BEFORE THE MISSISSIPPI SUPREME COURT

CLAUDIA B. ALLGOOD	**APPELLANT**
V.	NO. 2009-CA-00858
DEFORREST R. ALLGOOD	**APPELLEE**

APPELLEE'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The following persons have an interest in the outcome of this case for purposes of possible recusal by members of the Court:

1. Honorable Edward C. Fenwick, Chancellor;
2. Claudia B. Allgood, Appellant (formerly of MS now Fayetteville, AR);
3. DeForrest R. Allgood, Appellee, District Attorney, 16th District;
4. Stephen T. Bailey, Esquire, Evans & Bailey, PLLC, Tupelo, for Appellant; and,
5. Jackson M. Brown, Attorney, Starkville, for Appellee.

So certified, this the 13 day of January, 2010.

DeForrest R. Allgood

By: _____
Jackson M. Brown, MS Bar #4591

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BRIEF OF APPELLEE

STATEMENT OF ISSUES

1. Did the Chancellor commit reversible error in the identification, classification and division of marital property?

2. Did the Chancellor commit reversible error in not awarding Claudia alimony?

STATEMENT OF THE CASE

Forrest and Claudia were granted an irreconcilable differences divorce and joint legal custody of their minor daughter, Keller.

Unable to agree on anything regarding money, they referred eight (8) financial matters to the Chancellor for decision. After Claudia, Forrest, and the CPA testified, the parties waived oral argument. The Chancellor took the money matters under advisement, and later issued a fourteen (14) page Opinion (T 246; Clerks Papers 65-78; RE 3-16). A Final Judgment was entered incorporating the Chancellor's findings (CP 79-81; RE 17-19).

Rather than filing a motion to allow the Chancellor to address any perceived errors, Claudia noticed her appeal, twenty-eight (28) days later.

Claudia does not appeal six (6) of the Chancellor's eight (8) money rulings. Her two (2) claims are actually that Forrest should not have been given a credit for paying the house mortgage early, with his inheritance, and that she should have been awarded lump and periodic alimony. As

will be seen, the proof strongly militates against Claudia, in favor of Forrest.

STATEMENT OF FACTS

At the time of 1978 marriage both were recent graduates. Forrest was an assistant district attorney and Claudia taught school, having an elementary education degree (Clerk's Papers 3; T 6). Three children were born, the oldest two, a boy and girl, were emancipated, but Keller, the youngest female, was sixteen at trial (CP 3).

In 1988, Claudia got her Masters at night, with some financial help from her parents, while Forrest attended the children (T 136; 182). Soon thereafter, Claudia left Forrest, taking the children to Baxter County, Arkansas, where she sued him for divorce. Claudia alleged abuse by Forrest, not only to herself, but the children. Claudia refused to allow Forrest and the children visitation, forcing Forrest to go to Arkansas for a court order to require Claudia to permit him those rights (Ex P5) (T 35-37).

Claudia, on the heels of her adverse Arkansas visitation ruling, semi-reconciled with Forrest, moving back to the Columbus, but forced Forrest to sleep on the floor in another room (T 37).

At trial, *sub judice*, Claudia again accused Forrest of the same abuses she had claimed in Arkansas, and more, but had no corroboration. On cross-examination, at first, she denied that the Arkansas judge had ruled against her on the abuse allegations, in favor of Forrest, however, when pressed, she read from the court order (T 236-239) (Ex P5), which revealed:

> . . . .
> *the evidence does not convince the Court that this is a well founded fear or that the father poses any threat to the children's well being during visitation.*

. . . .

*When the **credibility** of each witness is considered considering all of the relevant and competent evidence does not show the Court that any restrictions . . . are justified. . . ."*

After the so-called semi-reconciliation, Claudia confessed to Forrest that she had an affair, a fact she did not deny at trial. (T 35; 37; 244). Even after this revelation, Forrest attempted to resume normal conjugal relations, to no avail, and eventually gave up trying. When Claudia left the final time, in February 2007, there had been no intimacy since 1996 (T 37). Forrest basically lived alone, his children had been alienated by Claudia. Claudia took numerous trips and vacations, in and out of the U.S., without an uninvited Forrest. One summer Claudia was gone 63 out of 92 days (T 33-34; 37).

Meanwhile, Forrest tried to contribute to the family in other ways. Every morning he fixed the children's breakfast, as well as lunches for the day. He took Keller to school, soccer practice, and other functions. He likewise helped to clean house on the weekends they chose as "work Saturdays" (T 115-116).

Early in the marriage the parties had a joint checking account but due to overdrafts, they opened separate accounts (T 31; 204-205). Later, when Forrest wanted to build a house, his mother gave him a parcel of land, for its construction, which Claudia oversaw. The lot's worth or the value of overseer services were not given at trial. The construction loan of about $104,000 was amortized and Forrest began paying $1100 monthly toward the mortgage.

After the so-called reconciliation, the marriage further disintegrated. Claudia only spent her pay check for her's and the children's groceries, clothes and some medicals, but frequently demanded more money from Forrest, over and above her $42,000 earnings, while he paid for

everything else (T 32). This caused a continual argument. Claudia refused to be questioned about her spending, and would only say "**all she wanted was the money when she wanted it.**" Forrest allowed this to happen trying "to keep the peace"and "avoid the fray". Additionally, he was trying to avoid the "[creation of] more problems and more strife in the marriage, [than] to demand an accounting" which "cut down on the argument" (T 33). This put additional stress on the so-called marriage, especially since Forrest was not only paying for everything else, but he also had to buy his own groceries, prepare his own meals, as well as pay for his other necessities (T 115). Claudia's numerous trips, without him, seemed conveniently timed while Forrest was in court (T 33-34).

Forrest's mother died, leaving him an inheritance. On the advice of his CPA, and to keep some semblance of peace at the house to comply with Claudia's financial demands, rather than taking $400 out of his inherited savings, each month, Forrest pre-paid the house loan balance of $82,000 from his inheritance, retiring the $1100 monthly installment that only he had paid (T 31-32; 138). $60,000 of the payoff came from a trust fund, after his mother's death, and then an additional $22,000 came from the sale of his mother's house. The $60,000 was deposited into savings, then transferred to Forrest's personal checking account, so that a check could be written and evidence the payment. The $22,000, from the sale of his mother's house, went directly into his individual checking and paid to the mortgage company, fully satisfying the loan (T 27; 30; Ex P3).

On the heels of the loan satisfaction, Claudia accused Forrest of infidelity, in the presence of the then 14 year old Keller, and left the final time, taking with Keller with her (T 12). Forrest,

a devout Christian, had only known one female, Claudia, and had been celibate for some 13 years, to the detriment of his health (T 12; 58).

Claudia stayed in Columbus for a few months, living with friends, which allowed Forrest and Keller to see each other weekly. Claudia continued to demand more money over and above her $42,000 salary. Forrest welcomed her to come back to the house, but Claudia refused. (T135).

Then, once again, Claudia moved to Arkansas, taking Keller, without Forrest's consent. Fayetteville is a 9 hour drive from Columbus and a trip to visit Keller costs Forrest $500 (T 13; 49-50). At Trial, Claudia claimed she moved to be closer to her ailing mother, for whom she held some type of power, but even after the move, Claudia was still a 3 hour drive away from her mother (T 233-234).

The above facts are undisputed and in fact, admitted at trial. Concisely, Claudia admitted Forrest had inherited property, valued at $129,000.00; the lot on which the house was built was given by Forrest's mother and that Forrest made all the monthly mortgage payments and that Forrest did in fact pre-pay the mortgage with $82,000 from his inheritance, *and* that on the heels of the debt retirement, she left without justification.

Additional facts, which are uncontroverted, include:

Claudia did not know if it was proper for her to involve Keller in financial matters between herself and Forrest (T 230-231).

By the time of trial, the house had appreciated in value to $240,000.00.

Forrest's documented that his PERS/Deferred Compensation was worth $220,000 at Trial. Claudia claimed her PERS retirement was $14,688 but on cross-examination, she admitted

that date of the stated value was over a year stale (T 227; Ex D6). Claudia additionally claimed her Global retirement was only worth $13,550.00 (Claudia's 8.05, Ex D5), but she had no documentation to back this assertion.

Forrest introduced Exhibit P4 that listed 3 different values of his PERS at earlier times, for the Chancellor's consideration (T 44-45):

> July 1996, $67,946 (*last intimacy*, T 39);
> July 2004, $141,823 (wife's *move from bedroom*, T 39); and,
> February 2007, $174,318, Claudia's last and *final separation* (T 40).

Forrest's 8.05 (Ex P1) showed he had a couple of hundred dollars left over each month, as did Claudia's (Ex D5). Claudia was questioned about some of her claimed monthly expenses, i.e., a $150 monthly cell phone cost for Keller, but when pressed, she finally admitted that the cost actually included an expense for the emancipated children (T 229).

At first Claudia denied she had recently received an insurance check for their car, but latter on, she tripped herself up, and then finally admitted she had in fact received $8000. Pressed further, she admitted that she had neglected to account for those funds and was unsure of what she did with the money (T 231-232; 235-236).

The Chancellor had questions:

> Q. You don't know how much you accumulated in your Arkansas retirement?
>
> A. **I don't**. (T. 241)
>
> . . .
>
> Q. [You want] *$1500* in permanent alimony *and* [ ] *lump sum alimony* [ ], *plus $850 a month in child support. Have you thought about what that would leave him to live on* [ ] ? [ ] that totals [ ] 2350, plus [ ] if [ ] in addition to [ ] any amount, say, $300, [puts] it around $2600 a month. He doesn't - - [], *he has no*

capacity to pay that kind of money over and above what he is - - [ ] making. You got any suggestion to me how we could [ ] do that?

A. **I don't.**

Q. Well, let me ask you [ ] about the two big items here [that] everybody acknowledges[,] his PERS [ ] and the house. Do you have a preference [] for me to do something along the lines that your husband suggested, that is for him to take title to the house, and pay you a substantial cash amount that would be a once and for all final payment, settlement?

A. Yes, sir.

Q. [ ] The law seems to have some preference for that sort of thing to minimize friction and problems with monthly payments and that kind of thing. *But if we did [] that, to a substantial degree, it would probably eliminate any obligation he would have to pay any kind of monthly amount.* I'm not talking about child support. Now that's a separate matter.

A. **Yes, sir.**

Q. What do you think about that? [ ] do you understand [ ] my question [ ]? Would you rather him pay you - -

A. **I think that would be fine.**

Q. - - *a substantial lump sum*?

A. **I think that would be fine.**

Q. [ ] I don't know that [Forrest] suggested a figure. I think you did say you ought to get a 50/50 split of the retirement and the house?

A. Yes, sir.

Q. Okay. You would agree he ought to get some credit for your retirement if you kept your retirement though, you see what I mean, if I pooled the two retirement amounts?

A. Right.

Q. What you've got, what he has got, it's all right you get to keep yours?

A. Uh-huh. I think it ought to be part of the picture for the 50/50 split, everything. (T 241-243).

At trial Claudia was earning $54,000.00 annually, $12,000 more than while living with Forrest.

Following the final separation, Forrest's living style changed little, he continued his same frugal lifestyle, preparing sandwiches for lunch, rather than eating out. His leisure activities had never been expensive, he hunted, kayaked and went to the "Y". The major expense associated with these hobbies was gasoline; he had no hunting leases or other expenses associated with these hobbies (T 91). However, in one very important aspect, his lifestyle changed considerably: because Keller was living 9 hours away, he could no longer visit her every day or weekly. Further, he was now burdened by a $500 cost to visit her in Arkansas (T 49-50).

Claudia, on the other hand, complained her life materially changed: she was living in a small apartment - not the big house- and, she no longer had a maid bi-monthly, having to clean the small apartment; she could no longer go to the salon, having to do her own hair; and, she no longer had money to spend for travel. On cross-examination, Claudia admitted that all of those changes in her lifestyle were caused by her own unilateral actions (T 232-233).

The Chancellor's Opinion (CP65-78) directed Forrest to pay $780.00 monthly child support (plus Keller's health insurance, $135, and MPACT, $169, a total of $1084), as well as six (6) other future expenses which Claudia has not appealed.

The Chancellor found that "there was no dispute that [Forrest] had separate property [] he acquired by gift [] or inheritance [from his family] valued at $128,988.00 (primarily bank stock)

and not subject to equitable distribution" citing *Hemsley v Hemsley*, 639 So. 2d 909 (Miss. 1994), *Ferguson* and *Johnson, infra.* (CP 67-68)

The remainder of the property, the Chancellor classified as marital, valuing it at $544,000.00 (CP 68-69), the bulk of which was the marital residence ($240,000) and their retirement accounts ($248,000), assigning favors, to either Forrest or Claudia, as required by *Ferguson*:

1(a) Forrest made the principal financial contribution to the marital home's acquisition,

(b) the last 11 years of the 30 year marriage was very poor with no intimacy, an almost hostile environment,

(c) Claudia received her Master's during the marriage but did receive some financial help from her parents (CP 70; RE 8);

2. Forrest was frugal in [ ] spending [ ] [Claudia] "only used her income for groceries and family clothing and [Forrest] frequently had to deposit money into the family operating account for her use" (CP 71-72) (See also a further finding under dissipation of assets under alimony #11, p. 12, 27);

3. The marital home sits on land Forrest received as a gift from his mother. The house was built [ ] for $104,000. Forrest grew up there and had sentimental attachment;

4. Forrest has a separate [inherited/gift] estate of $128,988.00 (CP 71);

6. "THE EXTENT TO WHICH PROPERTY DIVISION MAY, WITH EQUITY [,]BE UTILIZED TO ELIMINATE PERIODIC PAYMENTS [A] POTENTIAL SOURCE[] OF FUTURE FRICTION []." [Claudia] "testified that she preferred some type of lump sum settlement so she could purchase a house" allowing her and Keller to move out of the small

apartment. With [Claudia's] advanced degree and the job [] in Arkansas, she is able to provide a standard of living for herself roughly equivalent to that of [Forrest], if she has adequate funds to purchase a house"(CP 71; RE 9; Op p.7, #6.);

7. [Forrest's] "separate estate with his larger earning ability [] gives him a more secure financial future . . ."(CP72).

The Chancellor found that the house, built in 1994, is currently valued at $240,000.00 sitting on Forrest's gifted land and Forrest took most of his inheritance and pre-paid the $82,250.00 mortgage, and then Claudia left (CP 73). The Chancellor gave Forrest credit for his inherited fund payment in the form of a larger share of the home equity, citing *Wilson v Wilson*, 820 So. 2d 761 (Miss. App. 2002) (abuse of discretion to award wife ½ interest since husband paid for house with assets acquired prior to the marriage), and *Brock v Brock*, 906 So. 2d 879 (Miss. App. 2005) (separate property traceable to the source is not transmuted into marital property), and *18 J. Am. Acad. Matrim, Law* (2003) (CP 72).

After crediting Forrest $82,250.00, and subtracting that amount from the $240,000 home, the Chancellor awarded Claudia ½ or $78,875.00, together with an additional $67,000.00, for a total of $144,875.00 (CP 73, Op 14, RE 16).

The Chancellor granted Forrest miscellaneous personalty ($17,000), his retirement ($220,000 less $67,000), life insurance policies cash value ($23,000) which named Claudia beneficiary, while requiring him to borrow the $144,875.00 and begin paying a monthly mortgage of at least a $1,000.00, as well as his debts and other obligations (CP 73-74).

Claudia was awarded ½ home equity ($78,875 after the credit), two vehicles ($1600), furniture ($12,797), checking ($750), her retirement accounts ($28,807), part of Forrest's

retirement ($67,000) and directed her to pay her $20,000 debts incurred post separation. (Ex D5, 8.05's last page).

Mathematically, under the Chancellor's distribution, Forrest received $272,690 and Claudia $189,022 (CP 74) with Forrest being required to incur an additional $144,875 of debt to pay Claudia under the division. In reality, after subtracting the new debt, Forrest actually received $128,000, compared to Claudia's 189,000.

Claudia demanded $20,000 lump sum and $1500 monthly alimony. The Chancellor itemized his *Armstrong* findings (CP 75, Op 11-14; RE 13-16):

(1) Compared monthly income and expenses: Forrest, $5436 less $5175 = + $261, and Claudia's, $3802 less 3550 = +$252;

(2) Compared their health and earning capacities, finding neither suffered which would interfere with their normal living or effected their earnings, but Forrest's income exceeded Claudia's by 40%;

(3) Compared the needs of each, finding no significant differences, other than Claudia's need for more permanent housing;

(4) Compared their obligations and assets finding Forrest had significantly more assets due his inheritance and PERS and that a substantial portion of Claudia's net worth is a result of Forrest paying the home off with inherited funds. The home is debt free and valued at $240,000;

(5) They were married June 19, 1978, and separated in February 2007, which is long term;

(6) Keller, almost 17, does not need child care;

(7) Forrest was aged 55 and Claudia 52;

(8) Compared their living standard during marriage and at the time support is determined., finding that Forrest continues his same frugalness but Claudia claimed a lower lifestyle since she lived in a smaller dwelling, no longer had a maid and had to fix her own hair; (CP 77)

. . .

(10) Fault or misconduct: both agreed there had been no intimacy since 1996, some 11 years before the final separation and the marriage had been unhappy. Forrest said Claudia stopped sex and he gave up trying. Claudia admitted denying Forrest sex because he hurt her feelings. Both admitted there would be long periods where they did no speak even though living in the same house which created a tense and unhealthy environment.

(11) Dissipation of assets: Forrest lived frugally with little self-indulgences and no extravagances. Claudia used her income for groceries, clothing for herself and children and the remainder as she saw fit, but Forrest often had to give her extra money, over and above her $40,000 income. Claudia had traveled in and out of the country, with the children, to the exclusion of Forrest.

(12) The Chancellor found no other factors to be "just and equitable." (CP 77)

The Chancellor opined that alimony is to be considered in conjunction with equitable division, and awarded when circumstances, after an equitable division, considering each's non-marital assets, leaves a deficit to one, citing *Roberts* and *Johnson, infra,* that does not require divestiture of gifts or inherited non marital property. The Chancellor, based upon his findings, concluded "that the equitable division, applying the *Ferguson* guidelines, does not require that any more be done . . . by way of alimony and therefore, no alimony is awarded . . . . In reaching this conclusion the Chancellor considered that Forrest is to pay Claudia $144,875, and to do so, he will

[] have to borrow [] which will leave him with a sizable mortgage payment, or liquidate his separate estate. By requiring this cash payment to Claudia, she will have adequate funds to either buy a home or at least make a large down payment on a home for herself." (CP 78)

SUMMARY OF THE ARGUMENT

The Chancellor observed both Claudia and Forrest on the stand, assessing their credibility. Forrest's proof was documented and corroborated. On the other hand, Claudia's testimony was uncorroborated, some belied by the evidence. Claudia failed to present relevant documents to prove values, and if she presented any, it was either stale or unreadable, telling the Chancellor to figure it out.

28 days after Judgment, Claudia noticed her appeal without affording the Chancellor an opportunity to modify, correct, or take more proof, which might alter his fact findings and conclusions of law, *if* there was error. Under our rules and case law this is impermissible.

Moreover, in most instances, Claudia fails to cite authority, based upon most persuasive facts in favor of Forrest, to show that the Chancellor was *wrong,* abused discretion or misapplied our law. The Chancellor's decision should be affirmed.

ARGUMENT

I. THE CHANCELLOR CORRECTLY IDENTIFIED AND CLASSIFIED SEPARATE FROM MARITAL PROPERTY, AND THEN MADE AN EQUITABLE DIVISION.

A. **Standard of Review**.

"Chancellors are vested with broad discretion, and this Court will not disturb the

Chancellor's findings unless the court's actions were manifestly wrong, the court abused its discretion, or the court applied an erroneous legal standard." *Andrews v. Williams*, 723 So. 2d 1175 (¶7) (Miss. Ct. App. 1998 (citing *Sandlin v. Sandlin* , 699 So. 2d 1198, 1203 (Miss. 1997); *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994)(other cites omitted)."This Court does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder." *Wright v. Stanley*, 700 So. 2d 274, 280 (Miss. 1997). "If there is substantial evidence in the record to support a chancellor's finding of fact, no matter what contrary evidence there may be, an appellate court will uphold the chancellor." *Bower v. Bower*, 758 So. 2d 405, 412 (¶31) (Miss. 2000).

B. **The Chancellor properly credited Forrest with his inherited funds used to pay off the mortgage since they were traceable and were never transmuted, especially in view of the facts and circumstances. Moreover, the Chancellor was never given an opportunity to correct any alleged errors since no Rule 52 and/or 59 motion was filed, a waiver.**

Claudia does not dispute that Forrest pre-paid the house mortgage with $82,000 traceable to his inheritance, as found by the Chancellor (CP 72-73). She actually argues that this money lost its separate property characterization, because the saving account and house were jointly owned, and therefore Forrest should not have been given a credit for that amount, before the ½ distribution of the home equity.

Initially, this is a misrepresentation. Claudia claims that all of the $82,000 of Forrest's inheritance was funneled through a joint savings, but this is belied by the record. Only $60,000 initially went into savings and then transferred to Forrest's checking to pay the substantial part of the loan. The remaining $22,000 went directly from the sale of Forrest's mother's house into his personal checking, and he wrote the check which finally retired the debt (T 28).

Wilson v Wilson, 820 So.2d 761 (Miss. Ct. App. 2002) and *Brock v Brock*, 906 So. 2d 879 (Miss. Ct. App. 2005) support the Chancellor's finding. There is no dispute here that the money was traceable to Forrest and as the Chancellor found, Forrest made "the principal financial contribution to the marital home" (*Ferguson* factor 1.a., RE 8, Op p 6). Claudia does not attack these two findings by the Chancellor but attempts to distinguish her case with other authority, with different facts, to support her contention that Forrest's inheritance lost its separate character and was converted into marital property. Not only did Claudia not address these findings, her position fails in many ways. For example, it fails to take into consideration that the facts show that Claudia separated from Forrest soon after the mortgage's retirement (CP 73), an action strikingly similar to her prior separation after getting her Master's, and vexatiously suing him in Arkansas, which seems to establish a *modus operandi*. Claudia's prior and last separation are more egregious than the wife in *Devore v. Devore*, 725 So. 2d 193 (Miss. 1998) where the wife left after getting her name put on the deed. The facts here are more akin to those in *Chapel v Chapel*, 700 So.2d 593 (Miss.1997) where the chancellor noted that *the parties seldom lived together during the sham marriage* (¶15) and the *wife's decimation of husband's assets, her refusal to be a wife to him, making his life miserable by actions such as bringing false charges of assault* against him, *having him* arrested and *committed involuntarily* (¶19).

Moreover, here, the Chancellor, assessed Claudia's credibility, with her other actions, under the *Ferguson* guidelines, and did equity, by not rewarding Claudia's conduct with the windfall she demanded.

In any event, Claudia never gave the Chancellor the opportunity, if needed, to correct her perceived error in the Chancellor's judgment, by presenting him with a proper motion. MRCP,

Rules 52, and 59 govern such situations. MRCP, Rule 52 (a) requires that "in all actions tried [] without a jury the court may, and shall upon the request of any party [] find the facts specially and state separately its conclusions of law thereon and judgment [] entered accordingly." And 52(b) "[u]pon motion [] filed not later than ten days after [] judgment or [] findings and conclusions [] the court may amend its findings or make additional findings and may amend the judgment []. The motion may accompany a motion for new trial pursuant to Rule 59...."

While a motion for a new trial is not always required, *Kiddy v Lipscomb*, 628 So. 2d 1335, held that a motion must be filed *if an appellant seeks an appeal on matters not embraced in the rulings* DURING the trial. MRCP, Rule 59(a) states:

> "On a motion for a new trial in an action without a jury, the court may open the judgment . . . take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment." [(b)[the motion [must be filed] not later than 10 days [] after judgment or [] findings and conclusions []].

Kiddy held that a motion for a new trial, or its equivalent, must be filed if the appellant seeks to appeal on matters not embraced in the rulings during the trial. The reasons for such a rule are obvious. It prevents needless appeals which only serve to prolong the duration of a lawsuit and heap more work on appellate courts. Further, it prevents sandbagging the trial judge. Here, Claudia complains of the Chancellor's legal analysis, based upon his factual findings, *AFTER* the trial. These are not matters embraced in the rulings *DURING* the trial. Consequently, the Chancellor has never had the opportunity to consider her complaints. Had the Chancellor been presented with a proper motion, he may have been able to address her complaints, to her satisfaction. This is the very behavior *Kiddy, supra*, sought to prevent.

C. The Chancellor did consider Forrest's campaign funds in the distribution. Moreover, since no request modify, correct or clarify was filed, that argument was waived. Furthermore, no authority is cited in support her argument, another waiver.

Forrest had $8700 in a campaign reelection fund. Claudia believes that merely because the funds were not mentioned in the Chancellor's Opinion, it is reversible error, regardless of the controverted facts as to her help in its acquisition. "With respect to issues of fact where chancellor made no specific finding, this Court proceeds on the assumption that chancellor resolved all such fact issues in favor of the appellee, or at least in a manner consistent with the decree." *Smith v. Smith*, 545 So. 2d 725, 727 (Miss. 1989). "Generally, when there are no specific findings of fact, this Court often assumes that the chancellor resolved fact issues in favor of the appellee." *Sarver v. Sarver* , 687 So. 2d 749, 757 (Miss. 1997). This Court assumes that the "chancellor made determinations of fact sufficient to support its judgment . . . and the Court will look to the evidence and see what state of facts, if any, will justify the decree." *Id.* It is a fundamental rule of law that this Court does not review matters on appeal that were not first raised at the trial level. *Shaw v. Shaw* , 603 So. 2d 287, 292 (Miss. 1992) (See MRCP, Rules 52 and 59, I.B., *supra* and *infra.*

Claudia refuses to recognize that campaigns are expensive and for Forrest to comply with the Chancellor's financial directives, he needs to be reelected or start a new law practice in this economy. Furthermore, the Chancellor did not lament Claudia's incredulous claims, her $8000 unaccounted for insurance proceeds, her failure to provide the court with evidence of her retirement, telling the Chancellor to multiply an unreadable amount withheld from her pay check times twelve (T 241, Ex D5, last page) to arrive at the value.

Is this $8700 not tit, for Claudia's $8000 tat?

Moreover, Claudia did not request a modification, correction, additional finding of fact and conclusion of law or raise the issue in a motion for a new trial (see MRCP, Rules, 52, 59, *supra*). She gave the Chancellor no opportunity to rule on the matter at all. *Pace v. Owens,* 511 So.2d 489, 492 (Miss.1987) (when no specific findings of fact, this Court assumes the trial court made factual determinations sufficient to support its judgment). A party who fails to raise an issue at trial waives any right to complain thereafter. *Page v. Siemens Energy and Automation, Inc.* 728 So.2d 1075, 1082 (¶27) (Miss. 1998). This Court "has consistently held that an unsupported assignment of error will not be considered." *Graham v. Graham*, 767 So.2d 277 (Miss.App.,2000) (¶ 12). See again Rules 52 and 59, *supra* and *infra*.

D. The Chancellor is not required to make a 50/50 division of marital assets.

Ferguson does not require that the chancellor divide assets equally, only equitably. *Love v. Love* , 687 So. 2d 1229, 1232 (Miss. 1997). Divorcing parties have no right to equal distribution even where the parties jointly accumulated the property. *Pierce v. Pierce* , 648 So.2d 523, 526 (Miss. 1994). "The obligation of a chancellor is not to follow some precise formula as to each individual component of distribution, alimony, and other support, but to provide equitably between the spouses in the final outcome." *Welch v. Welch* , 755 So.2d 6, 10 (¶26) (Miss. Ct. App. 1999).

In *Richardson v. Riley*, 355 So.2d 667, 668 (Miss.1978), as here, the chancellor noted that he had not, as requested, "equally" divided their marital assets because the property division eliminated the need for periodic payments and other potential sources of friction between the parties. This Court will not substitute its judgment for that of the chancellor "[e]ven if this Court disagree[s] with the lower court on the finding of fact and might . . . [arrive] at a different conclusion."

Claudia complains that the Chancellor made no mention of her non-economic contributions to the marriage. It is significant to note that in many ways her testimony was contradicted. Forrest prepared breakfasts and lunches, he carried Keller to school and other places (T 115-116). At one point Claudia claimed she was responsible for cleaning, but then asserted that her lifestyle was lowered since she could no longer have a maid (T 203). Both cannot be true and is a credibility issue. Moreover, even while living with Forrest, the family had work Saturdays, when they had no bi-monthly house keeper.

Claudia claimed she sacrificed vested retirement by teaching in private schools but Forrest testified that Claudia chose to do so to be near the children. In any event, Forrest still had to pay tuition (T 112-113).

Claudia's Brief insists that she contributed to Forrest's election campaigns but the record showed that during the last campaigns she did nothing and would not allow a campaign sticker to be placed on her car (T 117). Again, another credibility issue.

Additionally, this Court has held that a chancellor has discretion in determining whether acquisitions during the dying stages of a marriage qualify as marital or separate property. *Aron v Aron*, 832 So. 2d 1257 (Miss. App. 2002). In *Shelman v Shelman*, 722 So. 2d. 547 (Miss. 1998, ¶25), it was held that *even though the marriage had not been legally terminated, the relationship from which equitable distribution arises had been ended months earlier* and did not entitle a spouse to have property declared marital. In *Shelman*, the husband demanded participation in the wife's retirement value at the time of the hearing, but this Court held he was not entitled because the marriage relation had ended earlier, even though it had not been *de jure* terminated. At Trial, Forrest's retirement was valued at $220,000, but on Claudia's last separation it was worth only

$174,318, and even less when conjugal relations ended. Here, the marital relationship giving rise to equitable distribution, had long been terminated, as in *Shelman*. Here, both Forrest and Claudia agreed, and the Chancellor so found, that they lived in a "hostile" environment, (RE 8, Op 6) Forrest living alone (RE 15, Op 11). The marriage was a sham.

Again, Claudia did not ask for a clarification, new trial or findings of fact and conclusions of law which waives the issue and reargues the her campaign argument. (See, Rule 52 and 59 arguments and case law, *supra*).

Nevertheless, because of the division she did receive, the Chancellor obviously considered Claudia's credibility as to what she claimed she did domestically, the sham marriage, her fault, and the fact that, ironically, she kept the District Attorney a virtual prisoner for at least 11 years.

II. THE CHANCELLOR CORRECTLY DENIED ALIMONY AWARDS

The Chancellor found that since he was requiring Forrest to borrow $144,875.00 to pay Claudia, Forrest would have a sizable mortgage payment and Claudia would have adequate funds to buy her own home and have no mortgage payment (RE 16, Op 14), concluding that after this large payment, together with Claudia's advanced teaching degree and her job in Arkansas making $54,000 annually, she was able to provide a standard of living for herself roughly equivalent to that of Forrest (RE 9; Op 7), and that under *Ferguson*, "no more need to be done" (RE 16, Op 14).

A. **Standard for Review**. "[A]limony, if allowed, should be reasonable in amount commensurate with the wife's accustomed standard of living, minus her own resources, and considering the ability of the husband to pay. As long as the chancellor follows this general standard, the amount of the award is largely within his discretion." *Gray v. Gray*, 562 So. 2d 79, 83 (Miss. 1990) (citing Wood v. Wood, 495 So. 2d 503, 506 (Miss. 1986). Additionally, the husband is entitled to a

normal life and as decent a standard as possible." *Graham v. Graham*, 767 So2d 277.

Since the decision to award alimony, as well as the amount, is left to the discretion of the chancellor, this Court will not reverse unless the chancellor manifestly erred or abused his discretion. *Voda v. Voda*, 731 So. 2d 1152, 1154 (¶7) (Miss. 1999). Alimony is not hermetically sealed but is considered with equitable distribution and other awards in the end. All awards to a spouse must be considered together to decide if they are equitable and fair. *Hubbard v. Hubbard*, 656 So. 2d 124, 130 (Miss. 1995) (citing *Ferguson*, 639 So.2d 921, at 929).

In *Johnson v. Johnson*, 650 So. 2d 1281 (Miss. 1994), this Court concluded that one legitimate aim of an equitable division of the marital assets is to provide for post-divorce financial security of both parties and that *only* if a "deficit" as to one spouse remains after the equitable division, should the chancellor proceed to consider some form of alimony to properly provide for the less financially secure party. *Johnson*, 1287.

In *Chesney v Chesney*, 2002 WL 119606 (Miss. Ct. App. 2002), both parties received a fairly substantial amount of assets accumulated during the marriage. The evidence in *Chesney*, as here, showed Mrs. Chesney was gainfully employed and no real difference existed between her and Mr. Chesney; there was no evidence of any unusual aspect of Mrs. Chesney's financial position that would indicate any difficulty as to her ability to survive with assets and income substantially the same as Mr. Chesney. On these facts, the Court was of the view that the evidence does not establish the kind of "deficit" that must be established as a precursor to the award of periodic alimony.

Claudia claimed her lifestyle had changed but only articulated that she now lived in a 700 square foot apartment, could no longer afford a maid, and could not get her hair done. The

Chancellor's award of $144,875.00 in equitable distribution should have been adequate to remedy the problem of the small apartment. Now, after that award, if she has a house payment, it should be small. Balancing a maid and hair salon against Forrest's loss of association with Keller and the $500 cost to him to visit, it seems that Forrest's lifestyle has been more disrupted than Claudia's. Claudia left the marital domicile and procured living quarters for herself and Keller, without cause and with no fault attributable to Forrest and soon claimed a need for more money from him over her $42,000 income, while she lived with friends. Forrest told Claudia she and Keller were welcome to return home but Claudia refused. "In the absence of evidence showing that the wife is ill, or that there was some other legitimate compelling reason requiring her to live separate and apart from her husband-- the husband is not required to pay alimony, separate maintenance, or to support her, so long as she wrongfully refuses to return to her conjugal duties" *Cox v Cox*, 183 So.2d 921, 924 (Miss. 1966). In cases where alimony is awarded to a spouse at fault, it is "not to enable the wife to maintain the lifestyle to which she had been accustomed, but to prevent her from destitution." *Id*. Here, in addition to Claudia's fault, there is no evidence that she would be rendered destitute by denial of alimony. *Graham v. Graham*, 767 So. 2d 277 (Miss. App. 2000). Claudia has failed to establish error in the chancellor's judgment.

Finally, Claudia, once again, failed to present this issue to the Chancellor through MRCP, Rules 52 and 59 and case law and is a waiver, *supra*.

B. Claudia was not entitled to lump sum alimony.

In addition to the inadequacy of the separate estates and financial security of the wife, in order to award lump sum alimony, chancellors look to the substantial contribution to the accumulation of total wealth. *Flechas v. Flechas*, 791 So. 2d 295, 304 (¶31) (Miss. Ct. App.

2000) (citing *Cheatham v. Cheatham*, 537 So. 2d 435, 438 (Miss. 1988). Here, just as in *Flechas*, there is no evidence of a substantial contribution to the total wealth by Claudia. The Chancellor found that Forrest made the principal financial contribution (RE 8, Op 6) and this factual finding is insufficient to be the basis for an award of alimony. In *Wallmark v Wallmark*, 863 So. 2d 68 (Miss. App. 2003), as here, the chancellor found that the wife would be financially secure and a decision to deny a lump sum award does not amount to an abuse of discretion and the issue was without merit.

Finally, this claimed error, once again, was not presented to the Chancellor, by way of MRCP Rules, 52 or 59, and case law *supra*, and is waived.

C. Claudia was not entitled to monthly alimony.

Claudia claims a series of actions by the Chancellor require reversal. Claudia asserts that the Chancellor, in determining her net income, included temporary child support, claiming that this might be fatal error if it was combined for analytical purposes. Forrest cannot find, either in the trial transcript or the Chancellor's Opinion, anything that indicates that the Chancellor placed undue emphasis, or any emphasis at all for that matter, on the amount of child support in the analysis. In fact, he awarded Claudia a hundred more than Forrest was paying without a temporary order. Furthermore, if the Chancellor placed any undue weight on the support, it was caused by Claudia when she testified to her income and introduced her 8.05, into evidence, having included the support as income (Ct Rep Ex D5, p.2). It is hornbook that a judge will not be held in error based upon something the complaining party caused. Allegations not supported by the record cannot be the basis for appellate relief. *Robinson v. State*, 662 So. 2d 1100, 1104 (Miss. 1995).

Nevertheless, child support must be considered when determining if there is any money remaining which could be used to pay monthly alimony

The facts show the parties are really quite even, just as the Chancellor found (Op. p. 7, # 6; RE 9), a matter that remains unaddressed by Claudia in her appeal. Forrest had a monthly net of $5436 (T 45-49) and Claudia $3800, as the Chancellor found. Subtracting $780 child support (exclusive of Keller's insurance and MPACT) leaves Forrest with $4656, and Forrest now has a mortgage payment of conservatively $1000 each month to pay for Claudia's division, leaving him with $3656, less his other monthly obligations. If, after equitable distribution, Claudia has a house payment it is negligible. Therefore, Forrest has disposable income of $3656 for life expenses, compared to Claudia's $3800. Moreover, even if Forrest's child support is dropped from the equation -as previously argued by Claudia- She still has $3022 monthly, without any significant housing costs. Forrest will have $3656, which is $634 more. This barely covers the cost of one visit to see his daughter in Arkansas.

Claudia demands $1500 in monthly alimony but Forrest only has a couple of hundred left over, after his frugal, but necessary expenses. Neither at trial, nor here, can Claudia show where this $1500 is to come from. How, pray tell, can Forrest keep the roof over his head, pay any unforeseen expenses, help in paying Keller's future expenses, and visit her? Under Claudia's demand, he cannot lead a normal life with a decent standard of living. If the District Attorney was ordered to pay Claudia's demand, he would face contempt charges and might go to jail. On the other hand, if Claudia's $1500 monthly alimony demand is ordered, allegedly so she can resume her claimed life-style, she can pay for a maid bi-monthly and go to the beauty parlor. That's a rather extravagant expenditure for those two items. If there's a difference, it trifling.

Claudia claims the Chancellor did not take into account that Forrest's monthly expenses included $950 in charitable contributions in determining if he had any excess funds with which to pay alimony. She fails to point to out anything in the record that even suggests that the Chancellor did not consider those contributions and therefore it cannot be the basis for appellate relief. *Robinson v State, supra*, or file a 52 and/or 59 motion.

Moreover, Claudia fails to tell this Court that $800 of the monthly contribution was church tithes (Ex P1, p.4), a practice the devout Christian Forrest started in childhood (T 145). Claudia fails to cite any case, statute or rule that overrides either the Mississippi or United States Constitution, separating Church from State (MS Article 3, Section 18; U.S. Amend 1). Indeed, such a holding would run afoul of our Constitutions. In *Ellis v. Ellis*, 651 So.2d 1068 (Miss.1995) (¶ 5), this Court noted that appellant failed to cite any authority in support of this claimed error and that the Court has consistently held that an unsupported assignment of error will not be considered. Furthermore, *Ellis* held, an issue, raised for the first time on appeal, would not be considered, especially where constitutional issues are concerned.

Once again, Claudia made no request, under MRCP, Rules 52 and 59, to allow the Chancellor an opportunity to address the issue, she simply appealed. See prior discussions of the rules and case law, *supra*.

The Chancellor addressed and analyzed each of the *Armstrong* [coupled with *Ferguson* findings] factors, in some detail, though not to Claudia's satisfaction, but which was consistent with the trial proof. For example, he found that Forrest, after necessary expenses, had $261 left over each month and Claudia had $252 (RE 13, Op 11, # 1). Claudia demanded $1500 monthly alimony, though she could not tell the Chancellor at trial, or this Court now, how Forrest can pay

such an amount. It is error for the trial court to impose an alimony requirement that is beyond the obligor's ability to pay. *Brooks v. Brooks*, 652 So. 2d 1113, 1122 (Miss. 1995). Furthermore, there was no proof that Claudia would be destitute. *Graham v. Graham*, 767 So. 2d 277 (Miss. App. 2000) Alimony, if allowed, "should be reasonable in amount, commensurate with the wife's accustomed standard of living, minus her own resources, and considering the ability of the husband to pay. As long as the chancellor follows this general standard, the amount of the award is largely within his discretion."*Gray v. Gray*, 562 So. 2d 79, 83 (Miss. 1990).

If there is substantial evidence in the record to support a chancellor's finding of fact, no matter what contrary evidence there may be, this Court will uphold the chancellor. *Bower v. Bower*, 758 So. 2d 405, 412 (¶31) (Miss. 2000).

Additionally, under *Armstrong* factor (3) the Chancellor found that the proof showed no significant differences in their needs, other than Claudia needed "her own house" and he gave her $144,875.00 to buy herself a house (RE 16, Op 14). This finding too, remains unaddressed.

Under *Armstrong* factor (4) the Chancellor found that Forrest had significantly more assets due to his inheritance and PERS, but that a substantial portion of Claudia's net worth was a result of Forrest's efforts (RE 14, Op 12, (4)). This finding too, remains unaddressed.

Under *Armstrong* factor (8) the Chancellor found that Forrest continued his same frugal living but Claudia claimed a significantly lower lifestyle after she separated: a smaller Arkansas dwelling, no bi-monthly maid, no hair stylist, and no money to travel (RE 14; T 203-204). The Chancellor's award of $144,875.00 should have been adequate. If Claudia has a house payment, it will be small, which leaves her with no maid, hair stylist, and the inability to gallivant (T 203-204).

Balancing that against Forrest's loss of association with his daughter and it literally costing him $500.00 just to visit her, it would seem that Forrest's lifestyle has been more disrupted than Claudia's. As to her travel money, she testified that because of her traveling, she frequently did not have enough money to pay her responsibilities under her terms. She was living above her means. No doubt the Chancellor was unimpressed by Claudia's claimed lower lifestyle.

As to fault or misconduct (*Armstrong* factor 10) the Chancellor found that Claudia had cut off all sexual contact with Forrest for some eleven years before Claudia left the last time (RE 15, Op 13). It is hornbook, refusal of conjugal relations for this length of time constitutes habitual, cruel and inhuman treatment, a ground for divorce, even discounting her other conduct. The Chancellor was most gracious to Claudia in the Opinion. He could have included adultery and that the totality of the circumstances, made the district attorney a hard-time prisoner. While fault is certainly a factor that may be considered in determining the appropriate solution in alimony proceedings, the chancellor is not required to specifically mention a certain factor, nor is he required to put special weight on one consideration over the other. *Moore v. Moore*, 803 So. 2d 1214 (¶ 20) (Miss. Ct. App. 2001); *Hoggatt v Hoggatt*, 766 So. 2d 9, at (¶ 9).

Under wasteful dissipation, (*Armstrong* 11), the Chancellor found [that even though Claudia made more than $40,000, *because of her spending*, Forrest frequently] "had to give her additional money" [] Moreover, the Chancellor also found that "[s]he traveled out-of-state and out of the country [ ] but not with [Forrest]" (RE 15). (See, also, *Ferguson* finding #6, CP 71; RE 9; Op p.7, *supra*).

Under *Armstrong* 5, the Chancellor, under the law, found that the marriage was lengthy. While this may militate in favor of alimony, the marriage's longevity was in no way attributable to Claudia. Her actions displayed the willingness to destroy it when she left in 1988, and she has done nothing to preserve it ever since.

In the end, the Chancellor found that under *Roberts v Roberts*, 924 So. 2d 550 (Miss. App. 2005), and *Johnson, supra*, "that alimony must be considered in conjunction with equitable division and only considered when the circumstances are such that an equitable division of marital property, taking into account each party's non-marital assets, leaves a deficit for one party. [ ] This process does not require divestiture of inherited or gift-acquired non marital property. [The Chancellor] conclude[d] that the equitable division [to Claudia] does not require that any more be done [] by way of alimony and therefore, [none] is awarded to [Claudia]. In reaching this conclusion, the [Chancellor took] into account that [Forrest] is to pay $144,875.00 in cash to [Claudia] [and] he will have to borrow this money, which will leave him with a sizable mortgage payment, or liquidate his separate estate. By requiring this cash payment to [Claudia], she will have adequate funds to either buy a home or at least make a large down payment on a home for herself" (RE 16).

The Chancellor had previously found, under his discussion of equitable distribution, that Claudia was earning $54,000 annually, with her advanced degree, and by requiring Forrest to pay her $144,875.00 would eliminate periodic payments, a potentially a source of future friction (RE 9). Again, Claudia could not at trial or here, show how Forrest can pay $1500 monthly alimony. Moreover, once again, Claudia failed to present the Chancellor, by way of a proper motion, an opportunity to correct, modify, or amend his sound analysis. See, Rules 52, 59 and case law

supra.

The Chancellor was correct in not awarding Claudia periodic alimony.

CONCLUSION

For more than 10 years Forrest endured Claudia's vexatious, if not sadistic, conduct. Now, still unsatisfied by the Chancellor and without giving him an opportunity to address her perceived complaints, she wants more retribution here, demanding more than possible, regardless of the consequences. This Court, just as the Chancellor, on the facts, should not give her an unjustifiable reward.

The Chancellor's Judgment should be affirmed.

Respectfully,

Jackson M. Brown for Forrest

CERTIFICATE OF MAILING

I certify that I have mailed the above and foregoing Brief of Appellee to:

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This the 13 day of January, 2010.