

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2009- CA- 00833

CHRISTOPHER PAUL SEGHINI

APPELLANT

VS.

KRISTY LEE SULLIVAN SEGHINI

APPELLEE

Appeal from the Chancery Court of Simpson County, Mississippi

BRIEF OF APPELLANT

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

Defendant/Appellant:

Christopher Paul Seghini

Counsel for Defendant/Appellant:

Chris D. Hennis
Mark K. Tullos

Plaintiff/Appellee:

Kristy Lee Sullivan Seghini

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Respectfully submitted,


Chris D. Hennis

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Statement Of The Issues

The issues are:

1. Whether the chancery court committed manifest error in failing to make specific findings of fact on the record before making its award of child support, its division of marital property and its award of alimony.
2. Whether the chancery court committed manifest error in failing to conduct an on the record analysis of the factors set forth in *Ferguson* and in its failure to consider the money derived from the foreclosure sale of the marital home as marital property.
3. Whether the chancery court erred in its award of permanent periodic alimony and whether the court below properly applied the factors set forth in *Armstrong*.
4. Whether the chancery court's automatic increase in child support was an improper anticipatory modification or an improper escalation clause.
5. Whether the chancery court abused its discretion in denying Chris relief from the judgment under Rule 60(b)(1).
6. Whether the chancery court committed manifest error by finding Chris in contempt of court and ordering him incarcerated.

Statement Of The Case

1. Nature Of The Case.

This is a divorce case involving Kristy Lee Sullivan Seghini and Christopher Paul Seghini. Kristy and Chris were married on February 19, 2000. They resided in Simpson County, Mississippi, until their separation at the end of May 2007 in Simpson County. During the course of their marriage they had two sons, Alexander Mason Seghini and Emerson Chandler Seghini, who were seven and two years of age, respectively, at the time the trial was held in this case.

During their marriage, Chris was self-employed as a trim carpenter which was his primary source of income and his primary vocation. Chris also worked as a police officer for the Town of Mendenhall for a period of time. As a police officer, Chris worked under Kristy's father, who was the Chief of Police for the Town of Mendenhall during that period. Kristy held various jobs during the marriage, which included working at a bank and a daycare, before becoming a nurse. (Tr. at 50-51).

At the trial, Chris admitted to committing adultery during the marriage and the Court rightly granted Kristy a divorce based on Chris' uncondoned adultery.

2. Course Of The Proceedings.

On August 17, 2007, Kristy filed a Complaint for Divorce against Chris in the Chancery Court of Simpson County, Mississippi. Kristy alleged as grounds for divorce, Chris's uncondoned adultery. On January 28, 2008, the parties entered into an Agreed Temporary Order which awarded Kristy temporary custody of the children with Chris having visitation every other weekend. Chris agreed to pay Kristy \$484.00 per month as temporary child support. The order also awarded Kristy temporary use and possession of the marital home with Chris being responsible for paying Kristy an additional sum of \$516.00 for the monthly mortgage note and

other incidental bills.

At the trial of this case, Chris testified that he was not sure what his monthly income was and that he was estimating on his 8.05 financial statement based on past years tax returns. (Tr. at 18).

The court below, at the close of proceedings, granted Kristy a divorce on the grounds of Chris' uncondoned adultery. The court also awarded Kristy the complete care, custody and control of the two minor children and granted Chris standard visitation with the children. The court further ordered Chris to pay \$500.00 per month as child support to Kristy and to pay her vehicle note until her vehicle was paid in full, and at such time, his child support would increase to \$650.00 per month.

Chris was ordered to pay all the marital debt with the exception of his life insurance policy and a small indebtedness to PriorityOne Bank which Kristy was ordered to pay. The court also ordered Chris to pay Kristy \$500.00 per month as permanent periodic alimony.

Chris timely filed his post trial motions requesting a new trial, to reopen the record to receive new evidence and a Rule 60(b) motion alleging that Kristy had made material misrepresentations to the court regarding the marital home and the supposed foreclosure that had taken place. Kristy filed an Answer and Counter-Complaint for Contempt in response to Chris' post trial motions.

Chris's post trial motions and Rule 60(b)(1) motion were denied. At the contempt hearing, Chris was found to be in contempt of the court's divorce decree in the amount of \$5,695.09 and was given twenty-four hours to pay that amount before being incarcerated. Chris was also ordered to pay Kristy \$3,000.00 in attorney's fees for the contempt hearing.

3. Disposition In The Court Below.

The trial court granted Kristy a divorce based on Chris' uncondoned adultery during the course of the marriage. The trial court was correct in granting the divorce on this grounds and Chris does not wish to have this part of the trial court's judgment examined because he has since remarried.

The trial court did not make a specific findings of fact and conclusions of law regarding Chris's monthly adjusted gross income or how it reached its figures regarding its financial awards. That was error.

The trial court awarded Kristy \$500.00 per month permanent alimony. (Tr. at 112-113). That was error.

The trial court awarded Kristy \$500.00 per month as child support to be increased to \$650.00 per month once Chris paid off Kristy's vehicle note. The chancellor ordered this automatic increase without making any specific findings of fact or conclusions of law to support the automatic increase in child support. (Tr. at 109 & 111). That was error.

The Court below failed to consider the excess bid that was made on the marital home when it was foreclosed on by Kristy's grandfather. The proceeds of the excess bid should have been considered marital property but was not reflected on Kristy's 8.05 financial statement. (Tr. at 112). That also was error.

The trial court abused its discretion by failing to grant Chris's Rule 60(b) motion for Kristy's material misrepresentations and fraud on the court regarding her testimony about the status of the marital home during the trial. (Tr. at 67-69, 86, 88 & 104). That also was error.

The court below found Chris in contempt for failure to meet his obligations under the Court's Final Judgment of Divorce. That was error.

The court ordered Chris to be incarcerated in the Simpson County jail until such time as he purged himself of contempt. The chancellor only allowed Chris a period of twenty-four hours to purge his contempt before ordering him to report to the custody of the Simpson County Sheriff. That also was error. This appeal followed.

4. Statement Of The Facts.

Kristy Lee Sullivan Seghini and Christopher Paul Seghini were married on February 19, 2000. They resided in Simpson County, Mississippi, until their final separation from each other at the end of May 2007, in Simpson County. During the course of their marriage they had two sons, Alexander Mason Seghini and Emerson Chandler Seghini, who were seven and two years of age, respectively, at the time of trial.

During their marriage, Chris was primarily self-employed as trim carpenter which was his primary source of income and his primary vocation. Chris also worked as a police officer for the Town of Mendenhall for a period of time. As a police officer, Chris worked under Kristy's father, who was then the Chief of Police for the Town of Mendenhall. Kristy held various jobs during the marriage, including working at a bank and a daycare, before becoming a nurse. (Tr. at 50-51).

At the trial, Chris admitted to committing adultery during the marriage and the Court granted Kristy a divorce based on Chris' uncondoned adultery.

Summary of the Argument

During the course of the trial, Chris Seghini testified that he did not know what he made each month and that he had completed his 8.05 financial statement using past years income tax returns as a guide to estimate his current monthly income at \$3,200.00. The court below said that

unless someone presented more proof of what his income actually was that it would have to pull a figure out of the air.

The trial court was required to make findings of fact regarding what it determined Mr. Seghini's adjusted monthly gross income was when it ordered Mr. Seghini to pay child support, alimony and the bulk of the other marital debt. The failure of the chancery court to state its determination of Chris's adjusted monthly gross income affects each and every aspect of the financial awards made in this case. The Court must conclude that the trial court committed manifest error by not making findings of fact on the record regarding Mr. Seghini's monthly adjusted gross income.

The trial court failed to make any findings of fact related to the factors set forth in *Ferguson* when making its equitable division of marital property and debt. The failure to make such on the record findings of fact was manifest error, affecting not only the division of marital property, but also the court's award of permanent periodic alimony.

The court below wrongly based its alimony award partly on the material misrepresentations made by Kristy Seghini during her testimony while testifying regarding the marital home and her living arrangements. The Court must conclude that the material misrepresentations made by Kristy influenced the court below's decision based on the trial court's clear reliance on her representations when issuing its judgment.

The court below erred in not taking into consideration the excess bid made by Kristy's grandfather on the marital home at the foreclosure sale. The court deflected any argument regarding the foreclosure sale and the excess bid which was made on the home, and refused to consider what happened to the monies paid in excess of the principal owing on the mortgage at

the time of the foreclosure. Clearly, this \$27,907.00 (as reflected on Kristy's 8.05) should have been considered by the trial court when making its financial awards in this case.

The facts presented at trial do not support the chancellor's award of permanent periodic alimony in this case. The chancellor made only a cursory on the record findings of fact regarding some of the factors set forth in *Armstrong* to support its award of alimony. The facts developed during the trial do not support the alimony award and are not sufficient for this Court to conduct an independent review of the chancellor's decision.

Chris was ordered to pay Kristy's monthly vehicle note until the debt was retired. Once Kristy's vehicle was paid for, Chris was ordered to increase his monthly child support payment from \$500.00 per month to \$650.00 per month. There was no findings of fact offered by the court to support a future substantial and material change in circumstances. Therefore, this automatic increase is an anticipatory modification not supported by on the record findings of fact by the chancellor. Alternatively, the trial court was attempting to insert an escalation clause into its judgment. This was also improper as there was no on the record discussion and findings of fact by the court regarding the factors which an escalation clause must be related to.

At the hearing of Kristy's Counter-Petition For Contempt filed in response to Chris's post trial motions, Chris was found to be in contempt of court and given twenty-four hours to purge his contempt or be incarcerated.

Chris testified at the contempt hearing that he had only earned approximately \$1,600.00 per month from January 1, 2009 through April 30, 2009 when the contempt hearing took place. His amended 2008 Federal Income Tax Returns supported his testimony regarding what he averaged per month as income from his employment. As the testimony clearly proved, Chris's

monthly obligations under the court's Final Judgment of Divorce exceeded his monthly bring home income, and thus, the trial court erred in finding Chris in wilful contempt of the Court's judgment.

Chris was given until 5:00 p.m. the day after the contempt hearing to pay Kristy the money for which he was found owing and for which he was in contempt of court. If Chris failed to purge his contempt by 5:00 p.m. the next evening, he was to report to the custody of the Simpson County Sheriff until such time as he purged himself of his contempt. Chris, being unable to purge his contempt, reported to the Simpson County Sheriff at 5:00 p.m. the next evening. He remained incarcerated for contempt for approximately forty days before posting an appearance bond.

The trial court committed manifest error and abused its discretion in ordering that Chris be incarcerated unless he paid the full amount of which he was found to be in contempt of court. The evidence and testimony was clear and convincing that Chris did not have sufficient income to pay the arrearage and there was no evidence or testimony illicit during the contempt hearing proving that Chris had savings or assets sufficient to pay the arrearage in full. Also, there was no evidence put forth at the contempt hearing to disprove what Chris claimed to be his monthly income. Thus, the Court erred in ordering Chris to be incarcerated for contempt.

Argument

The court below was required to make specific findings of fact regarding Chris Seghini's income, without which, this Court cannot possibly determine whether the award of child support, alimony, and the division of property were supported by the credible evidence offered at the trial.

I. The Chancery Court Erred As A Matter Of Law In its Failure To Make Specific Findings Of Fact As To Chris Seghini's Income Before Making An Award Of Child Support, Periodic Alimony, And A Division Of Property And Debt.

A. Mississippi Code Annotated Section 43-19-101(3)(a)-(b) Requires A Trial Court To First Determine A Payor's Adjusted Gross Income Before Awarding Child Support.

The trial court erred in not making specific findings of fact regarding the methodology it used in determining Chris Seghini's adjusted gross income. In fact, the record is silent as to what the trial court found Chris's adjusted gross income to be. Miss. Code Ann. Section 43-19-101(3)(a)-(b) (Rev. 2004) sets forth the proper method to be used by chancellors in determining a non-custodial parent's gross income. It also sets forth certain mandatory deductions which the chancellor must make to arrive at the payor's adjusted gross income. *Id.* In *Lee v. Stewart ex rel. Summerville*, 724 So. 2d 1093, 1097 (Miss. Ct. App. 1998), the Court held that because a chancellor failed to subtract certain mandatory deductions from a non-custodial parent's gross income, it was appropriate to reverse the child support award and remand to the chancery court for a recalculation of the child support award.

In *Gray v. Gray*, 745 So. 2d 234, 237, (Miss. 1999), the Mississippi Supreme Court held that without the benefit of a chancellor's findings of fact, it cannot be determined whether or not the statutory guidelines were followed. The Court also noted that the decree did not give proof of financial ability to the award nor did the court make findings with regards to the needs of the children. *Id.*

In this case, there is no evidence that the chancellor made any of the mandatory deductions from Chris' gross income. In fact, the record is absent of any findings of fact as to what Chris's gross income or adjusted gross income were at the time of trial. The trial court made reference to the fact that it would "pull a figure out of the air" if sufficient proof were not presented to the Court, however, the court failed to state on the record its findings of fact regarding what figure it pulled out of the air for Chris's income. (Tr. at 62). For the purposes of appellate review, it is imperative that a chancellor state on the record his findings of fact regarding a payor's monthly adjusted gross income.

It could be assumed that with the trial court's initial child support award of \$500.00 per month for two children that the court found Chris's adjusted gross income to be \$2,500.00 per month. This, of course, would not support the court's award of alimony and ordering Chris to pay Kristy's \$642.00 per month vehicle note and all the other marital debt with the exception of one small credit card bill. Such a finding would leave Chris destitute and in a perpetual state of contempt, as it has. The trial court did state at the hearing of Chris's post trial motions that it "came up with a figure based on the statutory guidelines." (Tr. at 131; R.E. 4). Accordingly, it can only be assumed that the trial court found Chris's monthly adjusted gross income to be \$2,500.00 per month.

The evidence offered by Chris to prove his income was his 2003, 2004 and 2005 income tax returns, Forms 1099-Misc for 2006, as well as, his 8.05 financial statement. (RE. 8 & 9). Admittedly, Chris testified that he made more income than was actually reflected on his 8.05 at trial, however, Chris did attempt to testify that the figures reflected on his 8.05 were estimates because his 2007 tax returns had not been filed yet and it was not time to file his 2008 income tax returns. (Tr. at 53) Regardless of his stating that he was not sure what his monthly income was or

that he made more than was reflected on his 8.05, the best evidence offered was his past income tax records and his 2006 1099's.

Chris testified that he did make more money than was listed on his 8.05, however, he also testified that he had employees to pay out of his gross earnings. (Tr. at 44). Chris further testified that at various times he had between five and ten employees that he had to pay. (Tr. at 44). Even Kristy admitted that Chris had to pay employees from his gross earnings. (Tr. at 85). Kristy testified repeatedly that Chris averaged earning \$1,000.00 per week. (Tr. at 61 & 63). The fact that the court below made no findings of fact regarding Chris's income before making an award of child support was clearly an abuse of the trial court's discretion and was manifestly wrong.

The record essentially makes it impossible for this Court to review the trial court's findings of fact as to Chris's adjusted gross income. Therefore, it is impossible for this Court to determine whether the chancellor applied an erroneous legal standard, abused his discretion or was manifestly wrong. The chancellors failure to make the required findings of fact requires this Court to vacate the trial court's award of child support and remand this matter back to the Chancery Court of Simpson County to make specific findings as to Chris's income and expenses.

B. The Chancery Court Erred As A Matter Of Law In Its Failure To Conduct A Proper *Ferguson* Analysis And Committed Manifest Error In Its Failure To Properly Consider, As Marital Property, The Money Derived From The Excess Bid Received On The Marital Home At The Foreclosure Sale.

The failure of the chancery court to make an on the record analysis of the *Ferguson* guidelines to support its division of marital assets is plain error. The Mississippi Supreme Court has directed chancellors to evaluate the division of marital assets by the guidelines set forth in *Ferguson* and to support their decisions with findings of fact and conclusions of law for the purposes of appellate review. *Ferguson v. Ferguson*, 639 So. 2d 921, 928 (Miss. 1994).

The Mississippi Supreme Court has further held that it “cannot determine whether the chancellor abused his discretion until he provides a record of his determination of both parties’ nonmarital assets, of his equitable distribution in light of each parties’ nonmarital property, guided by the *Ferguson* factors, and if necessary to do equity, of any award of alimony.” *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994). Also, the Mississippi Court of Appeals has held that “assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor. *McLaurin v. McLaurin*, 853 So. 2d 1279, 1285-1286, (Miss.Ct.App.2003); (citing *Flechas v. Flechas*, 791 So. 2d 295, 299 (Miss.Ct.App.2001)).

Clearly, the chancellor committed manifest error in not conducting an on the record analysis of the factors set forth in *Ferguson*. The record is eerily silent as to the chancellor’s findings of fact regarding the methodology he used in making an equitable distribution of marital assets and debt in this case. (Tr. at 111-112; R.E. 2). Without such an on the record finding of facts and discussion of the factors set forth in *Ferguson*, appellate review of the division of marital property and debt made by the chancellor is impossible. Unfortunately, not only is appellate review of the property division impossible, but also, appellate review is further frustrated regarding the periodic alimony awarded by the chancellor in this case.

Finally, the court committed manifest error in failing to consider the excess money paid for the marital home at the foreclosure sale by Kristy’s grandfather, Mr. Jimmy Charles Sullivan. The \$27,907.00 excess bid was marital property subject to an equitable distribution by the chancellor. The deed of trust from Chris and Kristy to Mr. Sullivan was dated May 2, 2001, and secured a promissory note having a principal balance of \$44,000.00. (R.E. 10). The trustee’s deed from William H. Smith, III, trustee under the deed of trust, in favor of Mr. Jimmy Charles Sullivan was dated August 17, 2007, and stated that Mr. Sullivan was the highest and best bidder

at the foreclosure sale, submitting a bid of \$50,000.00. (R.E. 10). Kristy's 8.05 financial statement entered into evidence at the trial listed the mortgage balance owing on the home at the time of trial as \$22,093.00, giving Chris and Kristy \$27,907.00 in equity in the home based on a value of \$50,000.00. (R.E. 11).

It should be pointed out that it was only at the close of testimony when the chancellor suggested that he was going to appoint an appraiser to do an appraisal of the home that Kristy's attorney announced that the home had been foreclosed on by Mr. Jimmy Charles Sullivan, Kristy's grandfather. (Tr. at 106). Kristy and Chris even entered into a temporary order on January 28, 2008, providing that Chris pay her the sum of \$516.00 per month temporary support for the monthly mortgage and other bills, this was in addition to \$484.00 per month child support,. (R.E. 12). (It should be noted that the temporary order is actually dated the 28th day of January, 2007, however, this is an obvious scrivener's error as no divorce action had been instituted at that time.)

The chancellor should have investigated further into what Kristy had done with the \$27,907.00 excess bid paid by Kristy's grandfather at the foreclosure sale. She clearly still treated the home as hers which is easily established by a review of her sworn testimony at trial.

Kristy testified that she was asking the court for use, possession and title to the house. (Tr. at 104). Kristy testified that she planned on moving back into the house. (Tr. at 104). She testified that the reason she had moved out of the house was because she was upset and needed help because of Chris's affair. (Tr. at 86). Kristy asked for possession of all household furniture and fixtures and asked the court to "leave them in the house." (Tr. at 68). She testified to certain maintenance expenditures incurred a week before the trial and that her sewage backs up "all the time." (Tr. at 81). Even with the knowledge that the house had been foreclosed on by her grandfather a year prior to the date of trial, Kristy even had the audacity to ask the chancellor to

make Chris pay the monthly house payment. (Tr. at 69).

At the time of the foreclosure sale, no divorce had been granted. Therefore, the \$27,907.00 paid in excess of the existing mortgage balance at the foreclosure sale, was unmistakably and indisputably marital property. The \$27,907.00 should have been used in the *Ferguson* analysis the court should have made, and possibly carried forward into its *Armstrong* analysis. The chancellor committed manifest error in failing to consider the largest marital asset Kristy and Chris had at the time of the divorce trial.

Therefore, this Court must reverse and remand the chancellor's equitable division ruling for a complete rehearing to develop the facts and circumstances surrounding the foreclosure and what Kristy did with the \$27,907.00 that should have been received from the trustee. This result is also necessitated by the circumstances surrounding the surprise revelation of the foreclosure at the divorce trial.

C. The Chancery Court Erred In Its Award Of Permanent Alimony And Failed To Properly Apply The Factors Set Forth In *Armstrong*.

The trial court erred in its award of permanent alimony and failed to properly apply the factors enumerated in "*Armstrong*" when it awarded Kristy periodic alimony. The factors to be considered by a chancellor in awarding periodic alimony are:

- (1) the income and expenses of the parties;
- (2) the health and earning capacities of the parties;
- (3) the needs of each party;
- (4) the obligations and assets of each party;
- (5) the length of the marriage;
- (6) the presence or absence of minor children in the home, which may require

- that one or both of the parties either pay, or personally provide, child care;
- (7) the age of both the parties;
 - (8) the standard of living of the parties, both during the marriage and at the time of the support determination;
 - (9) the tax consequences of the spousal support order;
 - (10) fault or misconduct;
 - (11) wasteful dissipation of assets by either party; or
 - (12) any other factor deemed by the court to be just and equitable in connection with the setting of spousal support.

Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993).

In *Gray v. Gray*, 745 So. 2d 234 (Miss. 1999), this Court reversed a chancellor's award of \$300.00 per month for periodic alimony and remanded so that the record could be fully developed regarding the husband's income to provide support for the amount awarded.

Clearly, the lower court did not conduct a proper analysis of the *Armstrong* factors and it failed to make sufficient findings of fact to support its award of periodic alimony to Kristy. (R.E. 2). This is evident by the court's silence regarding Chris's income and expenses. In fact, nowhere in the record can it be found what the court determined Chris's income to be, nor were any findings of fact stated on the record as to Chris's expenses. The Court, in its review of the *Armstrong* factors, simply stated that Chris testified that he made more money than Kristy. (Tr. at 112; R.E. 2).

This clearly falls short of the required *Armstrong* analysis mandated when determining if an award of alimony is warranted. Without the court stating its findings of fact, there is no possible way for this Court to review the chancellor's decision regarding periodic alimony.

The Court did state that "it now appears Kristy is going to have to find a place for she and the minor children to reside and live." (Tr. at 112; R.E. 2). This finding of fact by the chancellor is blatantly not supported by the evidence offered at the trial. Kristy testified that she was asking the court for use, possession and title to the house. (Tr. at 104). Kristy testified that she planned on moving back into the house. (Tr. at 104).

Tellingly, Kristy testified that the reason she had moved out of the house was because she was upset and needed help because of Chris affair. (Tr. at 86). Kristy asked for possession of all household furniture and fixtures and asked the court to "leave them in the house." (Tr. at 68). She testified that her air conditioner broke a week before the trial and she had to pay maintenance for the repairs and that her sewage backs up "all the time." (Tr. at 81). Finally, Kristy asked the chancellor to make Chris pay the monthly house note because she could not afford it with her income. (Tr. at 69).

Beside the fact that Kristy was deceiving and dishonest with the court concerning the situation surrounding the marital home at the time of trial, no evidence was offered that Kristy would have to find a new place for her and the children to live since the home had been foreclosed on by her grandfather. Therefore, the chancellor's findings of fact regarding this issue is not supported by the credible evidence offered during the trial and the chancellor committed manifest error.

In support of its award of periodic alimony, the court next considered the parties health. The court stated that it "appears that Kristy has some type of heart condition that was touched on somewhat and future need for medical expenses and costs for her." (Tr. at 112; R.E. 2). This finding of fact by the court is not supported by the credible evidence.

The only testimony from Kristy regarding the need for future medical expenses was that

she had a cardiologist she paid a certain amount to every month. (Tr. at 82-83). There was no testimony regarding how long she would incur these cardiologist expenses or if they were just past debt that she paid a little on each month. She did not testify that she has to be seen by a cardiologist each month and she offered no expert medical testimony to support the court's conclusion that she would need future medical treatment and incur future medical expenses.

Kristy testified that she and Chris paid her grandfather \$250.00 per month for the loan they received from him for her heart surgery and certain home repairs. (Tr. at 82). Chris was ordered by the court to pay this note to Kristy's grandfather. (Tr. at 111). Chris testified that Kristy had underwent heart surgery. (Tr. at 40). Most importantly, Kristy testified that she is a nurse who is employed full time. (Tr. at 74 & 106). The fact that she is employed full time, coupled with the lack of other substantiating testimony and evidence regarding future medical treatment and expenses, makes it plain that the chancellor's finding of fact regarding the health of the parties was not supported by credible evidence offered at the trial and is clearly erroneous.

To support its award of periodic alimony, the court next found that Kristy and Chris's seven year marriage touched on a long term marriage. In thirteen cases reviewed involving marriages under ten years, permanent alimony was only awarded in two cases. *See Bell on Mississippi Family Law at § 9.06[2][c]*. The recipient in both cases were at least sixty years old, one was unable to work and the other had stopped working at her husband's request. *Id.*

The fact that Kristy and Chris were married for seven years does not support the courts award of permanent periodic alimony. The fact that the court found that their marriage "touches on a long-term marriage" is not sufficient to support the court's award of permanent periodic alimony without further supporting evidence such as age, inability to work, lack of earning potential, lack of employable skills, etc., none of which was considered by the court in its findings

of fact. Therefore, the court gave improper weight to this factor when awarding permanent periodic alimony.

The court next considered Kristy's testimony regarding daycare expenses for the youngest child in awarding permanent alimony. Kristy listed on her 8.05 financial statement and testified during the trial that she paid \$495.00 per month in daycare expenses to Patty Cake Daycare and Sheila's Daycare. (Tr. at 83 and Re. 11). However, at the contempt hearing held in conjunction with the hearing on Chris's post trial motions, Kristy testified that Chris's mother watched the youngest child everyday. (Tr. at 159). The credible evidence offered at the trial of this case does not support the court's findings of fact that Kristy would incur additional expense for this child. The evidence presented at the trial and the contempt hearing is contradictory and does not support an award of permanent periodic alimony.

The final factor considered by the court was fault or misconduct. Chris does not contest that the court's findings of fact regarding this factor was supported by the credible evidence. Chris admitted that he had an affair while married to Kristy. (Tr. at 1 & 5).

Absent from the court's analysis of the *Armstrong* factors are: the income and expenses of the parties; the earning capacities of the parties; the needs of each party (emphasis added); the obligations and assets of each party (emphasis added); the age of the parties; the standard of living of the parties, both during the marriage and at the time of the support determination; the tax consequences of the spousal support order; and wasteful dissipation of assets by either party. See *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (1994).

Based on the credible evidence offered at the trial, a proper analysis of the above listed factors by the chancellor, conceivably, could have altered the court's decision to award permanent alimony. The court should have considered Kristy's free use of an automobile in its analysis. The

record is clear that four of the five factors found by the court to support its award of permanent alimony to Kristy were not supported by the credible evidence and were manifestly wrong and clearly erroneous.

Without the trial court's complete on the record analysis of the *Armstrong* factors and its findings of fact on said factors, this Court cannot exercise its appellate function to determine if the chancellor abused his discretion or was manifestly wrong. The court's decision to award permanent periodic alimony to Kristy without the benefit of a complete on the record analysis and findings of fact on all the *Armstrong* factors is manifest error requiring this Court to reverse and remand the chancellor's ruling. *Henderson v. Henderson*, 703 So. 2d 262, 266 (Miss. 1997).

II. This Court Must Reverse The Trial Court's Automatic Increase Of Child Support As Either An Anticipatory Modification Or An Improper Escalation Clause.

A. The Chancery Court Erred By Ordering Child Support To Increase Once Chris Paid Kristy's Vehicle Note In Full As This Is An Anticipatory Modification.

The trial court improperly ordered that Chris's child support automatically increase upon him paying Kristy's vehicle note off. "There can be no modification of a child support decree absent a substantial and material change in the circumstances of one of the interested parties arising subsequent to the entry of the decree sought to be modified." *Gillespie v. Gillespie*, 594 So.2d 620, 623 (Miss.1992). In *Gillespie*, the Mississippi Supreme Court held that a chancellor's decree requiring child support to be increased by fifty dollars per month once the child began attending kindergarten was improper as there was no evidence to establish a substantial and material change in circumstances. *Id* at 623.

This is in effect the same ruling entered by the trial court in this case. There was no evidence offered by Kristy and no findings of fact made by the trial court to establish a substantial and material change in circumstances would occur when her vehicle note was paid in

full. (R.E. 2). The only conclusion that can be reached in trying to decipher the court's reasoning for ordering the increase is that Chris would have more disposable income without the monthly vehicle note. The court's ruling was clearly an improper anticipatory modification and this Court must reverse and render the Chancellor's decision on this issue.

B. The Chancery Court Erred In Ordering Child Support To Increase Once Chris Paid Kristy's Vehicle Note In Full As This Is An Improper Escalation Clause.

The chancellor's automatic increase in Chris's monthly child support obligation once he paid Kristy's vehicle off is an improper escalation clause. In *Wing v. Wing*, 549 So. 2d 944, 947 (Miss. 1989), this Court stated that *Tedford v. Dempsey*, 437 So. 2d 410 (Miss. 1983), requires an escalation clause be tied to: (1) the inflation rate; (2) the non-custodial parent's increase or decrease in income; (3) the child's expense; and (4) the custodial parent's separate income.

Also, in *Gillespie*, the Mississippi Supreme Court reversed what may have been an attempt by a chancellor to create an escalation clause because the escalation was tied to only one event and lacked the specificity required for an escalation clause. *Gillespie* at 624. That Court further stated that "explanation is required for the increase if it is to be included in the original award." *Id.*

The chancellor's ruling in this case is essentially the same as that found in *Gillespie* above. The increase is related to only one event, Chris paying off Kristy's vehicle. (Tr. at 111; R.E. 2). The chancellor's ruling in this case also lacks the specificity required for an escalation clause. The chancellor made no findings of fact or conclusions of law to support the increase. (Tr. at 111; R.E. 2). Finally, the chancellor's order of the increase is not tied to any of the factors set forth in *Tedford*.

Accordingly, because the increase is tied to only one event and lacks the required specificity, this Court should reverse and render the chancellor's ruling on this issue as being

manifestly wrong and an abuse of discretion.

III. The Chancery Court Abused Its Discretion In Denying Chris's Rule 60(b)(1) Motion For Relief From The Judgment Based On Kristy's Misrepresentations Concerning The Marital Home.

Kristy's testimony throughout the trial concerning the marital home was a blatant misrepresentation of a very important fact. Mississippi Rule of Civil Procedure 60(b) provides the following,

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

...

The Mississippi Court of Appeals has held that "among the findings necessary to support granting relief under Rule 60(b)(1) is that, a trial court must find both that a witness intended to misrepresent some fact in order to influence the decision by the finder of fact, and that the finder of fact did rely upon the misrepresentation in its decision." *Williams v. Williams*, 964 So.2d 524, 528 (Miss.Ct.App.2007); citing *Stringfellow v. Stingfellow*, 451 So.2d 219, 221-22 (Miss.1984).

The facts of this case clearly support that the trial court abused its discretion in not granting Chris relief under Rule 60(b)(1). Kristy testified, under oath, at the trial regarding the marital home as follows: that she was asking the court for use, possession and title to the house. (Tr. at 104); that she planned on moving back into the house. (Tr. at 104); that the reason she had moved out of the house was because she was upset and needed help because of Chris affair. (Tr. at 86); that she wanted possession of all household furniture and fixtures and asked the court to "leave them in the house." (Tr. at 68); that her air conditioner broke a week before the trial and she had to pay maintenance for the repairs and that her sewage backs up "all the time." (Tr. at 81);

that she needed Chris to pay the monthly house note because she could not afford it with her income. (Tr. at 69).

Upon questioning by the court, after both sides had rested, about why she was not living in the house at the time of trial, Kristy testified as follows: "I had a newborn at home and a 5-year-old- 6 year old, and it was just hard for me myself dealing with the divorce and Carla and everything else to do on my own. So I moved in with my parents to get help from them." (Tr. at 104). She further testified when asked by the court whether she planned to move back in the house "Yes, sir." (Tr. at 104).

The above testimony by Kristy, all the while knowing that her grandfather had foreclosed on the home, makes it obvious that she was attempting to mislead the trial court. As further evidence of Kristy's attempt to misrepresent to the court the situation surrounding the marital home, this Court should pay special attention to the timing of when the true facts regarding the home were disclosed to the court.

At the close of testimony when both counsel for Chris and Kristy were being questioned by the court regarding the home, Kristy's attorney stated "Judge, I've been informed that the house is in Mr. Jimmy Charles Sullivan's name because it's been foreclosed on. The note was not paid, so it's been foreclosed on." (Tr. at 106). Thus, effectively precluding Chris's counsel from cross-examining Kristy about the circumstances of the foreclosure, where the money received from the excess bid went to and what she had done with the money Chris had paid pursuant to the temporary order for monthly mortgage payments.

It is also exceeding clear that the finder of fact, in this instance the chancellor, relied on these misrepresentations in making his decision. The chancellor, in awarding permanent periodic

alimony to Kristy stated “it now appears Kristy is going to have to find a place for she and the minor children to reside and live.” (Tr. at 112; R.E. 2). As this fact is clearly not supported by the evidence, the chancellor’s reliance on Kristy’s misrepresentations about the marital home is clear error. The chancellor also erred in not considering the equity gained at the foreclosure sale. As has been previously stated, there was at least a \$27,907.00 excess bid made by Kristy’s grandfather at the foreclosure sale. This was marital property subject to an equitable division and should have been considered by the chancellor in his award of alimony.

Ignoring the excess bid, at the hearing of Chris’s motion, the chancellor was of the opinion that Chris should sue Mr. Jimmy Charles Sullivan over the foreclosure. (Tr. at 119, 127 & 128; R.E. 5). This reasoning fails to address the issue presented in this case: that the \$27,907.00 received as an excess bid at the foreclosure sale was marital property, the most significant marital property the parties owned. The property, that if properly considered by the chancellor, could have impacted his decision to award permanent periodic alimony to Kristy.

The trial court’s failure to grant Chris relief under Rule 60(b)(1) under the facts of this case was clearly an abuse of its discretion and this Court should reverse and remand on this issue.

IV. The Chancery Court Was Manifestly Wrong In Finding Chris In Contempt Of Court And Further Abused Its Discretion By Incarcerating Chris.

The chancellor was manifestly wrong for finding Chris in contempt of court. Chris would show to this Court that his contempt of court in this instance was the direct result of the chancellor’s failure to properly conduct analysis of the factors set forth in *Ferguson* and *Armstrong* and the chancellor’s failure to first determine Chris’s adjusted monthly gross income during the divorce trial. These failures by the chancellor resulted in an inequitable and overly burdensome property settlement, child support and alimony award against Chris. A financial burden too heavy

to be born by Chris.

In his Amended Answer to Counter-Petition For Citation For Contempt, Chris raised as affirmative defenses: (1) genuine inability to pay; (2) that his failure to pay was not deliberate or wilful disobedience of court's judgment; (3) that his performance of court's judgment was impossible due to his level of income and current economic conditions.

A defendant in a contempt hearing may avoid a judgment of contempt by proving his present inability to discharge his obligation. *Clements v. Young*, 481 So.2d 263, 271 (Miss.1985). The defendant has the burden of proving his inability to pay, and must make such showing with particularity and not in general terms. *Id.* Also, the court's power to imprison a person until he complies with the terms of a decree depends on that person's present ability to comply with the decree. *Wilborn v. Wilborn*, 258 So.2d 804, 805 (Miss.1972). In *Jones v. Hargrove*, 516 So.2d 1354, 1358 (Miss.1987), the Mississippi Supreme Court held that where a contemnor is unable to pay, . . . , imprisonment cannot accomplish the purpose of a civil contempt decree, which is to compel obedience. (Citing Miss. Const. art. 3, § 30.)

Upon taking the stand at the contempt hearing, Chris immediately admitted to the court that he had not paid Kristy all that he had been ordered to pay her pursuant to the divorce decree. (Tr. at 172). He testified that he did carpentry work and that his work had been very slow. (Tr. at 172 & 183). Chris testified that he had earned from January 1, 2009 to April 30, 2009, the date of the contempt hearing, about \$6,600.00. (Tr. at 175). Chris's amended 2008 federal tax returns were admitted into evidence showing that he had an adjusted gross income of \$28,588.00 and that he owed \$4,154.00 in federal taxes out of that figure. (Tr. at 180 & Re. 13). That left Chris with an average monthly income of \$2,000.00 for the year 2008 after taxes. (Tr. at 181).

Chris testified that pursuant the final judgment of divorce, he was ordered to pay Kristy around \$2,000.00 per month in child support, alimony, car note, the note to her grandfather, and other incidental marital bills. (Tr. at 181 & 183). Chris also testified as to his necessary monthly living expenses: \$650.00 truck note; \$150.00 cell phone bill; \$70.00 credit card bill; fuel for his truck, \$100.00 per week; and food. (Tr. at 181-182). Chris even testified about his attempts to find other employment to increase his income. (Tr. at 183).

Despite Chris's testimony regarding his income, he was found to be in contempt of court in the amount of \$5,695.09 and was ordered to pay that amount immediately. (Tr. at 218). Chris should not have been found in contempt of court based on his testimony and his documentary evidence presented at the hearing. He testified with particularity concerning his earnings and his necessary monthly expenses. No evidence was submitted to contradict that Chris earned more money than what he testified about. The chancellor simply stated that the court "is not impressed with the affirmative defense of Mr. Seghini in that he has failed to prove inability to pay as ordered, previously ordered by this court." (Tr. at 217; R.E. 6). Most certainly, Chris should not have been incarcerated for his failure to pay as directed by the divorce decree. Alternatively, he should have been allowed more than one day to purge his contempt prior to being incarcerated. (Tr. at 219).

The chancellor committed manifest error by finding Chris in wilful contempt of court. The evidence put forth by Chris at the hearing showed with "particularity" that his failure to pay was not wilful and that he had a genuine inability to pay pursuant to the terms of the final judgment of divorce. Chris's testimony and evidence presented at the hearing also proved that performance of his financial obligations under the decree were impossible due to his financial

situation and the downward turn of the economy and its effects on the construction industry. For these reasons, this Court should reverse the chancellor's finding of contempt and in doing so, should vacate the chancellor's award of \$3,000.00 in attorney fees to Kristy.

The chancellor committed manifest error, abused his discretion and applied an erroneous legal standard in ordering Chris to be incarcerated if he did not purge his contempt within twenty-four hours. The evidence presented at the hearing coupled with Chris's testimony clearly established that he did not have a present ability to purge himself of his civil contempt. Thereby making his incarceration punitive in nature, as opposed to, coercive. As such, this Court should vacate the chancellor's order of incarceration.

Conclusion.

Even though Chris presents several issues to this Court for its review, the chancellor's failure to make an on the record findings of fact in its determination of Chris's monthly gross income and his monthly adjusted gross income, make most of his assignments of error not easily susceptible to appellate review by this Court.

Without the benefit of the chancellor's findings of fact related to a payor's income, no award of child support and alimony can be properly reviewed to determine if the chancellor abused his discretion or committed manifest error in formulating his award. This failure affects every aspect of the financial awards made during a divorce trial involving children, property division and alimony.

This Court must reverse and remand the judgment back to the Chancery Court of Simpson County, Mississippi, for further hearings and testimony to be had in accordance with this Court's ruling.

Respectfully submitted,

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