

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANFEI LUO

APPELLANT

V.

CASE NO. 2008-CA-00929

DONALD WALTER HENRICHS

APPELLEE

BRIEF OF APPELLEE

APPEAL FROM THE DECISION OF THE
CHANCERY COURT OF TATE COUNTY, MISSISSIPPI

John T. Lamar, Jr. MSB # [REDACTED]
John T. Lamar, III MSB # [REDACTED]
OF COUNSEL FOR APPELLEE
LAMAR & HANNAFORD, P.A.
Attorneys at Law
214 S. Ward St.
Senatobia, MS 38668
662-562-6537

ORAL ARGUMENT NOT REQUESTED

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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 Mississippi Supreme Court and the Judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

Mr. Donald Walter Henrichs,

Appellee

Ms. Anfei Luo,

Appellant

John T. Lamar, Jr., Esq.

Counsel for Appellee

John T. Lamar, III, Esq.

Lamar & Hannaford, P.A.

214 S. Ward St.

Senatobia, MS 38668

David L. Walker, Esq.

Counsel for Appellant

Attorney at Law

P.O. Box 719

Batesville, MS 38606

Honorable Vicki B. Cobb

Trial Judge

Chancellor, Third Chancery Court District

P. O. Box 1104

Batesville, MS 38606

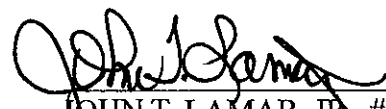

JOHN T. LAMAR, JR., #1781
Attorney of Record for Appellee

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUES ON APPEAL	iv
STATEMENT OF THE CASE	1
A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	3
A. STANDARD OF REVIEW	3
B. ISSUE I: THE APPELLANT MAY NOT RAISE AN ISSUE FOR THE FIRST TIME ON APPEAL	3
C. ISSUE II: THE CHANCELLOR WAS NOT MANIFESTLY IN ERROR IN HIS DIVISION OF THE MARITAL PROPERTY OF THE PARTIES.....	4
D. ISSUE III: THE CHANCELLOR WAS NOT MANIFESTLY IN ERROR IN NOT AWARDING THE APPELLANT ANY VISITATION WITH THE PARTIES MINOR CHILD. ...	6
E. ISSUE IV: THE CHANCELLOR WAS NOT MANIFESTLY IN ERROR IN NOT AWARDING THE APPELLANT ALIMONY.....	7
F. ISSUE V: THE CHANCELLOR WAS NOT MANIFESTLY IN ERROR IN AWARDING THE APPELLEE WITH PARAMOUNT CARE, CUSTODY AND CONTROL OF THE MIINOR CHILD.	8
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

State Cases

<i>Albert v. Allied Glove Corp.</i> , 944 So.2d. 1, 7 (Miss. 2006)	3
<i>Albright v. Albright</i> , 437 So.2d 1003 (Miss. 1983).....	8
<i>Armstrong v. Armstrong</i> , 618 So. 2d 1278 (Miss. 1993).....	7
<i>Carrow v. Carrow</i> , 642 So. 2d 901 (Miss. 1994).....	5
<i>Crow v. Crow</i> 622 So.2d 1226 (Miss. 1993).....	3
<i>Dell v. Parker</i> 563 So.2d 594 (Miss. 1990).....	3
<i>Dunn v. Dunn</i> , 609 So.2d 1277, 1286 (Miss.1992).....	6
<i>Ferguson v. Ferguson</i> , 639 So. 2d 921, 928 (Miss. 1994).....	4, 5
<i>Fisher v. Fisher</i> 771 So.2d 364-367 (2000).....	3
<i>Luse v. Luse</i> , No. 2007-CA-00171-COA, decided July 1, 2008.....	6, 7, 8
<i>Newsome v. Newsome</i> 557 So.2d 511, 514 (Miss. 1990).....	3
<i>Nichols v. Tetter</i> 547 So.2d 766, 781 (Miss. 1989).....	3
<i>Purvis v. Barnes</i> , 791 So.2d 199, 202 (Miss. 2001).....	3
<i>Thompson v. Thompson</i> , 815 So. 2d 466 (Miss. Ct. App. 2002).....	5
<i>Weigand v. Houghton</i> , 730 So.2d 581, 587 (Miss.1999).....	6

STATEMENT OF THE ISSUES ON APPEAL

1. **ISSUE I:** WHETHER THE APPELLANT MAY RAISE AN ISSUE FOR THE FIRST TIME ON APPEAL
2. **ISSUE II:** WHETHER THE CHANCELLOR WAS MANIFESTLY IN ERROR IN HIS DIVISION OF THE MARITAL PROPERTY OF THE PARTIES
3. **ISSUE III:** WHETHER THE CHANCELLOR WAS MANIFESTLY IN ERROR IN NOT AWARDING THE APPELLANT ANY VISITATION WITH THE PARTIES MINOR CHILD
4. **ISSUE IV:** WHETHER THE CHANCELLOR WAS MANIFESTLY IN ERROR IN NOT AWARDING THE APPELLANT ALIMONY
5. **ISSUE V:** WHETHER THE CHANCELLOR WAS MANIFESTLY IN ERROR IN AWARDING THE APPELLEE WITH PARAMOUNT CARE, CUSTODY AND CONTROL OF THE MINOR CHILD

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

Donald Walter Henrichs and Anfei Luo were married on April 11, 2000, and lived together as husband and wife until the date of their separation, which took place on or about August 25, 2006, in Tate County, Mississippi. During the course of the parties' marriage, one child was born, namely: Tai Long Henrichs, a male child born December 26, 2000. After the separation, Donald Walter Henrichs, the Appellee, hereinafter referred to as "Mr. Henrichs", sought a divorce from the Appellant, Anfei Luo, hereinafter referred to as "Ms. Luo". A complaint for divorce was filed by Mr. Henrichs on September 25, 2006, in the Chancery Court of Tate County, Mississippi. Ms. Luo was personally served with process on September 25, 2006. Ms. Luo never filed an answer or any responsive pleadings in the divorce proceeding. This case was set for trial on April 14, 2008, notice was given to Ms. Luo, who failed to appear or contest the issues before the Court. (R. at 51). The Court, after having heard sworn testimony in open Court granted Mr. Henrichs a divorce from Ms. Luo on the grounds of Habitual Cruel and Inhuman Treatment, awarded the paramount custody and control of their minor child, Tai Long Henrichs, to Mr. Henrichs and divided their marital property. (R. at 51-55).

SUMMARY OF ARGUMENT

The Appellant completely failed to defend this lawsuit, and therefore, cannot raise issues for the first time on appeal. (R. at 51). Accordingly, all of Ms. Luo's arguments are procedurally barred. Additionally, the Chancellor heard sworn evidence in open court and applied the correct law to the facts as to the division of marital property, child visitation, alimony and child custody. (R. at 51-55). The Chancellor did not commit manifest or clear error and did not apply an erroneous legal standard. Accordingly, the Chancellor's ruling should be affirmed.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review in domestic relations cases is well settled and is limited: "this Court will not disturb the findings of a Chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Crow v. Crow* 622 So.2d 1226 (Miss. 1993); *Dell v. Parker* 563 So.2d 594 (Miss. 1990). In other words, the Court stated: "on appeal, we are required to respect the findings of fact made by a Chancellor, supported by credible evidence and not manifestly wrong." *Newsome v. Newsome* 557 So.2d 511, 514 (Miss. 1990). This is particularly true "in the areas of divorce and child support". *Nichols v. Tetter* 547 So.2d 766, 781 (Miss. 1989). In *Fisher v. Fisher* 771 So.2d 364-367 (2000), the Supreme Court stated that it views the facts of the divorce decree in a light most favorable to the Appellee. It may not disturb the Chancellor's decision unless the Court finds it manifestly wrong, unsupported by substantial evidence. It is the position of the Appellee that the Chancellor was correct in her ruling.

B. ISSUE I: THE APPELLANT MAY NOT RAISE AN ISSUE FOR THE FIRST TIME ON APPEAL

It is undisputed that Ms. Luo completely failed to defend this lawsuit. (see Appellant's Brief and Record). As such, Ms. Luo cannot now complain of matters she failed to defend in the trial court. A party is not allowed to raise an issue for the first time on appeal. *Albert v. Allied Glove Corp.*, 944 So.2d. 1, 7 (Miss. 2006); *Purvis v. Barnes*, 791 So.2d 199, 202 (Miss. 2001). Accordingly, all of Ms. Luo's arguments are procedurally barred.

C. ISSUE II: THE CHANCELLOR WAS NOT MANIFESTLY IN ERROR IN HIS DIVISION OF THE MARITAL PROPERTY OF THE PARTIES

Ms. Luo, in her brief, alleges that the Chancellor was manifestly in error because she did not classify property as either marital or non-marital, inequitably divided the marital property, and did not make any findings of fact and conclusions of law as to the application of the "Ferguson Factors." (Appellant's Brief, p. 6-8). Mr. Henrichs contends that the Chancellor was not manifestly in error, was not clearly erroneous and that an erroneous legal standard was not applied.

The Mississippi Supreme Court has mandated the steps to be followed by the Chancery Court in making an equitable distribution of property. Those steps are to (1) classify assets as marital or separate; (2) value assets, using expert testimony if necessary; (3) divide marital property equitably; and (4) award alimony if needed after the division of the assets. *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994). Ms. Luo contends that certain property (specifically Mr. Henrichs retirement benefits) was not classified as either marital or non-marital before division amounting to reversible error. (Appellant's Brief, p.8). This is simply not true. In the Decree of Divorce, the Chancellor clearly classified the retirement benefits as marital property under paragraph 2. (R. at 52-53).

The *Ferguson* factors, set out by the Mississippi Supreme Court to be used by chancellors as a guide to dividing marital property, are as follows: (1) substantial contribution to property accumulation, including indirect economic contribution, contribution to family stability and contribution to the education or

training of the wage-earning spouse; (2) spousal use or disposition of assets and distribution by agreement; (3) the market and emotional value of assets; (4) the value of each spouse's separate estate; (5) tax consequences and legal consequences to third parties; (6) the extent to which property division can eliminate the need for alimony; (7) the needs of each spouse; and (8) other factors which should be considered in equity. *Ferguson*, at 928 (Miss. 1994). Additionally, the Supreme Court has added marital fault as another factor to be considered. *Carrow v. Carrow*, 642 So. 2d 901, 904 (Miss. 1994). Again, a chancellor's division of marital assets will not be overturned "unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Thompson v. Thompson*, 815 So. 2d 466, 468 (Miss. Ct. App. 2002). Equal division and division of each asset are not required as long as the overall division is equitable. *Ferguson* at 927 (Miss. 1994). The Chancellor clearly followed the necessary requirements to divide property in that she heard sworn evidence in open court and applied the requirements for equitable distribution of property according to the legal standards set out in *Ferguson*. (R. at 51-53).

Additionally, Ms. Luo claims that the Chancellor should have made findings of fact and conclusions of law. (Appellant's Brief, p. 7). The Mississippi Court of Appeals has stated that "to require a chancellor to make specific findings of fact and conclusions of law, according to *Ferguson*, either on the record or in an order in every uncontested chancery court matter in this State, when the defendant has already had the opportunity to have his day in court and has chosen not to take

advantage of it, is not justified.” *Luse v. Luse*, No. 2007-CA-00171-COA, decided July 1, 2008. Additionally, there is a presumption that sufficient evidence was heard to sustain a decree once it has been entered, and Ms. Luo presented no evidence to counter this presumption of correctness. *Id.* It is undisputed that Ms. Luo received proper notice and chose not to contest the divorce or be present at the hearing. (R. at 51). Accordingly, the Chancellor did not commit clear or manifest error by not making findings of fact and conclusions of law.

D. ISSUE III: THE CHANCELLOR WAS NOT MANIFESTLY IN
ERROR IN NOT AWARDING THE APPELLANT ANY
VISITATION WITH THE PARTIES MINOR CHILD

The chancellor has broad discretion regarding visitation. *Weigand v. Houghton*, 730 So.2d 581, 587 (Miss.1999). Restrictions on visitation can be placed if they are necessary to avoid harm to the child. *Dunn v. Dunn*, 609 So.2d 1277, 1286 (Miss.1992). As the divorce decree states, the Chancellor heard sworn evidence in open court and found that it was in the best interest of the child not to award visitation to Ms. Luo at that time. (R. at 51 and 54). There is a presumption that sufficient evidence was heard to sustain the decree once it has been entered, and Ms. Luo presented no evidence to counter this presumption of correctness. *Luse v. Luse*, No. 2007-CA-00171-COA, decided July 1, 2008. It is undisputed that Ms. Luo received proper notice and chose not to contest the divorce or be present at the hearing. (R. at 51). Accordingly, the Chancellor did not commit clear or manifest error by not awarding Ms. Luo visitation with the minor child.

It should be noted that in this matter the more appropriate procedure for Ms. Luo to gain visitation with the minor child would be to file a Petition for Modification of the Divorce Decree with the lower Court.

E. ISSUE IV: THE CHANCELLOR WAS NOT MANIFESTLY IN ERROR IN NOT AWARDING THE APPELLANT ALIMONY

Alimony awards are within the discretion of the chancellor, and his discretion will not be reversed on appeal unless the chancellor was manifestly in error in his finding of fact and abused his discretion. In the case of a claimed inadequacy or outright denial of alimony, we will interfere only where the decision is seen as so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion. *Armstrong v. Armstrong*, 618 So. 2d 1278 (Miss. 1993). The divorce decree states that the Chancellor heard sworn evidence in open court and found that neither party shall receive alimony from the other party. (R. at 51 and 54). Ms. Luo claims that the Chancellor committed manifest error by not making findings of fact and conclusions of law to support her finding. (Appellant's Brief, p. 10-11). As previously set out above, to require a chancellor to make specific findings of fact and conclusions of law either on the record or in an order in every uncontested chancery court matter in this State, when the defendant has already had the opportunity to have her day in court and has chosen not to take advantage of it, is not justified. *Luse v. Luse*, No. 2007-CA-00171-COA, decided July 1, 2008. As stated, there is a presumption that sufficient evidence was heard to sustain the decree once it has been entered, and Ms. Luo presented no evidence to counter this presumption of correctness. *Luse v. Luse*, No. 2007-CA-00171-COA, decided July 1, 2008. It is undisputed that Ms. Luo received proper notice and chose not to contest the divorce or be present at the hearing. (R. at 51). Accordingly, the Chancellor did not commit clear or manifest error by not awarding Ms. Luo alimony.

F. ISSUE V: THE CHANCELLOR WAS NOT MANIFESTLY IN
ERROR IN AWARDING THE APPELLEE WITH PARAMOUNT
CARE, CUSTODY AND CONTROL OF THE MINOR CHILD

The polestar consideration in child custody cases is the best interest and welfare of the child. The age of the child is subordinated to that rule and is but one factor to be considered. Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship. *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983). After applying all of the aforesaid factors to the sworn evidence heard in open court, the Chancellor found it to be in the best interest of the minor child for his paramount care, custody, and control to be with Mr. Henrichs. (R. at 51 and 54). Again, there is a presumption that sufficient evidence was heard to sustain the decree once it has been entered, and Ms. Luo presented no evidence to counter this presumption of correctness. *Luse v. Luse*, No. 2007-CA-00171-COA, decided July 1, 2008. It is undisputed that Ms. Luo received proper notice and chose not to contest the divorce or be present at the hearing. (R. at 51). Accordingly, the Chancellor did not commit clear or manifest error by not

awarding Ms. Luo custody of the minor child.

CONCLUSION

It is the position of Mr. Henrichs that Ms. Luo's arguments are procedurally barred and that there is substantial evidence to support the Chancellor's ruling. This case should be affirmed and the Appellee should be awarded fees and costs in defense of this appeal.

Respectfully submitted,

LAMAR & HANNAFORD, P.A.

John T. Lamar, Jr. MSB# [REDACTED]

John T. Lamar, III MSB# [REDACTED]

214 South Ward Street

Senatobia, MS 38668

Phone: (662) 562-6537

BY: 

JOHN T. LAMAR, JR.

Attorneys for Appellee


CERTIFICATE OF SERVICE

I, John T. Lamar, Jr., attorney for Appellee, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

Honorable Vicki B. Cobb, Chancellor
P.O. Box 1104
Batesville, MS 38606

David L. Walker, Esq.
P.O. Box 719
Batesville, MS 38606

This the 1st day of December, 2008.



John T. Lamar, Jr.
Certifying Attorney