or inability to pay said expenses and in failing to properly apportion the payment of said expenses equitably between the parties based upon their respective incomes.**

**4. The Court erred in failing to make specific findings through its designation of marital assets and the equitable distribution thereof.**

## **STATEMENT OF CASE**

### **1. NATURE OF CASE**

This matter is an Appeal from that Corrected Judgment of Divorce, which was entered by the Chancery Court of Pontotoc County, on July 15, 2008.

### **2. COURSE OF PROCEEDINGS**

This matter was initiated by the filing of a Complaint for Divorce by Billy J. Cossey (hereinafter referred to as "Billy") against Nancy L. Cossey (hereinafter referred to as "Nancy") in the Chancery Court of Pontotoc County, Mississippi on September 6, 2007. The grounds for divorce stated in the Complaint were adultery, desertion, habitual cruel and inhuman treatment, and irreconcilable differences. Following the service of process upon Nancy she filed her Answer to the Complaint and a Counter-Complaint for Divorce against Billy. In her Answer Nancy denied all grounds for divorce alleged against her by Billy, including irreconcilable differences. Furthermore, in her Counter-Complaint against Billy she alleges desertion, adultery, habitual cruel and inhuman treatment, and irreconcilable differences as grounds for the divorce. Billy then Answered Nancy's Counter-Complaint, specifically denying all grounds for divorce alleged against him by Nancy.

At the day set for the trial the parties entered into a Consent Agreement in an effort to comply with Mississippi Code Section 93-5-2 (3). After the filing of the Consent Agreement, the Honorable John A. Hatcher conducted an evidentiary hearing for the purpose of adjudicating the issues of identification and valuation of marital assets, the equitable distribution of those assets, the custody of the parties remaining minor child (Tyler) and the amount and extent of Billy's liability for Tyler's support, both prospectively and retroactively. As a result of the evidentiary hearing the Court issued a Judgment for

Divorce on the grounds of irreconcilable differences on March 31, 2008. A timely Notice of Appeal was filed on April 9, 2008 and the Trial Court, on its own motion, issued and caused to be filed a corrected Judgment for Divorce on the grounds of irreconcilable differences, which was entered July 15, 2008 which endeavored to correct certain errors identified by the Court in it's prior Judgment.

### **3. STATEMENT OF RELEVANT FACTS**

Billy J. Cossey and Nancy Cossey where married to each other (for a second time) on March 4<sup>th</sup>, 1977. During the term of their marriage to each other they had three children born unto them namely Dionne Guter Cossey, who was born on April 25, 1973, Billy Cossey, Jr., August 17, 1977, Tyler Cossey July 18, 1988. They lived together as husband and wife until they finally separated on July 2, 2002, when Nancy left the former marital home. The parties' youngest son, Tyler, went to live with his mother shortly after she left the home, and has remained with her since the separation. For various reasons Tyler and Billy's relationship soured after the parties' separation. In spite of this, Tyler successfully graduated High School and then proceeded to attend college.

## **SUMMARY OF ARGUMENT**

1. The Chancery Court exceeded its authority in granting a divorce on the ground of irreconcilable differences. Although both parties alleged irreconcilable differences as an alternate ground for divorce in their respective pleadings, when responding to those allegations both parties denied the others right to be granted a divorce on said ground. The denial by each party of the others right to a divorce constituted a "contest or denial" as contemplated by Mississippi Code Annotated section 93-5-2, and as such precluded the entry of a divorce on said ground until the denial was withdrawn or cancelled by leave and order of the Court. Because no leave was ever granted nor order given for the withdrawal or cancellation of those denials, the Chancery Court was without statutory authority to enter the Judgment of Divorce.

2. The Chancery Court erred by not specifically directing visitation between Billy and the parties' remaining minor son Tyler, but instead only awarding visitation to Billy at the whim of the child. The Appellate Court's have steadfastly held that a child's wishes are clearly insufficient to restrict visitation, and the Court's refusal to award Billy specific periods of visitation with Tyler acts as a restriction upon his right to visit with his son.

3. The Chancery Court erred by requiring Billy to provide for payment of one-half of Tyler's college expenses because (a) the Court failed to specifically find that Billy had the financial ability to pay these expenses, and (b) even if Billy can pay part of Tyler's college expenses, he should not be required to pay one-half of them given that Nancy enjoys a substantially higher income than Billy and therefore has more ability to pay these expenses.



4. The Court erred in failing to make specific findings through its designation of marital assets and the equitable distribution thereof, and as a result it is impossible to establish whether the Court's designation of assets or subsequent equitable distribution thereof was either appropriate, given the application of the correct legal standard, or otherwise supported by substantial, credible evidence.

## **ARGUMENT**

### **STANDARD OF REVIEW**

For the sake of brevity it is recognized that throughout this brief the scope of appellate review is limited by the substantial evidence/manifest error rule. Samples v. Davis, 904 So.2d 1061, 1063-65 (¶ 9)(Miss. 2004). The Appellate Court will not disturb the chancellor's opinion when supported by substantial evidence 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).

#### **1. The Chancery Court exceeded its authority in granting a divorce on the ground of irreconcilable differences.**

The underlying action was initiated in the trial court by the filing of a Complaint for Divorce by Billy Cossey. In paragraph 5 of the Complaint Billy alleges certain "fault" based grounds for Divorce, namely adultery, desertion and habitual cruel and inhuman treatment. Paragraph 6 of Billy's Complaint then alleges that there had arisen certain irreconcilable differences that entitled him to a divorce from Nancy as an alternate "no-fault" ground for divorce. In her Answer Nancy not only denies that Billy was entitled to a divorce based upon his fault allegations, but also denies the allegations of irreconcilable differences.

Nancy then, through her Counter-Complaint against Billy, alleges that she is entitled to a divorce from Billy on the grounds of desertion, adultery, habitual cruel and inhuman treatment, and also irreconcilable differences. Billy, through his Answer to Nancy's Counter-Complaint, specifically denies all grounds for divorce alleged against him by Nancy including irreconcilable differences.

On the day set for trial, the parties entered into and file with the trial court a "Consent Agreement" in an effort to comply with Mississippi Code § 93-5-2(3) and state therein that they have agreed that there are irreconcilable differences between them and consent to a divorce be granted to them on grounds of irreconcilable differences. (Agreement P.1) The Trial Court, in its ruling then recognizes that both parties plead irreconcilable differences as alternative grounds for divorce and states that "Though not stated the Court assumes the parties withdrew their various fault grounds for divorce, defenses and answers, but if not, the Court hereinafter denies same as no proof was offered thereon." (Corrected Judgment P. 2, paragraph V).

It is well settled that divorce in Mississippi is a creature of statute, and that strict compliance with the statutory provisions for a divorce on the ground of irreconcilable differences is required. See Engel v. Engel, 920 So.2d 505 (¶ 17)(Miss. App 2006), Perkins v. Perkins, 787 So.2d 1256, 1265 (¶ 25)(Miss. 2001). The statutory requirements for granting an irreconcilable differences divorce are set forth in Mississippi Code Annotated § 93-5-2 which states in pertinent part:

[N]o divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the 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) (Rev.2004)

As stated above, although both parties requested a divorce on the ground of irreconcilable differences, both parties also **denied** that the other party was entitled to a divorce on this ground, and these denials were never withdrawn or cancelled by either party filing for leave and receiving an order of the Court allowing same. And Mississippi

Code § 93-5-2 makes no provision for the withdrawal or cancellation of the denials by the filing of an agreement as contemplated by Mississippi Code § 93-5-2(3), but instead specifically requires that said denials could only be cancelled by leave and order of the trial court. Because this was never done, the trial court exceeded its jurisdiction in granting a divorce to the parties on the ground of irreconcilable differences.

**2. The Chancery Court erred by not specifically directing visitation between Billy and the parties' remaining minor son Tyler, but instead only awarding visitation to Billy at the whim of the child.**

In determining the custody and visitation for the parties remaining minor child, the trial court granted Billy "reasonable rights of visitation with Tyler Cossey, **as Tyler Cossey desires**, though the Court strongly urges that the visitation be regularly and frequently exercised." (Corrected Judgment, Page 21 ¶ 15) Unfortunately based upon the evidence brought forth in trial it is clear that allowing the child's desires to dictate the amount and conditions upon which Billy may exercise visitation will result in the denial of Billy's visitation, and as such the condition is an unreasonable restriction upon Billy's visitation rights with Tyler.

Although Courts are free to place restrictions upon a noncustodial parent's visitation rights should there be some aspect of the visitation that the Court thinks is harmful to the child, the Mississippi Supreme Court has recognized that the child's wishes are "clearly insufficient as a matter of law" to restrict visitation. Cox v. Moulds, 490 So.2d 866, 870 (Miss. 1986). As stated in Cox, "While there is nothing wrong with the children being heard regarding their wishes, our law proceeds on the assumption that they are nevertheless children and, thus, 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 where that is possible." *Id.* at 870 (¶ 6). And although this is not a classic restriction upon the terms of visitation, such as restricting overnight stays, the effect of letting Tyler dictate when and how he will see his father will result in the noncustodial parent being restricted by the whims of the child. Such a restriction upon Billy's right to visitation with Tyler is unreasonable. While there was evidence brought out at trial that the relationship between Billy and Tyler was strained, there is nothing in the record that states Tyler would be subjected to any physical or psychological harm. As such, the Court's restriction of Billy's visitation to the desires of Tyler is not supported by substantial evidence and was therefore an abuse of the Court's discretion.

**3. The Chancery Court erred in requiring Billy to pay one-half of Tyler's college expenses.**

In paragraph VIII of page 15 of the Corrected Judgment, the Chancellor found Billy to have an adjusted gross income of \$2,555.00. Based upon this figure the Chancellor ordered Billy to pay Nancy \$357.77 per month as child support for Tyler (Judgment Pg 17, ¶ 7). The amount of child support reflects the application of the statutory child support percentage (14%) upon what the Court found to be Billy's adjusted gross income. The Court additionally ordered Billy to pay one-half of the following in-state college expenses for Tyler: tuition, books, school supplies, housing, utilities and transportation costs. (Judgment Pg 18, ¶ 9). In the Corrected Judgment of Divorce the Court awards Nancy a money judgment against Billy, and in doing so quantifies, to some extent, those costs incurred by Tyler to be split between the parties. (Judgment Pg 20, ¶ 14) Presuming Tyler's future college expenses will remain as they were during the Fall 2007-Spring 2008 school year,

Billy will be responsible (as his one-half of the expenses) for the payment of an additional \$441.66 per month (Tuition @ \$1,200.00/year or \$100.00/mo., Room and Board @ \$1,200.00/year or \$100.00/mo., travel @ \$200.00/mo. and Book @ \$500.00/year or \$41.67/mo.).

**a. The Court failed to make any findings that Billy had the financial ability to pay any portion of Tyler's college expenses.**

While it has long been the law in Mississippi that a parent's duty of support for a minor child may include the cost of a college education, there must be some finding that the child is qualified for higher education and that the parent is financially able to meet the expenses. Pass v. Pass, 118 So.2d 769, 773 (Miss. 1960). The Chancellor committed error by failing to make any finding that Billy has the present ability or future capability to financially meet the obligation for payment of Tyler's college expenses.

**b. The Court erred in the apportionment of the payment of Tyler's college expenses.**

Once a court has determined that the child is qualified for higher education and that the parent is financially able to meet the expenses, the court must then determine the appropriate apportionment of the payment of those expenses as between the parties. The trial Court found Billy's monthly adjusted gross income (for determining child support) to be \$2,555.00. (Judgment Pg. 15, ¶ VIII). According to the financial declaration filed by Nancy her monthly income, after taxes, is \$4166.37, some 56% greater than Billy's. Stated another way, if the parties incomes were pooled together, Nancy's income would represent more than 60% of the total income pool, and Billy's less than 40%.

In apportioning college expenses the Mississippi Appellate Courts have often recognized the appropriateness of apportioning the payment of college expenses based upon the respective ability of each parent to pay those expenses. Falcher v. Pell, 831 So.2d 1137, 1141-42 (Miss 2002)(father ordered to pay 70% of college expenses based upon higher income), Lazarus v. Lazarus, 841 So.2d 181, 185 (Miss. Ct. App. 2003), Traxler v. Traxler, 730 So.2d 1098, 1103 (Miss 1998). Given the substantial disparity in the parties incomes, coupled with the impact the payment of one-half of Tyler's college expenses will have on Billy's meager income, the Court committed manifest error in not apportioning to Nancy more of the responsibility to pay Tyler's college expenses, both retroactively as well as prospectively.

**4. The Court erred in failing to make specific findings through its designation of marital assets and the equitable distribution thereof.**

The trial court was faced with the task of disentangling a long term marriage between two people who had been separated for almost six years. There were several pieces of property, both real and personal, and some liquid holding both in cash (in bank accounts) and in retirement accounts. Although the Court analyzed the designation and distribution of those assets using the correct legal standard (Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994)) because of how the decision was rendered it is unclear whether the Court's decision was supported by substantial, credible evidence and therefore should be remanded for further findings.

In review of the findings of the Court as found in the Correct Judgment of Divorce, the Court makes specific findings as to certain assets, whether they were marital, whether they were in someone else's possession, whether they had been wasted and their

respective values (when determinable). (Judgment Pg. 5-14) Unfortunately these findings fall short of the specificity needed to make a proper determination of whether the Court, in its subsequent equitable distribution, supported the distribution with either substantial evidence or specific findings. This is not so much the fault of the Court as much as it is the voluminous nature and character of the parties' respective holdings. As one example, it is unclear from the Court's ruling as to what items were used in the final determination of "assets subject to equitable distribution" as stated by the Court on Page 25 at paragraph 23 and following. As another example there is no finding or explanation by the Court why, in valuing the parties' respective retirement accounts, the Court valued Billy's retirement as of the date of the trial, but valued Nancy's as of December 31, 2002 (which is stated in the Judgment as the time of the separation). (Judgment Pg. 8, ¶ 2(f) numbers 23a & 23b)

Because of these and other ambiguities in the Court's Judgment it is impossible for a proper determination to be made as to whether the Chancellor's decision was based upon substantial credible evidence and/or the result of the appropriate application of law.



## **CONCLUSION**

Should the Court find merit in the first argument, then Appellant would respectfully request this Court reverse the Corrected Judgment of Divorce entered below and remand the case to the Trial Court for further proceedings upon the parties respective Complaint and Counter-Complaint.

Should the Court not be persuaded by the Appellant's first argument, but would find merit in any of the remaining arguments made herein, then the Appellant would request as follows:

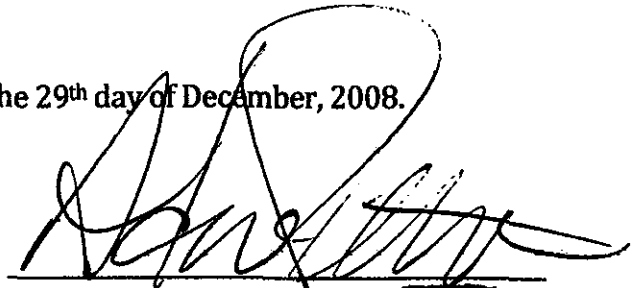
As to the Second Issue, the Appellant would request the Court reverse the limitation placed upon his visitation with his son and either remand the case to the Trial Court for a determination of the appropriate amount of specific periods of visitation or render a decision by granting the Appellant specific and reasonable periods of visitation with his son.

As to the Third Issue, the Appellant would request the Court reverse the requirement that the Appellant pay for one-half of Tyler's college expenses and either render a decision finding that the Appellant does not have the ability to pay one-half of said expenses and direct him to pay a portion of said expenses relative to his ability to pay (when compared with the ability of the Appellee to pay) or remand the matter to the Trial Court for specific findings as to the Appellant's ability to pay one-half of Tyler's college expenses and instructions to apportion the payment of those expenses between the parties in relation to their respective abilities to pay.

As to the final issue, the Appellant would request the Court reverse the equitable distribution of the parties' assets and remand the matter to the Trial Court for more

specific findings that better illustrate how each item of personal and real property was considered, both in establishing it's final distribution as well as the distribution of the value of those assets.

RESPECTFULLY SUBMITTED, this the 29<sup>th</sup> day of December, 2008.

A handwritten signature in black ink, appearing to read 'Adam A. Pittman', written over a horizontal line.

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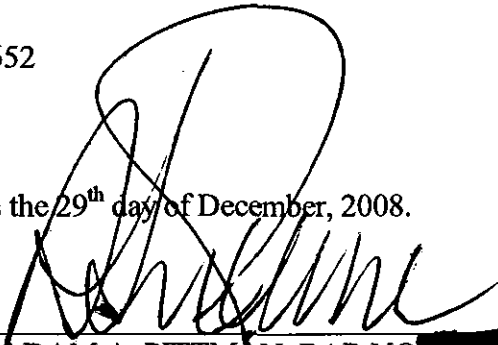
CERTIFICATE OF SERVICE

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 Appellant to the following interested parties:

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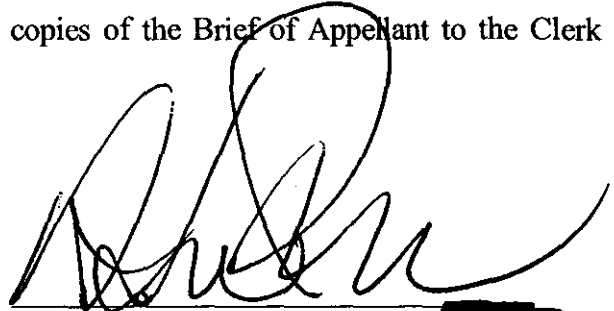
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CERTIFICATE OF MAILING

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

This the 29<sup>th</sup> day of December, 2008.

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