

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOSEPH F. TATUM, III

APPELLANT

VERSUS

NO: 2008-CA-01858

LAUREN D. TATUM

APPELLEE

On appeal from the Chancery Court of Lamar County, Mississippi
Case No. 2007-0394-GN-W

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for Joseph F. Tatum, III certifies that the following listed persons have an interest in the outcome of this case. These representations are made for the purpose that the Justices of this Court may evaluate possible disqualification or recusal:

1. Appellant, Joseph F. Tatum, III
2. Appellee, Lauren D. Tatum (Fairey)
3. Michael V. Ratliff, Esq., and all counsel of Johnson, Hall and Ratliff
4. H. H. Klein, III, Esq.
5. David A. Pumford and all counsel of Erik M. Lowrey, P.A.
6. Hon. Johnny L. Williams, Chancellor

This the 13th day of August, 2009



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REQUEST FOR ORAL ARGUMENT

The Appellant, Joseph F. Tatum, III, submits that oral argument may be beneficial to the resolution of this case.

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STATEMENT OF THE ISSUES

- 1. THE CHANCERY COURT COMMITTED MANIFEST ERROR IN RELYING ON ASSUMPTIONS AND SPECULATION THAT WERE NOT SUPPORTED BY THE TESTIMONY AND EVIDENCE AT TRIAL AND ERRED AS A MATTER OF LAW IN ITS FAILURE TO PROPERLY CONSIDER THE *FERGUSON* FACTORS GOVERNING THE EQUITABLE DISTRIBUTION OF MARITAL ASSETS.**
- 2. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND COMMITTED MANIFEST ERROR IN ITS AWARD OF ALIMONY. THE AWARD OF ALIMONY IS UNSUPPORTED BY ANY SUBSTANTIAL, CREDIBLE EVIDENCE.**
- 3. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND FACT IN THE CALCULATION OF CHILD SUPPORT. THE CHANCERY COURT DID NOT MAKE AN ON THE RECORD ANALYSIS THAT WOULD JUSTIFY A DEVIATION FROM THE MISSISSIPPI CHILD SUPPORT GUIDELINES.**
- 4. THE DECISION OF THE CHANCERY COURT THAT PLACED THE SAVINGS FOR THE CHILDREN IN LAUREN'S NAME, RATHER THAN IN THAT OF BOTH PARTIES NAMES, OR THE CHILDREN'S NAMES ONLY, IS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE.**
- 5. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES. NO EVIDENCE WAS PRESENTED FOR WHICH THE CHANCERY COURT COULD MAKE A DETERMINATION FOR AN AWARD OF ATTORNEY FEES.**

STATEMENT OF THE CASE
AND RELEVANT PROCEDURAL HISTORY

This case involves a divorce action and concerns matters of child custody, child support and attendant expenses, as well as the equitable distribution of marital assets and liabilities, and alimony. The parties to this divorce are Lauren D. Tatum, now Fairey, since Lauren has since re-married, (Lauren), and Joseph F. Tatum III. (Joseph) A copy of the Chancery Court docket (CP 3-5) is contained in the Record Excerpts of Appellant (RE 1-3) as well as a copy of the Clerk's List of Papers. (CP 1-2) (RE 4-5) Throughout this Brief the transcript of Court proceedings shall be referenced "TR" by page number, the Clerks Papers are referenced "CP" and the Record Excerpts referenced "RE".

A Complaint for Divorce was filed by Lauren on September 19, 2007, alleging both fault grounds and irreconcilable differences. (CP 8-12) After service of process an Answer was filed by Joseph on October 8, 2007. (CP 17-20) An Order of Recusal was entered by Honorable James H.C. Thomas on October 11, 2007 (CP 25) and the Honorable Johnny L. Williams subsequently presided over the case. An Order for Temporary Support was entered on November 29, 2007 (CP 26-29) (RE 6-8) which was in part modified by the Agreed Order Authorizing Expenditure of Funds entered on February 7, 2008 (CP 30-31) (RE 10-11) and the Agreed Order Employing Service of An Appraiser entered on March 27, 2008. (CP 32-33) (RE 12-13) A Judgment of Divorce was entered on March 20, 2008, granting Lauren a divorce from Joseph on the statutory ground of adultery. (CP 34-35) (RE 14-15) The Court

took under advisement any remaining issues pending further hearings, including, but not limited to, child support, alimony and the division of marital assets. Trial continued on March 18, 2008, (TR 37) June 4, 2008 (TR 40) and June 25, 2008 (TR 189). The Court issued a bench ruling. (TR 277-308) (RE 24-55) The Court subsequently entered a Judgment Regarding Child Custody, Visitation, Distribution of Property and Support which was entered on October 1, 2008. (CP 36-48) (RE 16-23 and 56-63) Post-trial motions were filed by both Lauren (CP 45-48) and Joseph. (CP 49-53) (RE 64-68) An Order Overruling Motions was entered by the Court November 6, 2008. (CP 56) (RE 71) Joseph timely filed a Notice of Appeal on November 12, 2008, which is now perfected and before the reviewing Court. (CP 58-59)

STATEMENT OF THE FACTS

Lauren and Joseph were lawfully married on May 12, 2001, in Forrest County, Mississippi. A divorce was granted on March 20, 2008. At the time of trial the parties had been married for six years. (TR 37) Two children were born to the parties, namely Britton A. Tatum, born June 22, 2000, and Cara A. Tatum, born February 8, 2002. (CP 26) (RE 6) One of these children was born during the marriage. (TR 285) (RE 32)

The Order for Temporary Support, entered on November 29, 2007, provided that Joseph pay the sum of Three Thousand Eight Hundred Eleven Dollars (\$3,811.00) per month in temporary child support and spousal support. (CP 26) (RE 6) The Order also contained provisions for the payment of medical expenses for the minor children and awarded each

party Twenty-Five Thousand Dollars (\$25,000.00) each from a savings account which had a balance at that time of approximately Two Hundred Eight Thousand Dollars (\$208,000.00). The parties were permitted additional withdrawals contingent on both receiving the same amount. The Court ordered neither party to waste or to dissipate marital assets, provided joint legal custody with primary physical custody of the children to Lauren and reserved all remaining issues for trial.

At a trial on the merits twenty-four (24) exhibits were admitted into evidence, including the parties' respective Rule 8.05 financial statements and *Hemsley* summaries of marital assets and liabilities. (RE 72-73) The Court issued a bench opinion consisting of various findings of fact and conclusions of law, some of which are at issue in this appeal. Joseph also maintains that the Chancellor omitted or misapplied certain findings of fact and conclusions of law in both the bench opinion and subsequent Judgment.

The Chancery Court denied Lauren's request for sole legal custody of the minor children and awarded both parties joint legal custody. (TR 279) (RE 26) Based on the stipulation of the parties Lauren was awarded primary physical custody. Both parties also stipulated to a morality clause that neither party will have company overnight of the opposite sex while the children are in their custody and neither party would expose the children to abusive use of alcohol or drugs. (TR 277-278) (RE 24-25)

The Chancellor awarded Lauren a total of Four Hundred Eighty Seven Thousand Two Hundred Thirty-One Dollars and Seventy-Two Cents (\$487,231.72) in marital assets. In

addition, the Chancellor awarded Lauren Forty Eight Thousand Dollars (\$48,000.00) in rehabilitative alimony and Fifteen Thousand Five Hundred Dollars (\$15,500.00) in attorney fees. (CP 38-41) (RE 18-21) These amounts are in addition to the monies previously received by Lauren in attorney's fees and pursuant to the Temporary Order. Though the Chancellor stated that he was not going to consider the savings accounts containing funds for the minor children for either party for purposes of equitable distribution and valuation of the marital estate, the Chancellor stated that "she (Lauren) will be the owner of those." (TR 288) (RE 35) (CP 41) (RE 21) Joseph was awarded Four Hundred Nine Thousand Seven Hundred Dollars (\$409,700.00) in marital assets. (CP 38-41) (RE 18-21)

The Chancellor determined that, including a six month separation, the length of the marriage is close to seven years. The Chancellor characterized the length of the marriage to being "closer to being in the nature of long term." (CP 285) (RE 32) The Chancellor ordered Joseph to pay the following as Child and Marital Support:

- Child support at Seven Hundred Fifty Dollars (\$750) per child per month for a total of Fifteen Hundred (\$1,500)per month;
- Joseph pay all of the health insurance premiums for the children. Five Hundred Five Dollars (\$505) per month;
- Joseph pay three-quarters (3/4) of the medical costs not covered by insurance;
- Joseph to take out a Five Hundred Thousand Dollars (\$500,000) life insurance policy for the children;
- Joseph pay all of the tuition, registration, and student fees for the children at Sacred Heart School, or for any other private school the children may attend. Six Hundred Sixty Seven Dollars (\$667) per month;
- Joseph pay Lauren Forty-Eight Thousand Dollars (\$48,000) in rehabilitative alimony at the rate of \$2,000.00 per month.

(CP 42-23) (RE 22-23)

Based on the above figures, as referenced by the Court in its bench opinion and subsequent Judgment, as well as based on the information contained in Joseph's Rule 8.05 financial statement, (EX 1) (RE 74-86) the amount to be paid each month by Joseph under the Judgment is more than Four Thousand Six Hundred Eighty Two Dollars (\$4,682) per month, before life insurance premiums and the costs of extra-curricular activities are taken into account. This amount is also in excess of Joseph's net monthly pay of Four Thousand Two Hundred and Eighty Three Dollars (\$4,283). (EX 1) (RE 75)

The Court awarded Lauren attorney fees of Fifteen Thousand Five Hundred Dollars (\$15,500) in addition to the Four Thousand Five Hundred Dollars (\$4500) that Joseph had already contributed toward Lauren's attorney fees. (CP 48) (RE 23) No record was made by Lauren of any attorney fees expended on her behalf. The Chancery Court brought up the question of attorney fees itself, after Lauren had rested on her case in chief. (TR 298) (CP 45)

SUMMARY OF THE ARGUMENT

The Chancery Court made purely speculative findings of fact concerning certain purported "undisclosed" marital assets, findings which are not supported by the record. To do so was manifest error and denied Joseph a fair trial based solely on the testimony of the witnesses and the evidence admitted. As a result, the Chancery Court failed to properly consider the *Ferguson* factors and the applicable law governing the equitable distribution of marital assets and denied Joseph a fair trial based on the facts as established by the evidence admitted and the testimony of the witnesses at trial. Further, Lauren presented no evidence

on which this Court could make a determination for an award of 50% or more of the marital estate. The Court awarded Lauren principally liquid assets and awarded Joseph assets, that would incur substantial capital gains taxes as well as sales commissions to liquidate, and also awarded Lauren greater than 50% of the net marital estate. The Chancery Court made purely speculative findings of fact concerning Joseph coming from a "well to do family," findings which are not supported by the record. Even if this were proven to be the case, there is no evidence before the Court, or evidence for the Court to opine, that Joseph would have access or rights to any income or assets owned by members of his extended family. The Chancery Court further ignored the fact that because Lauren is awarded the former marital home, free and clear of debt, Joseph will have to find another home, pay for it and take out a mortgage. Further, the Court did not account for Joseph's actual liabilities, income and assets as put into evidence at trial, but relied on speculative reasoning concerning his extended family's potential wealth which is not supported by the record. The Chancery Court did not account in its monetary awards for the fact that Lauren received over \$53,000.00 in temporary relief, or give Joseph credit for the same when considering matters of equitable distribution and support.

The award of alimony to Lauren was not justified. Unreasonable financial hardship is created for Joseph as a result of this award to the extent that he is left no remaining income after the award. Because Lauren has been left with no deficit after the equitable distribution of marital assets, to award Lauren any form of alimony was not justified under the facts of this

case. Lauren presented no evidence on which this Court could make a determination for an award of alimony. Lauren has a college education, is young, healthy and has the ability to support herself through her own employment. The Chancery Court characterized the marriage as a “medium to long term marriage” and again relied on speculation outside of the record to justify an award of alimony.

The Chancery Court did not make an on the record analysis that would justify a deviation from the Mississippi Child Support guidelines and child support should have been set at the statutorily presumptive amount of 20% of \$50,000.00. Further, Lauren presented no evidence on which this Court could make a determination for an award of more than 20% of \$50,000.00. The Chancery Court erred when it placed the savings for the children in Lauren’s name, rather than in that of either both parties’ names or the children’s names only. The Chancery Court assessed private school tuition and three quarters (3/4) of the medical expenses for the children against Joseph, in addition to exceeding the statutory presumption concerning child support. There is no basis in the record to support such an imbalanced responsibility for these additional financial needs of the children, the same exceeds Joseph’s ability to pay, and leaves Joseph without sufficient available income for himself to live upon.

The Chancery Court failed to properly consider the *McKee* factors and the applicable law governing attorney fee awards and to enter specific findings and conclusions based on each factor. Further, Lauren presented absolutely no evidence upon which the Chancery Court could make a determination for an award of attorney fees.

STANDARD OF REVIEW

Findings of the Chancellor will not be disturbed or set aside on appeal unless the decision of the trial court is manifestly wrong and not supported by substantial credible evidence, abused its discretion, or unless an erroneous legal standard was applied. *Sarver v. Sarver*, 687 So.2d 749, 753 (Miss. 1997); *Southerland v. Southerland*, 875 So.2d 204, 206 (Miss. 2004). Where there is a question of law, the standard of review is *de novo*. *Morreale v. Morreale*, 646 So.2d 1264, 1267 (Miss. 1994).

ARGUMENT

- 1. THE CHANCERY COURT COMMITTED MANIFEST ERROR IN RELYING ON ASSUMPTIONS AND SPECULATION THAT WERE NOT SUPPORTED BY THE TESTIMONY AND EVIDENCE AT TRIAL AND ERRED AS A MATTER OF LAW IN ITS FAILURE TO PROPERLY CONSIDER THE *FERGUSON* FACTORS GOVERNING THE EQUITABLE DISTRIBUTION OF MARITAL ASSETS**

It is the role of the Chancery Court to classify assets as either marital or non-marital, to value those assets and to make an equitable distribution of those assets and liabilities between the parties as required by the Mississippi Supreme Court in *Ferguson v. Ferguson*, 637 So.2d 921 (Miss. 1994); *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994); *Johnson v. Johnson*, 650 So.2d 1281 (Miss. 1995) and their progeny.

The Chancery Court classified the marital assets and found various personal property belonging to Joseph to be separate property, the value of which Joseph estimated to be Forty

Two Thousand Four Hundred Twenty Dollars (\$42,420.00). The household furnishing and personal property awarded to Lauren were valued by the Chancellor at Forty Three Thousand Dollars (\$43,000). The Court made the following findings and conclusions on the record concerning the division of marital property:

“Now, Joseph has other non-marital property, which we do not know the value of. Part of it would be in the form of trusts; part of it would be in the form of some investments that are held through some manner or some entity that has been created by his father or his parents, and I point this out because it indicates that Joseph is somehow in a better financial position than Lauren, and the Court is cognizant of that fact as the Court goes through *Ferguson* to make the division of marital assets as the Court is about to do. That to some extent will influence how the Court will rule and view its decision on the division of the various marital assets.”

(TR 281) (RE 28)

When considering some of the *Ferguson* factors the Chancellor again went outside of the record and evidence at trial in stating that “It’s not denied that Joseph comes from one of the most well to do families on our community.” (TR 296) (RE 43)

The Court noted in its bench ruling that most of the assets accumulated during the marriage came from direct economic contributions from Joseph, either through his own efforts, or as a result of gifts from his family and that Joseph was the primary breadwinner while Lauren was primarily a stay at home mom. (TR 282) (RE 29)

The Court observed that the marital estate was valued by Joseph to be Nine Hundred Seventy One Thousand Dollars (\$971,000.00) and by Lauren at One Million and Forty Four Thousand Dollars (\$1,044,000.00). (TR 283) (RE 30) The Chancellor made a determination

to value the marital estate at One Million Dollars (\$1,000,000). (CP 38) (RE 18) The Chancellor determined that the assets were to be divided equally. The Chancellor noted that even though most of these assets came to Joseph through inheritance, gifts and his own income, the Chancellor stated as follows:

“I’m going to divide it equally because of the other assets that Joseph may have, and I’m going to consider that he’s going to be a lot better off financially than Lauren will, so I’ve determined to just split the assets down the middle.”

(TR 285) (RE 32)

Ultimately Lauren was awarded the following, the figures either taken from the Chancellor’s Opinion, or, where not specified, consistent with Lauren’s own *Hemsley* Summary, in evidence as Exhibit 21:

Former marital home:	\$240,000.00
Household items	\$41,000.00
Regions Bank Account	\$7,300.00
Toyota Highlander	\$30,000.00
Checking account at Trustmark	\$51.10
Lauren’s IRA	\$11,277.47
Trustmark money market	\$106,703.15
Cash	\$50,000.00
One half of stimulus check	\$900.00
Total	\$487,231.72

Lauren was also awarded the following:

Attorneys fees:	\$15,500.00
Rehabilitative alimony	\$48,000.00
Total	\$63,500.00
 Grand Total to Lauren	 \$550,731.72*

*This figure does not include the additional Fifty Three Thousand Dollars (\$53,000.00) that Lauren was awarded in temporary relief.

Joseph was awarded the following:

Luxury Holdings Properties	\$381,000.00
Joseph's Trustmark Checking	\$7,000.00
Luxury Holdings Account	\$5,400.00
Luxury Properties Account	\$900.00
Tidewater Boat	\$12,000.00
Bad Boy Buggy	\$2,500.00
One half of stimulus check	\$900.00
Total	\$409,700.00

(CP 38-41) (RE 18-21)

In the case at bar the Chancery Court made purely speculative findings of fact concerning certain purported "undisclosed" marital assets, findings which are not supported by the record. Chancellors are bound to rely upon the facts and record as presented, not upon speculation. *Cosentino v. Cosentino*, So.2d 1065, 1069 (Miss. Ct. App. 2008).

The reviewing Court must ask what evidence, if any, was in the record to support these suppositions. Joseph's father, Joseph F. Tatum, Jr. (known as "Chip" Tatum.) Chip testified that he is the chairman and secretary/treasurer of Loresco, a manufacturing company in Hattiesburg, Mississippi, that is also Joseph's employer, the company being wholly owned by Chip and his wife, Mary S. Tatum, who are also the Board of Directors for that corporation. (TR 223-224) Joseph is not a stockholder, nor is he on the Board of Directors. Joseph's salary is determined by Chip as any other employee would be. The same applies to bonuses which are not automatically payed but based upon performance. (TR 225) Chip also stated that the divorce proceedings were irrelevant to any decisions made by the company regarding whether

or not to award bonuses. (TR 231)

Chip also testified concerning certain mineral interests which had been conveyed in part to Joseph, specifically regarding Exhibits 22 and 23 which were in evidence and are part of the record on appeal. (TR 225-226) Exhibit 22 is a letter from Chip which was corroborated and authenticated by his testimony at trial. Exhibit 23 is the deed of conveyance. In the letter in evidence as Exhibit 22 Chip states that "Joseph was gifted in 2005 with .00636232 fractional ownership of Tatum Mineral Partnership LP. This ownership came from a Bernice S. Tatum Trust, which was administered by my father. At the closure of the trust in 2005, the fractional ownership was distributed to the great grand children of Bernice S. Tatum." Chip also stated that this mineral interest was, for all intents and purposes practically worthless. (EX 22) This was the extent of any evidence offered and admitted at trial regarding Joseph's family or assets outside of the marital estate. There were no "undisclosed assets" on the part of Joseph.

Lauren presented no evidence on which this Court could make a determination for an award of 50% or more of the marital estate. The Court awarded Lauren all liquid assets and awarded Joseph assets that would incur substantial capital gains taxes to liquidate and awarded Lauren greater than 50% of the net marital estate. The Chancery Court also failed to account for the fact that Lauren received over \$53,000.00 in temporary relief, or give Joseph credit for the same when considering matters of equitable distribution under *Ferguson*. (CP 26-28) (RE 6-8) (CP 30-31) (RE 10-11).

Because the Chancery Court failed to properly consider the *Ferguson* factors and the applicable law governing the equitable distribution of marital assets, because the Court went beyond the record and relied on its own suppositions and speculation, which also had an impact on the Court's consideration of alimony, Joseph should be granted a new trial on the issue of the equitable distribution of marital assets, as well as on the issue of the award of any form of alimony.

2. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND COMMITTED MANIFEST ERROR IN ITS AWARD OF ALIMONY. THE AWARD OF ALIMONY IS UNSUPPORTED BY ANY SUBSTANTIAL, CREDIBLE EVIDENCE.

Joseph incorporates herein by reference his analysis of the Chancery Court's findings, rulings and judgment under the *Ferguson* discussion herein above in the context of equitable distribution of assets and liabilities. One of the principal goals for equitable distribution is to alleviate the need for alimony. *Ferguson v. Ferguson*, 63 So.2d 921, 929 (Miss. 1994). An award of alimony should only be considered where a situation exists that an equitable division of marital assets leaves a deficit for one party. *Sellers v. Sellers*, No. 2007-CA-01459-COA (Miss. Ct. App. 2009); *Franks v. Franks*, 759 So.2d 1164, 1167 (Miss. 1999); *Knutson v. Knutson*, 704 So.2d 1331, 1333 (Miss. 1997). In the case at bar Lauren was awarded more than half of the marital assets, a home free and clear of any debt, and was left with no debts whatsoever, other than her student loans, which totaled only Three Thousand Three Hundred Eighty Dollars and Fifty-Eight Cents (\$3,380.58). (EX 10) Lauren was also awarded child support in excess of the guidelines and did not have to pay medical insurance

or tuition costs for the children. (CP 36-43) (RE 16-23) It can hardly be said that Lauren would be left with a deficit. Even without taking these factors into consideration, the award of almost half a million dollars and virtually no debt, representing more than one half of the marital estate, does not leave Lauren at a deficit. As stated by the Mississippi Court of Appeals in *Sellers*, where there is no deficit suffered after an equitable division of the marital estate, the Chancery Court manifestly errs in awarding alimony. *Sellers v. Sellers*, No. 2007-CA-01459-COA (Miss. Ct. App. 2009). Where the record does not support a finding that the equitable division of the marital estate leaves one party at a deficit an award of alimony shall be reversed. *Cosentino v. Cosentino*, So.2d 1065, 1068 (Miss. Ct. App. 2008). The purpose of rehabilitative alimony is to ensure that the less able party is not left destitute. *Hubbard v. Hubbard*, 656 So.2d 124, 130 (Miss. 1995).

The Chancery Court failed to properly consider the *Armstrong* factors and the applicable law governing alimony awards and to enter specific findings and conclusions based on each factor. The Chancery Court characterized the marriage as a “medium to long term marriage.” In fact, this is a relatively short term marriage, a marriage of six years and seven months. Lauren presented insufficient evidence on which the Chancery Court could make a determination for an award of alimony. Lauren presented no evidence that she would suffer a deficit without an award of alimony. Lauren has a degree in psychology and worked at Hattiesburg Clinic from 1995-2001 running a printing center. Lauren is in good health (TR 111-112) The record and evidence at trial reflects that in terms of their age, health and

earning capacity, the parties are on a level playing field. Lauren has a college education, is young, healthy and will have the ability to support herself through her own employment. (TR 295) (RE 42)

The Chancery Court also ignored the fact that because Lauren is awarded the former marital home, free and clear of debt, Joseph will have to find another home, pay for it and take out a mortgage. Further, the Court did not account for Joseph's actual liabilities, income and assets as put into evidence at trial, but again relied on speculative reasoning concerning his extended family's potential wealth which is not supported by the record. Neither did the Chancery Court account in its monetary awards for the fact that Lauren received over \$53,000.00 in temporary relief, or give Joseph credit for the same when considering matters of equitable distribution and support. (CP 26-28) (RE 6-8) (CP 30-31) (RE 10-11).

The Chancery Court made purely speculative findings of fact concerning Joseph coming from a "well to do family," findings which are not supported by the record. Even if this were proven to be the case, there is no evidence before the Court, or evidence for the Court to opine, that Joseph would have access or rights to any income or assets owned by members of his extended family. Chancellors are bound to rely upon the facts and record as presented, not upon speculation. *Cosentino v. Cosentino*, So.2d 1065, 1069 (Miss. Ct. App. 2008)

The total amount of support to be paid each month by Joseph under the Judgment is more than Four Thousand Six Hundred Eighty Two Dollars (\$4,682) per month before life

insurance premiums and the costs of extra-curricular activities are taken into account. This amount is also in excess of Joseph's net monthly pay of Four Thousand Two Hundred and Eighty Three Dollars and Eighty-Seven Cents (\$4,283.87). (EX 1)(RE 75) A Chancery Court commits manifest error where the amount ordered to be paid would exceed the ability of the non-custodial parent to pay. *Sellers v. Sellers*, No. 2007-CA-01459-COA (Miss. Ct. App. 2009) Because of the financial hardship created for Joseph as a result of this award and because Lauren has been left with no deficit after the equitable distribution of marital assets, Joseph respectfully requests that the appellate Court reverse and render the Judgment of the Chancery Court and decline to award Lauren any form of alimony.

3. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND FACT IN THE CALCULATION OF CHILD SUPPORT. THE CHANCERY COURT DID NOT MAKE AN ON THE RECORD ANALYSIS THAT WOULD JUSTIFY A DEVIATION FROM THE MISSISSIPPI CHILD SUPPORT GUIDELINES.

The Chancery Court did not make an on the record analysis that would justify a deviation from the Mississippi Child Support guidelines and child support should have been set based on either Joseph's net monthly income at the time of trial, or at the statutorily presumptive amount of 20% of \$50,000.00. Lauren presented no evidence on which this Court could make a determination for an award of more than 20% of \$50,000.00.

Miss. Code Ann. § 43-19-101 (2004) provides guidelines for child support and further states that the Chancery Court is to provide written findings to support any deviation up or down from the child support guidelines. For a Chancery Court to deviate from the statutory

presumption of 20% for two minor children, the deviation must be supported by written findings of fact to explain the deviation and to explain why the presumptively correct amount is not appropriate. *Thompson v. Thompson*, 894 So.2d 603 (Miss. Ct. App. 2004). The Chancery Court Order must state explicitly that the amount of child support produced through the application of the child support guidelines is “unjust or inappropriate.” *Yelverton v. Yelverton*, 961 So.2d 19, 27 (Miss. 2007).

The calculations made by the Chancery Court with respect to child support payments to Lauren for the two minor children are not supported by the record and the evidence as presented at trial and there were no findings of fact or conclusions of law as required by the applicable law to justify a deviation. The Chancery Court has awarded child support in the amount of Fifteen Hundred Dollars (\$1,500) per month. (CP 42-23) (RE 22-23) Joseph’s net monthly income is Four Thousand Two Hundred Eighty Three Dollars and Eighty Seven Cents. (\$4,283.87) (EX 1) (CP 75) His basic child support obligation as ordered by the Chancellor is therefore over thirty five per-cent (35%) of his net monthly income. The guideline child support amount at 20% would be Eight Hundred Fifty Seven Dollars and Seventy-Seven Cents (\$857.77) for two children. The Chancellor awarded almost double this amount.

The Chancery Court also assessed private school tuition and three quarters of the medical expenses for the children against Joseph, in addition to exceeding the statutory presumption concerning child support. (CP 42-23) (RE 22-23) Private school tuition would

ordinarily be expected to be included in the basic support award. *Roberts v. Roberts*, 924 So.2d 550, 553-54 (Miss. Ct. App. 2005). Assessment of educational and other expenses to the non-custodial parent which, in combination with the initial award of child support, exceed the statutory child support guideline presumption, must be supported by findings of fact by the Chancellor, as the award is treated as a deviation from the child support guidelines. *Chesney v. Chesney*, 828 So.2d 219, 221 (Miss. Ct. App. 2002). The additional cost to Joseph is Five Hundred Five Dollars (\$505) per month for health insurance for the children and Six Hundred Sixty Seven Dollars (\$667) for private school expenses. This brings his total child support awarded by the Court to a figure of Two Thousand Six Hundred Seventy Two Dollars (\$2,672). This equates to more than sixty percent (60%) of Joseph's net monthly income.

There is no basis in the record or the respective financial disclosures of the parties to support such an imbalanced responsibility for the financial needs of the children, the same exceeds Joseph's ability to pay, and leaves Joseph without sufficient available income for Joseph himself to live upon. Joseph respectfully requests that the appellate Court reverse and render to award the statutory child support guideline amount of support, or in the alternative to reverse and remand this issue to the Chancery Court, with instructions to establish and apply the statutory child support guideline amount of support.

4. **THE DECISION OF THE CHANCERY COURT THAT PLACED THE SAVINGS FOR THE CHILDREN IN LAUREN'S NAME, RATHER THAN IN THAT OF BOTH PARTIES NAMES, OR THE CHILDREN'S NAMES ONLY, IS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE**

The Chancery Court placed the savings for the children in Lauren's name, rather than in that of either both parties' names or the children's names only. To do so was plain error and an abuse of discretion. There is no factual, legal or logical reason for doing so. The best interests of the children are not served by placing savings in the name of one parent over another. There is no dispute between the parties in this case that there are two bank accounts which properly belong to the minor children. The funds in these accounts came principally from Joseph. (TR 249-251) Though the Chancellor stated that the children's accounts were not being considered for equitable distribution, he allowed them to be kept in Lauren's name only, without restriction. Lauren could withdraw those funds in any way she elects to do so at any time. In lieu of establishing a formal guardianship account, a sensible and obvious safeguard would be to place the account in the names of both parents or at the very least in the names of the children only. If the Judgment is left to stand, if something were ever to happen to the children, the funds would belong to Lauren as a matter of law, a result contrary to the stated intention of the Chancery Court to exclude these funds from Lauren's portion of the marital estate.

5. THE CHANCERY COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES. NO EVIDENCE WAS PRESENTED FOR WHICH THE CHANCERY COURT COULD MAKE A DETERMINATION FOR AN AWARD OF ATTORNEY FEES.

The Chancery Court awarded Lauren attorney fees of Fifteen Thousand Five Hundred Dollars (\$15,500) in addition to the Four Thousand Five Hundred Dollars that Joseph had

already contributed toward Lauren's attorney fees. (CP 48) (RE 23) No record was made by Lauren of any attorney fees expended on her behalf. The Chancery Court brought up the question of attorney fees itself, after Lauren had rested on her case in chief:

THE COURT: Now what about attorneys' fees?

MR. RATLIFF: Yes, sir. Your Honor, the law is that –

THE COURT: Well, I haven't seen any. How much attorneys' fees did you ask for?

MR. RATLIFF: Well, we asked for them but we haven't calculated our bill through today. We can do that and submit that to the Court

THE COURT: I need to know that now.

MR. LOWREY: Your Honor, attorneys' fees, if I may, are only payable if in fact she can't afford it. You have just made her able to afford it. Now, with the testimony which previously that we – Joseph had already paid a \$4,500 amount to her attorneys' fees. There is no bill. They can't reopen the case. There's been no submission of attorney fees.

THE COURT: Well they asked for them. They did ask for them.

MR. LOWREY: They may have asked for them, but they didn't prove them.

THE COURT: They asked for them, though.

MR. LOWREY: No, they didn't ask for them.

MR. KLEIN: Yes, we did.

THE COURT: We know they have attorneys' fees.

MR. LOWREY: I didn't – no, it's not a question of we know they have attorneys' fees.

THE COURT: Well, here's what I'm going to do. I'm going to award an additional \$15,500 in attorneys' fees. It will be \$20,000.

(TR 298-299) (CP 45-46)

In *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1990) the Mississippi Supreme Court set forth certain factors to be considered by lower Courts in making an award of attorney's fees: financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, the time and labor required, the customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case. The burden is on the party requesting attorney's fees to prove an inability to pay. *Rodriguez v. Rodriguez*, No. 2007-CA-00132-COA (Miss. Ct. App. 2009) Lauren offered not one shred of evidence concerning any of the factors set forth in *McKee* during her case in chief. There is not even an itemization of time or attorney fee bills contained in the record. Absent evidence in the record to support an award of attorney fees none can be awarded. See also *Powell v. Powell*, 644 So.2d 269, 276 (Miss. 1994); *Carpenter v. Carpenter*, 519 So.2d 891 (Miss. 1998); *Suess v. Suess*, 718 So.2d 1126, 1129-30 (Miss. Ct. App. 1998); *Sessums v. Vance* No. 2008-CA-00198-COA (Miss. Ct. App. 2009).

The Chancery Court failed to properly consider the *McKee* factors and the applicable law governing attorney fee awards and to enter specific findings and conclusions based on each factor. Further, Lauren presented absolutely no evidence whatsoever at trial on which

the Chancery Court could make a determination for an award of attorney fees and to do so was erroneous as a matter of law and an abuse of discretion. As stated by the Chancellor himself on the record, concerning attorney fees for Lauren, “Well, I haven’t seen any.” (TR 298-299) (CP 45-46)

Counsel for Joseph also specifically requested that the Chancery Court state specifically and set forth separately its findings of fact and conclusions of law in this case pursuant to MRCP 52 (a). (CP 49-53) (RE 64-68) When a party requests specific findings of fact and conclusions of law, it is error for the court to fail to make such findings. *Miss. Dep’t of Transp. v. Trosclair*, 851, So.2d 408 (Miss. Ct. App. 2003). Where the underlying facts are disputed and there are issues of credibility, the court errs in not making specific findings of fact and conclusions of law. *Patout v. Patout*, 733 So.2d 770 (Miss. 1999) The Court made no specific findings of fact or conclusions of law concerning the attorney fees award, nor could it have done. Because Lauren put on absolutely no proof concerning an award of attorney fees it was manifest error, an abuse of discretion and erroneous as a matter of law for the Chancellor to make any award of attorney fees and Joseph requests that the reviewing Court reverse and render as to the award of any attorney fees to Lauren.


CONCLUSION

For the foregoing reasons Joseph respectfully requests that the appellate Court reverse and remand the decision of the Chancellor as to the award and equitable distribution of marital assets to Lauren and to reverse and render as to the award of periodic alimony and attorney fees to Lauren. Joseph further respectfully requests that the appellate Court reverse and render to award the statutory child support guideline amount of support only. Alternatively, Joseph requests that the appellate court reverse and remand this matter to the Chancery Court of Lamar County for a new trial.

RESPECTFULLY SUBMITTED this the 13th day of August, 2009

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOSEPH F. TATUM, III

APPELLANT

VERSUS

NO: 2008-CA-01858

LAUREN D. TATUM

APPELLEE

CERTIFICATE OF SERVICE AND FILING

I, David A. Pumford, do hereby certify that I have this date mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following persons at their usual mailing addresses:

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I, David A. Pumford, Attorney for the Appellant, hereby certify that I have actually mailed this date the Original and three copies of the Brief of the Appellant to the Mississippi Supreme Court.

THIS, the 13th day of August, 2009



David A. Pumford

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