

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY JOSEPH CUCCIA

APPELLANT

VS.

NO. 2010-CA-00083

JULIE ANNE CUCCIA

APPELLEE

**BRIEF OF APPELLEE
JULIE ANNE CUCCIA**

APPEAL FROM THE CHANCERY COURT
OF DESOTO COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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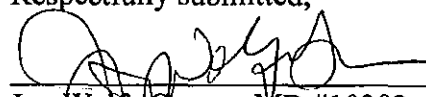
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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2. Julie Anne Cuccia, Appellee.
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7. J. Wesley Hisaw, Counsel for Anthony Joseph Cuccia, Post Office Box 256, Horn Lake, Mississippi 38637.
8. Honorable Percy Lynchard, DeSoto County Chancery Court, 2535 Highway 51 South, Hernando, Mississippi 38632.

SO CERTIFIED this the 10th day of September, 2010.

Respectfully submitted,



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I. STATEMENT OF THE ISSUES

1. Whether the Chancellor properly awarded sole legal and physical custody of the parties' two minor children to Julie Anne Cuccia.
2. Whether the Chancellor properly awarded rehabilitative alimony to Julie Anne Cuccia.
3. Whether the Chancellor properly divided the marital estate.

II. STATEMENT OF THE CASE

A. Nature of the Case and Disposition Below

This appeal was filed by Anthony Joseph Cuccia (hereinafter “Mr. Cuccia”) following the entry of the Opinion of the Court (hereinafter “Opinion”) (Record at 370-81 (hereinafter R. 370-81); Appellant’s Record Excerpts at Tab 4 (hereinafter AJCRE Tab 4)) and Decree of Divorce (R. 382-89; AJCRE Tab 2) by the Chancery Court of DeSoto County, Mississippi.

For purposes of this appeal, Julie Ann Cuccia (hereinafter “Ms. Cuccia”) adopts the procedural history as detailed by Mr. Cuccia on pages 6-11 of his Brief (hereinafter B. 6-11). In the interest of judicial economy, Ms. Cuccia will not restate the procedural history; however, in adopting Mr. Cuccia’s version of the procedural history, Ms. Cuccia in no way adopts or accepts the arguments, characterizations or opinions of Mr. Cuccia contained therein.

B. Statement of Facts Relevant to Appeal

Because this appeal involves questions that require fact-specific analysis, many of the facts necessary for consideration are contained within the Argument section below and will not be restated here. However, in order to the Court with the general background of the parties, Ms. Cuccia offers the following brief statement of facts related to this matter.

The parties were married on November 30, 1996. (R. 8). Ms. Cuccia worked outside the home until their daughter was born in 1998. (Trial Transcript at 106 (hereinafter T. 106)). Subsequently, in 2002, the couple had a son. (T. 106). Ms. Cuccia has been a stay-at-home mom to the children for their entire lives. (T. 106). Mr. Cuccia has worked for Federal Express since 2000. (T. 107). At the time of trial, he was employed as a Managing Director of Information Security. (T. 19).

Mr. Cuccia left the marital home on December 26, 2007, allegedly because Ms. Cuccia was boarding four dogs in addition to the eight family pets and 30 boarded dogs that were

previously present in the home. (T. 20, 99, 110, 112; R. 126, 128). Mr. Cuccia, however, did not feel the home was dangerous at that time. (T. 99). The parties both acknowledge that Ms. Cuccia had started a dog training business and a dog rescue operation during the parties' marriage. (T. 95, 106). In fact, Mr. Cuccia helped Ms. Cuccia prepare dog runs for the business. (T. 96). Additionally, on occasion, Mr. Cuccia would request that a particular dog remain with the family. (T. 104-05). The Chancellor, in dissolving the TRO discussed below, noted that the situation about which Mr. Cuccia was complaining was one in "which he had lived for quite some time." (T. 101).

However, after leaving the home on December 26, 2007, and leaving the two minor children in the marital home, Mr. Cuccia suddenly became concerned for the children's safety and welfare because of the presence of the dogs. (T. 99, 111). In spite of this allegedly dangerous condition, Mr. Cuccia did not seek to remove the children from Ms. Cuccia's care (or the marital home) until March 12, 2008. (T. 110-12). In fact, in his Complaint for Divorce (filed a month after he abandoned the marital home leaving his minor children with Ms. Cuccia) and his Amended Complaint for Divorce (filed in March 2008), Mr. Cuccia sought joint legal and physical custody of the minor children. (R. 8-15).

After a full hearing on Mr. Cuccia's Motion for Temporary Relief, the Chancellor dissolved the Temporary Restraining Order, which had allowed Mr. Cuccia to remove the children from Ms. Cuccia's home and care without notice to her of his request, and awarded the parties joint physical and legal custody. (R. 46; AJCRE Tab 3b). From that point forward, Ms. Cuccia had the children for the majority of the time – Mr. Cuccia was granted visitation three weekends per month and one afternoon per week from 4 p.m. until 8 p.m. (R. 46; AJCRE Tab 3b).

At the trial of this matter, the parties stipulated to a divorce on the grounds of irreconcilable differences and left all other issues to the determination of the Chancellor. (R. 336). Following two days of testimony (in April and August 2009), the Chancellor entered his Opinion on September 21, 2009 (R. 370; AJCRE Tab 4) and filed his Decree on October 19, 2009 (R. 382; AJCRE Tab 2). The Chancellor granted Ms. Cuccia sole legal and physical custody of the minor children, granted Mr. Cuccia visitation rights, ordered that Mr. Cuccia pay child support and rehabilitative alimony and caused an equitable division of the marital property. (R. 370-82; AJCRE Tab 4). Mr. Cuccia thereafter unsuccessfully sought post-judgment relief in the trial court (R. 390, 645; AJCRE Tab 3q) and subsequently perfected this appeal. (R. 406).

III. SUMMARY OF THE ARGUMENT

The Chancellor's Opinion and Judgment should be affirmed in all respects because Mr. Cuccia has failed to demonstrate that any of the decisions about which he complains were the result of the application of an improper legal standard, were manifest error, clearly erroneous or an abuse of discretion. The Chancellor's Opinion is supported by the testimony and evidence presented at the trial of this matter and should not be disturbed on appeal.

The Chancellor correctly considered and applied the factors set forth in *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983), in determining that Ms. Cuccia should be granted sole custody of the parties' two minor children. The Chancellor's Opinion includes on the record findings regarding each of the applicable factors, and Mr. Cuccia has failed to bear his burden of demonstrating that those findings are clearly erroneous such that reversal is required. Furthermore, the parties both testified that joint custody was not an appropriate option because of their inability to cooperate in co-parenting the minor children. (T. 166-67, 274).

Mr. Cuccia fails to brief his alleged assignment of error related to visitation with the minor children and therefore has waived that issue on appeal. *O'Hara v. Robinson*, 904 So.2d 1110, 1111 (Miss. Ct. App. 2004).

Mr. Cuccia's arguments related to the award of alimony are similarly without merit because the Chancellor considered the proper legal standard and determined that Ms. Cuccia, because of her financial situation, was entitled to an award of rehabilitative alimony in the amount of \$2,000.00 for a period of 48 months. *Turnley v. Turnley*, 726 So.2d 1258, 1267 (Miss. Ct. App. 1998).

Finally, with respect to the equitable division of property, the Chancellor properly applied *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994), and *Pittman v. Pittman*, 791 So. 2d 857 (Miss. Ct. App. 2001), to determine that Mr. Cuccia's bonus check was marital property because it was

accumulated during the marriage although it was not received until after the entry of the Temporary Support Order. Similarly, pursuant to *Pittman*, the Chancellor found that Ms. Cuccia's home, which was purchased after the entry of the Temporary Support Order and without the use of any marital funds, was her separate property. The Opinion was also not erroneous for failing to consider the parties' marital debt, an issue which is not briefed by Mr. Cuccia, according to *Selman v. Selman*, 722 So. 2d 547, 553-54 (Miss. 1998). Finally, the Chancellor acted within his discretion, based on the testimony presented at trial, in valuing the property owned by the parties and located in Tennessee.

For all of these reasons, and as set forth more fully below, Mr. Cuccia has failed to bear his burden of demonstrating that the Chancellor's Opinion and Judgment should be reversed.

IV. STANDARD OF REVIEW

A Chancellor's findings regarding child custody will be reversed on appeal only if "the decision is manifestly wrong, clearly erroneous, or the [C]hancellor applied an erroneous legal standard." *Norman v. Norman*, 962 So. 2d 718, 720 (Miss. Ct. App. 2007) (citing *Roberson v. Roberson*, 814 So. 2d 183, 184 (Miss. Ct. App. 2002)).

Similarly, "[a]limony awards are within the chancellor's discretion, and [will not be reversed unless] the chancellor committed manifest error in his findings of fact and abused his discretion.'" *Brady v. Brady*, 14 So. 3d 823, 826 (Miss. Ct. App. 2009) (quoting *Graham v. Graham*, 767 So. 2d 277, 280 (Miss. Ct. App. 2000)). Furthermore, an appeal from an award of alimony or from a chancellor's division of marital property will not succeed unless the aggrieved party demonstrates that the "court was manifestly wrong, abused its discretion or applied an erroneous legal standard." *Fogarty v. Fogarty*, 922 So. 2d 836, 839 (Miss. Ct. App. 2006) (citing *Sandlin v. Sandlin*, 699 So. 2d 1198, 1203 (Miss. 1997)).

Therefore, the Appellant in this matter has a heavy burden on appeal to demonstrate that the Chancellor committed manifest error or otherwise abused his discretion. For the reasons contained in this brief, as supported by the record from the trial court, he has failed to satisfy that burden, and the Chancellor's ruling should be affirmed in all respects.

V. ARGUMENT

A. The Chancellor's Decision Regarding Child Custody Was Not Manifest Error Or Clearly Erroneous Nor Did the Chancellor Apply an Incorrect Legal Standard.

1. The Chancellor correctly considered the *Albright* factors in determining that Ms. Cuccia should be given sole legal and physical custody of the minor children.

The Chancellor explicitly recognized in his Opinion that “[i]n any custody matter, the pole star consideration of the Court should always be the best interest of the children.” (R. 372; AJCRE Tab 4; *see also Albright*, 437 So.2d at 1005 (Miss. 1983). Furthermore, because this is an initial custody determination and, as required by established Mississippi law, *Passmore v. Passmore*, 820 So.2d 747, 750 (Miss. Ct. App. 2002) (citing *Powell v. Ayars*, 792 So. 2d 240, 244 (Miss. 2001)), the Chancellor examined each of the factors enumerated in *Albright*, and made findings in his Opinion regarding each of those factors. (R. 372-76; AJCRE Tab 4). Therefore, Mr. Cuccia cannot demonstrate that the Chancellor applied an erroneous legal standard to the determination of custody in this matter.

2. The Chancellor's application of the *Albright* factors was not manifest error or clearly erroneous.

Because the Chancellor applied the proper legal standard to the question of custody in this matter, Mr. Cuccia must demonstrate that the Chancellor was manifestly wrong or clearly erroneous in his analysis of the *Albright* factors. This he cannot do.

Albright mandates that trial courts consider certain enumerated factors in determining the custody of children involved in divorce actions. The Chancellor in this matter examined each factor and determined that nine of the factors did not favor either party and three of the factors favored Ms. Cuccia. As a result, the Chancellor was not clearly erroneous in awarding Ms. Cuccia sole legal and physical custody of the minor children. In this appeal, Mr. Cuccia attempts to call into question the Chancellor's findings regarding the *Albright* factors. For the reasons below, his efforts fall short of the showing needed for a reversal by this Court, as he cannot

demonstrate that the Court's findings are clearly erroneous or manifestly wrong with respect to the *Albright* factors.

a. Health and Sex of the Children

The minor children born to Mr. and Ms. Cuccia were 11 and 7 years old at the time the Chancellor rendered his Opinion in this matter. (R. 372; AJCRE Tab 4). As such neither the "tender years doctrine" of Miss. Code Ann. § 93-13-1 nor the child's preference provision of Miss. Code Ann. § 93-11-65, applies to the present action. The Chancellor considered the age and sex of each child and determined that this factor favored neither party, as the female child (age 11) about to enter puberty would favor the mother and the male child (age 7) would ordinarily favor the father. (R. 372; AJCRE Tab 4). *See, e.g., Watts v. Watts*, 854 So.2d 11, 13 (Miss. Ct. App. 2004) (finding that chancellor properly found that sex of 13 and 9 year old girls favored mother); *Bass v. Bass*, 879 So.2d 1122, 1124 (Miss. Ct. App. 2004) (finding that chancellor properly found that age of 4 year old boy favored mother but sex favored father). Therefore, the Chancellor correctly concluded that this factor favored neither party. (R. 372; AJCRE Tab 4).

Mr. Cuccia avers that Ms. Cuccia has not seen to the health of the minor children. However, there is nothing in the record to suggest that either child has suffered from significant medical problems that would support his allegations that their medical needs have not been met. No testimony or other evidence was presented at trial regarding this matter. Furthermore, to the extent Mr. Cuccia complains that the children missed "well-child check up[s]" prior to March 2008, he was living in the marital home with the children during that time and apparently never felt such appointments were critical for the children's well-being, as he only scheduled such appointments after leaving the marital home. (B. 27; T. 51, 125). The Chancellor noted that the children "suffer from no illnesses or disabilities which would require special care for which

either party may be more qualified” to provide. (R. 374; AJCRE Tab 4). There is no basis to overturn this finding as clearly erroneous.

Mr. Cuccia also argues that he is more attuned to his pre-pubescent daughter’s needs than Ms. Cuccia. He bases this solely on his claim that he obtained her first bra for her. (B. 29). Such a claim simply does not support a reversal of the Chancellor’s well-reasoned finding that the minor child is about to enter “a period of time in which a female child by necessity may feel more comfortable with her mother.” (R. 372; AJCRE Tab 4). In fact, Mr. Cuccia’s claim regarding the purchase of the bras for the minor children supports the Chancellor’s findings in that he acknowledges that his aunt assisted him in obtaining the bras; thereby implicitly recognizing the need for female interaction and direction for the minor child at this time. (T. 47; B. 29). Moreover, Mr. Cuccia acknowledges that Ms. Cuccia is closely bonded with her daughter. (B. 36). Therefore, Mr. Cuccia has failed to demonstrate that the Chancellor’s finding that “[t]he sex of the female child would favor the natural mother” was clearly erroneous. (R. 372; AJCRE Tab 4). As a result, the Chancellor’s finding that this factor favored neither party should not be disturbed.¹

b. Continuity of Care for the Minor Children

The Chancellor found that “the primary custodial parent throughout this marriage and prior to the separation of the parties was the natural mother.” (R. 372; AJCRE Tab 4). Mr. Cuccia does not dispute this finding; instead, he states “prior to the parties’ separation, . . . Mr. Cuccia worked and relied on Ms. Cuccia to be primarily responsible for the daily needs of the children.” (B. 30; T. 106-07). On appeal, Mr. Cuccia relies upon *Jerome v. Stroud*, 689 So.2d 755 (Miss. 1997) to argue that the Chancellor erred in not considering the continuity of care

¹ The Chancellor determined that the minor son would favor Mr. Cuccia. Ms. Cuccia, although disputing Mr. Cuccia’s allegations that she is “detached, unaffectionate and distant” from her son, (B. 29; T. 94-95), does not believe that she has grounds for a reversal of the Chancellor’s finding on this issue.

following the parties' separation. (B. 29-30). His reliance is misplaced, as the Chancellor specifically noted that *Jerome* allowed consideration of "all periods of care for the children, including those post-separation" and concluded that although Mr. Cuccia made contributions to the care of the children, it was primarily Ms. Cuccia who provided care, even post-separation. (R. 373; AJCRE Tab 4). The Chancellor's finding that this factor favors Ms. Cuccia is well-supported. Prior to the separation there is no dispute that Ms. Cuccia was the primary caregiver and post-separation – when Mr. Cuccia left the marital home – she provided primary for the two children for a period of almost three months prior to entry of the temporary restraining order. (R. 23). Following dissolution of the TRO, the children were returned to the joint custody of the parties, and Ms. Cuccia was restored as the primary caregiver, except for three weekends per month and one weekday afternoon per week. (R. 46; AJCRE Tab 3b). The Chancellor's ruling was, therefore, not clearly erroneous.²

c. Best Parenting Skills

The Chancellor found that both parents possessed "admirable and proper" parenting skills but concluded that, because Ms. Cuccia had been the primary caregiver during both the marriage and during the separation, this factor favored Ms. Cuccia. (R. 373; AJCRE Tab 4). On appeal, Mr. Cuccia relies solely on his opinion regarding the presence of multiple dogs owned and/or boarded by Ms. Cuccia in and around the marital home. (B. 31-33). Mr. Cuccia makes a number of unsupported allegations regarding the condition of the home and the impact of the animals on the children. However, merely because Mr. Cuccia does not approve of the presence

² Mr. Cuccia appears to take issue with the Court's finding that Ms. Cuccia provided primary care for the children for a period of three months following the parties' separation. In fact, Mr. Cuccia left the marital home on December 26, 2007 (T. 20-21) and did not obtain the temporary order until March 12, 2008 (R. 23). Although not quite three calendar months, certainly Mr. Cuccia insistence that it was only 76 days (and not three months) (B. 19) is of no import, as the Chancellor's finding that Ms. Cuccia provided primary care for the majority of the post-separation period is equally applicable to either period of time.

of the animals, does not mean that Ms. Cuccia's parenting skills are inadequate. Additionally, there had been numerous pets and boarded and rescued animals in the home during the marriage. (T. 20, 99, 110, 112; R. 126, 128). Furthermore, in spite of Mr. Cuccia's alleged concerns regarding the condition of the home and the presence of the animals, he delayed seeking custody of the minor children for almost three months after he left the marital home. (R. 21). And, after being awarded custody of the children, he entered an Agreed Order consenting to the return of the children to Ms. Cuccia's care pending a hearing on his Motion. (R. 45). Additionally, no testimony by any objective third party or other corroborative evidence regarding Mr. Cuccia's allegations concerning the condition of the home or the impact of the animals on the children was presented at trial.³ In fact, the Chancellor ordered, and subsequently relied upon, a home study performed by the Department of Human Services that found no problematic conditions in Ms. Cuccia's home. (R. 375-76). Finally, although Mr. Cuccia now demonizes Ms. Cuccia's passion for dogs, he acknowledges that, during the marriage, she was engaged in boarding and training dogs and that the family had numerous pets and that he allowed her to be the primary caregiver during that time. (T. 20, 99, 106, 110, 112; R. 126, 128). Certainly, he would not have left one "lack[ing] the most basic and common sense principles of parenting," (B. 31), to care for his children. The Chancellor's findings on this factor are not clearly erroneous and should be upheld.

d. Willingness to Provide Primary Childcare

The Chancellor found that Ms. Cuccia had not only stated a willingness to provide primary childcare but had actually provided such primary care to the children, including during

³ Mr. Cuccia states in his brief that "he believed that Joseph's poor performance in first grade was caused by the chaotic, unstructured environment of Ms. Cuccia's home and her failure to give the child the one-on-one attention and assistance he needed with his homework." (B. 32; T. 41-43). Mr. Cuccia, however, offers no support for his "belief" and no basis for his conclusion or qualifications to make such a determination. He also offered no expert testimony regarding the underlying causes of any academic problems encountered by his minor son.

the period after Mr. Cuccia left the marital home. (R. 374; AJCRE Tab 4). Mr. Cuccia, on the other hand, left the children in the marital home and made no effort to provide primary care until almost three months later. (T. 110-12). Furthermore, as noted by the Chancellor, Mr. Cuccia petitioned the Court for joint legal and physical custody in both his Complaint for Divorce and Amended Complaint for Divorce. (R. 8-15). Additionally, contrary to Mr. Cuccia's assertions on appeal, he did enter into an Agreed Order allowing Ms. Cuccia to share custody of the children with him during the pendency of the Temporary Restraining Order. (R. 45). These requests and agreements do not suggest that Mr. Cuccia is prepared to provide primary childcare. The Chancellor's finding that this factor favored Ms. Cuccia is not clearly erroneous and therefore should be upheld.

e. Responsibilities of Employment

The Chancellor found that this factor favored neither party as "[b]oth parties are fortunate in that their respective employment allows the liberty to be with the children should emergencies arise." (R. 374; AJCRE Tab 4); *see Gilliland v. Gilliland*, 969 So.2d 56, 68 (Miss. Ct. App. 2007). On appeal, Mr. Cuccia argues that Ms. Cuccia has insufficient time to care for the minor children because of the demands of her employment. (B. 33-35). However, as the Chancellor concluded, and as shown by the evidence in this matter discussed above, Ms. Cuccia has served as the primary caregiver throughout the minor children's lives. Mr. Cuccia points to no evidence to support his argument that suddenly Ms. Cuccia is unable to continue to provide care for the children and maintain her business.⁴ Furthermore, although Mr. Cuccia contends that his job allows him the flexibility to attend the children's extra-curricular activities, his testimony reveals that the flexibility might not be so great, as he acknowledged being unable to attend soccer

⁴ Although Mr. Cuccia suggests that Ms. Cuccia does not have time to attend to the needs of the children, the uncontroverted testimony at trial was that her duties related to the animals at the home took only a few hours in the morning and evening. (R. 193).

practices (for a team that he coached) and volleyball games because of work commitments. (T. 159, 171). Accordingly, the Chancellor's finding on this factor should not be disturbed on appeal.

f. Physical and Mental Health of the Parties

The Chancellor found that this factor favored neither party. Mr. Cuccia concedes that the Chancellor was correct in this finding.⁵ Therefore, there is no basis for reversal of the Chancellor's finding on this factor.

g. Physical and Mental Health of the Children

The Chancellor found that this factor favored neither party. As noted above, the Court found that the evidence did not support a finding that either minor child suffered from any condition that would warrant special care for which Mr. Cuccia or Ms. Cuccia would be better suited to provide. There is no evidence in the record to rebut the Chancellor's finding and, therefore, this finding should be affirmed on appeal.

h. Stability of Employment

The Chancellor found that neither party was in jeopardy of being displaced from their employment and that this factor favored neither party. Mr. Cuccia argues that because Ms. Cuccia indicated that she was considering options related to new or additional employment that this factor should have favored him. (B. 20-21). However, considering possible alternative employment does not suggest that Ms. Cuccia's current employment status is less stable or in jeopardy. The Chancellor heard all of Ms. Cuccia's testimony regarding her employment, both current and potential, and determined that she was in a stable situation at the time of trial. Such a finding was not clearly erroneous and should be affirmed.

⁵ Ms. Cuccia denies Mr. Cuccia's suggestion that she has a mental health issue, and there is nothing in the record to suggest that there is any basis for such an inference. (B. 35-36).

i. Emotional Ties of Parent and Child

The Chancellor found that the evidence suggested that “both parties dearly love the children and are loved in return by the children” and that this factor favored neither party. (R. 375; AJCRE Tab 4). Mr. Cuccia argues on appeal, and without any supporting citations to the record or evidence, that Ms. Cuccia is not bonded to her minor son but that he is closely bonded with both children. (B. 36). The only testimony regarding Ms. Cuccia’s lack of bonding with her minor son came from Mr. Cuccia or his family. The Chancellor, having had the opportunity to hear testimony from all witnesses and observe the parties, found that although Ms. Cuccia was more bonded with her daughter and Mr. Cuccia was more bonded with his son, there was not an absence of bonding between the children and either parent. This finding should not be disturbed on appeal in the absence of evidence that his finding was clearly erroneous. Mr. Cuccia has failed to make that showing.

j. Moral Fitness of the Parents

The Chancellor found that “neither party has exhibited any immorality which would give the Court cause for concern with reference to the children” and concluded that this factor favored neither party. (R. 375; AJCRE Tab 4). On appeal, Mr. Cuccia argues that Ms. Cuccia should be deemed morally unfit by the Court because of certain misstatements she is alleged to have made on various documents following the parties’ separation. (B. 36-37). However, the alleged misstatements, even if assumed to have been intentionally made by Ms. Cuccia, are not significant to the question of whether Ms. Cuccia is a morally fit parent to her children under this *Albright* factor. The Chancellor’s findings on this issue are not clearly erroneous and should be upheld.

k. Home, School and Community Record of the Children

The Chancellor found that both Mr. Cuccia and Ms. Cuccia had been involved in the minor children's activities and that both parties have family members who are willing to assist in rearing the children. As a result, the Chancellor found that this factor favored neither party. (R. 375; AJCRE Tab 4). Mr. Cuccia appears to argue that this factor should have been decided in his favor because the minor son allegedly had some academic difficulties during first grade. (B. 37). Interestingly, Mr. Cuccia offers no citation to the record in support of this conclusion. Indeed, he cannot do so because there is nothing in the record to support the conclusion that the minor child's academic performance was in any way affected by the actions of Ms. Cuccia. Mr. Cuccia merely elects to blame the minor child's academic struggles on Ms. Cuccia but fails to consider the potential impact his own actions had on the child (i.e., leaving the family home). Mr. Cuccia also contends that he should prevail with respect to this factor because he served as his daughter's sponsor in connection with her First Communion⁶ and because he coaches his son's soccer team. (B. 37-38). Neither of these facts is determinative, as the Chancellor's Opinion clearly acknowledged that both parties had been involved in extracurricular activities with the children and so Mr. Cuccia's involvement in one particular activity with each child does not make the Chancellor's finding clearly erroneous. Therefore, the finding with respect to this factor should be affirmed.

l. Stability of the Home Environment

The Chancellor concluded that each party had established a stable and suitable environment for the children in their post-separation homes. Mr. Cuccia does not address this issue in his brief and, therefore, any objection to this finding is waived. *O'Hara*, 904 So.2d at

⁶ Ms. Cuccia testified that no sponsor is required for First Communion and that the parties took turns taking their daughter to the required classes. (T. 262).

1111 (holding that “this Court is not required to review any issues which are not properly supported by reasons and authority”) (citing *Hoops v. State*, 681 So. 2d 521, 535 (Miss. 1996)).

Because the Chancellor correctly considered and applied the *Albright* factors,⁷ there can be no manifest error, as “such careful consideration and application . . . precludes reversal on appeal.” *Jerome v. Stroud*, 689 So.2d at 757 (citing *Smith v. Smith*, 614 So. 2d 394, 397 (Miss. 1993)). The Chancellor concluded that nine of the *Albright* factors favored neither party and that, but for the inability of the parties to agree on “the rearing of the children and the accommodation of the other party with respect thereto” he would grant joint custody in this action. Yet, when faced with the parties’ inability to agree on issues necessary for successful joint custody – an inability that was acknowledged by both parties at trial (T. 166-67, 274) – and because three of the factors were deemed to favor Ms. Cuccia, the Chancellor granted her sole legal and physical custody. There is no basis for disturbing the Chancellor’s well-reasoned and documented findings of fact. The mere fact that Mr. Cuccia disagrees with some of the child-rearing decisions made by Ms. Cuccia does not render the Chancellor’s findings reversible. The Chancellor’s ruling on custody should be affirmed in all respects.

3. Mr. Cuccia has waived any challenge to the visitation schedule ordered by the trial court.

Mr. Cuccia identifies the imposition of the “standard Farese schedule” as an issue on appeal. However, except for a single mention on page 12 of the Procedural History section of his brief, Mr. Cuccia has failed to present this argument on appeal. Having failed to advance his argument related to this matter, any objection to the visitation schedule is waived for purposes of this appeal. *O’Hara*, 904 So.2d at 1111 (citing requirements of rules of appellate procedure and

⁷ The Chancellor did not consider the preference of the minor children because neither child had reached the age of 12 years at the time this matter was tried. Miss. Code Ann. § 93-11-65.

holding that failure to cite any authority or make any reference to the record results in procedural bar).

However, even if this Court considers this issue to have been sufficiently raised, no evidence in the record supports a finding that the Chancellor's visitation provisions for Mr. Cuccia were not appropriate under the circumstances. Ms. Cuccia testified that the temporary visitation schedule under which the parties were living during the pendency of the divorce action was disruptive and difficult for the children. (T. 264). "On visitation issues, as with other issues concerning children, the chancery court enjoys a large amount of discretion in making its determination of what is in the best interest of the child." *Clark v. Myrick*, 523 So.2d 79, 82 (Miss. 1988). In the present case, the Chancellor's decision regarding visitation cannot be shown to be an abuse of that discretion.

B. The Chancellor's Findings Regarding the Award of Alimony Are Not Manifest Error Or An Abuse of Discretion.

Mr. Cuccia argues that the Chancellor committed reversible error in awarding Ms. Cuccia rehabilitative alimony in the amount of \$2,000.00 for a period of 48 months.⁸ (B. 38-42). The Chancellor considered "all of the factors set forth in *Armstrong [v. Armstrong]*, 618 So.2d 1278 (Miss. 1993)], *Cheatham [v. Cheatham]*, 537 So.2d 435 (Miss. 1988)] and *Hubbard [v. Hubbard]*, 656 So.2d 124 (Miss. 1995)]" and determined that an award of rehabilitative alimony was appropriate. (R. 378; AJCRE Tab 4). The Chancellor's findings in this respect were not clearly erroneous or an abuse of discretion. Rehabilitative alimony is designed to provide temporary support for a spouse to allow him or her to become "self-supporting without becoming destitute in the interim." *Hubbard*, 656 So.2d at 130. Unlike other types of alimony, rehabilitative alimony is not designed to be an equalizer between the parties. Bell, Deborah H., *Bell on*

⁸ On page 26 of his brief, Mr. Cuccia incorrectly states that the Chancellor awarded Ms. Cuccia the sum of \$3,453.00 in rehabilitative alimony for 48 months. (B. 26).

Mississippi Family Law (2005), Section 9.02[3][a]. An award of alimony of this type is based upon the consideration of the same factors used in determining whether permanent alimony should be awarded. *Turnley*, 726 So.2d at 1267 (citing *Armstrong* factors in support of award of rehabilitative alimony). The Chancellor considered this factors and noted that Mr. Cuccia's income and earning potential far exceeded Ms. Cuccia's, that the parties were both in good health, that the marriage was relatively lengthy (12 years), that the parties were accustomed to a relatively high standard of living during the marriage, and that there was no evidence of fault or misconduct on the part of either party. (R. 377; AJCRE Tab 4).

Mr. Cuccia makes a number of arguments related to the Chancellor's findings regarding alimony; however, each argument fails to demonstrate that the Chancellor abused his discretion or manifestly erred.⁹ For example, he argues that his income is insufficient to cover his expenses; however, in his expenses, he includes the temporary support he was ordered to pay Ms. Cuccia. As noted by the Court, this support terminated upon the entry of the divorce decree; therefore, it should not be considered in weighing the appropriateness of rehabilitative alimony to be paid after the entry of the divorce. Therefore, Mr. Cuccia's argument on this point is flawed on its face. (B. 39-40). Mr. Cuccia also attempts to allege that Ms. Cuccia was at fault in the divorce. (B. 42). However, it is undisputed that the parties agreed to a divorce on the grounds of irreconcilable differences (R. 371; AJCRE Tab 4) – he cannot now be heard to complain that fault-based grounds for divorce existed that would justify denying Ms. Cuccia alimony. Furthermore, Mr. Cuccia testified that he believed that he had “some obligation” with respect to the support of his wife. (T. 137). This admission demonstrates that Mr. Cuccia is aware that an alimony award is justified.

⁹ Mr. Cuccia takes issue with the Chancellor's findings regarding the award of alimony; however, he wholly fails to cite to any portion of the record in support of his arguments. (B. 38-42). This failure is fatal to his argument, Miss. R. App. P. 28(a)(6), and the Chancellor's ruling should be affirmed on this basis.

The Chancellor's findings of fact related to alimony are not disproven by Mr. Cuccia's unsupported statements and allegations. Therefore, the finding of the Chancellor should be upheld.

C. The Chancellor's Division of the Marital Assets Was Not Manifest Error Or Clearly Erroneous Nor Did the Chancellor Apply an Incorrect Legal Standard.

1. The Chancellor correctly considered the *Ferguson* factors in his division of the marital assets.

The Chancellor acknowledged that *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994) controlled the classification of property for purposes of an equitable distribution. (R. 379; AJCRE Tab 4). Mr. Cuccia does not call into question the application of the *Ferguson* factors to this determination. Therefore, there is no basis to conclude that the Chancellor applied the incorrect legal standard to his determination regarding the division of property. Furthermore, the Chancellor applied the principles of *Hemsley*, 639 So.2d 909, to determine that the parties should share equally in the marital property because "both parties have contributed to the acquisition of the aforesaid property either through direct financial contributions . . . or indirect contributions by in kind services." (R. 379; AJCRE Tab 4). Pursuant to *Hemsley*, for divorce purposes, both direct and indirect contributions to the acquisition of marital assets are assumed to be equal. *Hemsley*, 639 So.2d at 915. Again, Mr. Cuccia does not question the applicability of *Hemsley* to the facts before the Chancellor. Therefore, there is no basis to overturn the Chancellor's decision on this grounds.

2. None of the four issues related to the division of marital property raised by Mr. Cuccia satisfy the standard for reversal by this Court.

Although Mr. Cuccia appears to concede that the Chancellor applied the correct legal standard to the consideration of the division of marital property, he raises four issues related to the conclusion reached by the Chancellor following the application of that standard. For the

reasons that follow, each of Mr. Cuccia's arguments falls short of the standard required for reversal of the Chancellor's decision on appeal.

a. Mr. Cuccia's Federal Express Bonus Is Marital Property

Mr. Cuccia argues that because he received a bonus in the amount of \$43,360.00 after the entry of a Temporary Order on May 9, 2008, it should not have been classified as marital property. (B. 25-26, 43). In support of his position, Mr. Cuccia relies on *Pittman*, 791 So. 2d 857. Mr. Cuccia contends that because the bonus was received after the entry of the Temporary Order and because Ms. Cuccia did not contribute to the acquisition of the bonus nor did he use marital property to obtain the bonus it should be his separate property. While Mr. Cuccia is correct that, generally speaking, property accumulated after the entry of a temporary support order is a party's separate property, *Pittman*, 791 So. 2d at 864, see also *Godwin v. Godwin*, 758 So. 2d 384, 386 (Miss. 1999), that does not render the Chancellor's classification of the bonus erroneous under the facts of this case. The bonus received by Mr. Cuccia after entry of the Temporary Order was based upon the performance of Federal Express during the period of June 1, 2007 through May 31, 2008. (T. 139). Therefore, the bonus was "accumulated during the marriage" and is marital property, subject to equitable distribution. *Hemsley*, 639 So. 2d at 915. In fact, much of the bonus was accumulated prior to Mr. Cuccia's departure from the marital home and essentially all of it was accumulated prior to entry of the Temporary Order. The fact that Mr. Cuccia did not receive payment of the bonus until after the entry of the Temporary Order does not change its classification as marital property. See, e.g., *White v. White*, 868 So.2d 1054 (Miss. Ct. App. 2004) (nothing that Chancellor found that yearly bonus not yet received at time of trial was marital property to the extent it was earned during the marriage). The delayed payment is similar to retirement benefits that are accrued during the marriage but not payable until years later – those assets are clearly marital as is this bonus. Mr. Cuccia has failed to bear

his burden of demonstrating that the bonus was non-marital in character and, therefore, the ruling of the Chancellor should be affirmed. *See Morris v. Morris*, 5 So. 3d 476, 492 (Miss. App. 2008).

b. Ms. Cuccia's Post-Separation Home is Her Separate Property

Ironically, while Mr. Cuccia recognizes the holding in *Pittman* in his effort to challenge the classification of his employment bonus, he attempts to circumvent that holding in arguing that Ms. Cuccia's home, which she purchased after the entry of the Temporary Order on May 9, 2008, should be classified, in whole or in part, as marital property. (B. 26, 45). However, unlike Mr. Cuccia's bonus, which was accumulated during the marriage and therefore is properly classified as marital property, Ms. Cuccia's post-separation home was not acquired (or in any way accumulated) prior to the entry of the Temporary Order. Moreover, marital funds were not used to purchase the property and Mr. Cuccia did not make any contributions to the acquisition of the property. (R. 380; AJCRE Tab 4; T. 272-73). Therefore, it is her separate property pursuant to *Pittman*.

Mr. Cuccia alleges that because Ms. Cuccia used funds received from him pursuant to the Temporary Order to aid in the payment of the mortgage debt associated with the post-separation home, the home should be considered marital property, at least to the extent of such mortgage payments. (T. 139-40). Mr. Cuccia's argument is without merit. The support required pursuant to the Temporary Order was an obligation flowing from Mr. Cuccia to Ms. Cuccia. The fact that Ms. Cuccia elected to use a portion of that support to provide a home for her minor children does not somehow transform that home into marital property. To find otherwise would effectively eliminate the rule established by *Pittman* that the entry of a Temporary Order terminates the accumulation of marital property. If Mr. Cuccia's position were to be accepted by this Court, then the recipient of support pursuant to a Temporary Order could not use that support to acquire

any property because such property would be deemed marital property. The fallacy of such a result cannot be overstated, as the support would be rendered largely useless to the recipient if such were the case.

Ms. Cuccia purchased her home after entry of the Temporary Order using no marital funds. It is her separate property pursuant to *Pittman*, and the ruling of the Chancellor should not be disturbed.

c. The Chancellor's Findings Regarding the Value of the Tennessee Property Are Not Clearly Erroneous

Mr. Cuccia contends that the Chancellor erred in relying upon the appraisal prepared by the appraiser agreed upon by the parties in valuing the land owned by the parties, jointly with Mr. Cuccia's parents, and located in Tennessee. (B. 23, 24 and 26). Mr. Cuccia contends that this appraisal was erroneous because it valued the incorrect piece of real property. (B. 26). At trial, Mr. Cuccia testified on his own behalf regarding this contention but offered no other testimony or other evidence of any type to support his position. (T. 75-76, Appellee's Record Excerpts at Tab 1 (hereinafter JACRE Tab 1)). Rather, he attempted to rely upon a separate appraisal, prepared by an appraiser that had not been accepted by the parties, to establish the value of the property. (T. 72-76; JACRE Tab 1). Notably, the appraiser who prepared the appraisal offered by Mr. Cuccia was not present at trial, and, as a result, counsel for Ms. Cuccia was unable to cross-examine him regarding his valuation of the real property. (T. 73; JACRE Tab 1). In contrast, after the Court entered an Order calling into question the correctness of the appraisal prepared by the agreed-upon appraiser, Ms. Cuccia presented that appraiser as a witness at trial. (T. 245-57; JACRE Tab 2). The appraiser offered concrete responses to the issues raised by Mr. Cuccia in connection with the validity of the appraisal and testified that the property he appraised was the correct property. (T. 246-48; JACRE Tab 2) and raised questions considering the validity of the appraisal offered by Mr. Cuccia (T. 245-57; JACRE Tab 2). The

Chancellor, after confirming that the parties had agreed to the appraiser who testified at trial, (T. 252-54; JACRE Tab 2) and after hearing the testimony from Mr. Cuccia regarding his objections to the appraisal (T. 72-76; JACRE Tab 1) and the testimony from the appraiser regarding his response to those objections (T. 246-48; JACRE Tab 2), determined that the original appraisal should be accepted. Certainly, the decision regarding which testimony to accept is within the discretion of the Chancellor and should not be overturned absent a strong showing by Mr. Cuccia. Instead, on appeal, Mr. Cuccia, again without citing to any authority or portions of the record, merely states that “[i]t is hard to imagine given the current state of the real estate market that the property would be worth twice what it was in 2001.” (B. 26). Mr. Cuccia had the opportunity to produce an appraiser to testify regarding his opinion of the value of the property, and he failed to do so. Similarly, he failed to provide testimony sufficient to convince the Chancellor that the original appraisal was incorrect in light of the testimony of that appraiser. He cannot now rely on his own opinion regarding the value of the property to effect a reversal of the Chancellor’s decision. The Chancellor’s decision regarding the value of the property is supported by the trial testimony and should be upheld on appeal.

d. The Absence of Any Findings Related to Marital Debt Is Not Reversible Error

Mr. Cuccia contends, without citing any authority or otherwise briefing the issue, that the Chancellor committed reversible error by failing to consider the marital debt of the parties as part of the equitable distribution. (B. 5, 25, 26). As noted previously, the failure of Mr. Cuccia to brief this issue on appeal results in a waiver of any appeal of this matter. *O’Hara*, 904 So.2d at 1111. Furthermore, even absent this procedural bar to his allegation considering the alleged marital debt, Mr. Cuccia’s argument must fail. In *Selman*, 722 So. 2d at 553-54, the court held that the failure of the Chancellor to make findings of fact and conclusions of law related to the marital debt was not reversible error. Additionally, this Court, in *Glass v. Glass*, 857 So. 2d 786,

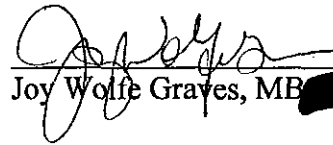
788 (Miss. App. 2003), noted that the evidence regarding marital debt before the Chancellor was "sparse" and that no error was committed by the failure to consider the indebtedness. Similarly, in this case, the evidence concerning the alleged marital debt¹⁰ was sparse and, without more, the failure of the Chancellor to make findings regarding said alleged debt is not reversible error.

VI. CONCLUSION

Mr. Cuccia has failed to bear his burden on appeal of demonstrating that the Chancellor's findings related to child custody, visitation, alimony and equitable division of property were clearly erroneous, decided under incorrect legal standards or otherwise an abuse of discretion. For the reasons set forth herein, the Chancellor's ruling should be affirmed in all respects, and Ms. Cuccia should be granted all other relief to which she may be entitled.

Respectfully submitted,

JULIE ANNE CUCCIA


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¹⁰ Mr. Cuccia contends that he used his employment bonus to pay off marital debt without knowledge that he was to deposit those funds with the Court. He then alleges that he had to borrow the money to pay into the Court in order to comply with the Court's Order. He contends that the debt incurred to comply with the Order should be deemed marital debt. However, he used the proceeds of the bonus at his own peril – Ms. Cuccia should not be penalized for his failure to comply with a Court Order.

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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that this day a true and correct copy of the foregoing instrument has been delivered to the following persons:

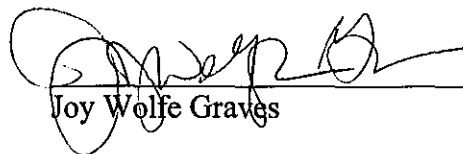
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So certified, this the 10th day of September, 2010.


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