NO. 2010-CA-00083 RT

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

ANTHONY JOSEPH CUCCIA APPELLANT

VS.

JULIE ANNE CUCCIA, APPELLEE

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STATEMENT OF ORAL ARGUMENT

Anthony Joseph Cuccia ("Tony") submits that Oral Argument will assist the Court in rendering its decision. This case involves matters of "judge shopping" along with findings of fact regarding custody and property division which shock the conscience including, but not limited to, manipulation and deception of the facts by the Appellee, Julie Anne Cuccia (Ms. Cuccia). Oral Argument will assist this Court in grasping the depths of this as well as provide an opportunity to view first hand this deception which tainted the entire lower court proceedings and to experience the factual errors as determined by the lower court.

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I. Clarification of Facts

There are multiple factual inaccuracies, as well as inconsistencies, in Julie Anne Cuccia's brief that must be clarified. First, the facts as stated by Ms. Cuccia in her brief make it appear that Tony disappeared when he left the marital home on December 26, 2007. The record reflects that Tony was very active with the minor children and was visiting them on a regular basis from the time the parties separated. Tr. 21. [1] Tony became concerned as the behavior and actions of Ms. Cuccia continued to deteriorate. Tr. 23. Her personal hygiene and grooming habits had deteriorated. She stopped shaving her legs and menstruated on Tony's car seat at least once and left it there. Tr. 130-131. Of note from the record, there were approximately eight dogs in the house which adversely affected the marriage. Tr. 20. By the time of the temporary hearing, that number had grown to thirty-six (36) dogs. Tr. 21.

Based on the above and other evidence, Chancellor Lundy issued a temporary restraining order on Ms. Cuccia and gave Tony sole custody. R. 23-24. The children were allowed to visit with Ms. Cuccia during the time of the restraining order with restrictions and preliminary injunctions placed on Ms. Cuccia by the chancellor. R. 45. Subject to the restrictions in place, Chancellor Lundy later granted the parties joint legal and physical custody on a temporary basis in his ruling from the bench. R. 46-48. Tony never consented to joint custody, but Chancellor Lundy made a ruling for joint custody after discussions with counsel for the parties off the record in chambers. R. 118-121. The Temporary Order in this matter was entered on May 9th 2008, *nunc pro tunc* back to March 25, 2008. R. 46-48. As such, March 25, 2008 served as the line of demarcation for marital property. The Chancellor ordered a Department of Human Services

[1] Citations to the Record are designated as (R.__), the Transcript of Testimony as (Tr.___) and Exhibits as (Ex.___).

home study as there were genuine concerns over issues of neglect which the chancellor felt he minimized by the restrictions and injunctions he issued against Ms. Cuccia. R.48. Chancellor Lundy also found that Ms. Cuccia was running a successful and profitable business. R. 22.

Taking exception to Chancellor Lundy's ruling, only **five (5) days** after entry of the Temporary Order on the Court docket, Ms. Cuccia sought to modify it. R. 49-50. When the Chancellor continued her motion, Ms. Cuccia hired Malenda Harris Meacham presumably to force Judge Lundy to recuse from the case. R. 53-60. It is common knowledge in Desoto County that Ms. Meacham's law "partner" filed a suit in federal Court against Chancellor Lundy that resulted in an automatic recusal by Lundy from any case where Mrs. Meacham is involved. This conduct is questionable as "judge shopping" and under Rule 1.06 of the Uniform Chancery Court Rules. R. 53-60. It is also of note that the record of the Court does not reflect the chancellor who presided on the case was ever actually assigned to it. R. 1-7. This ultimately severely prejudiced Tony and the litigation in general. It is undisputed by all parties that the Department of Human Services home study **was not done on former marital home** as ordered by the Court. Tr. 69. It was done on Ms. Cuccia's new $ 256,339.30 home not long after she moved in. Tr. 69.

After Chancellor Lundy was recused, the new chancellor declined to appoint a guardian ad litem despite the allegations of neglect in violation of Mississippi Code Annotated Section 93-5-23 and 93-11-65 R. 231-279; awarded Ms. Cuccia $3,750.00 per month in temporary support despite no findings of a change in circumstances nor any unforeseen circumstances since the temporary order, R. 83-84; did not consider the amounts Tony paid Ms. Cuccia after the trial was continued despite the Amended Order Continuing trial dated July 8, 2009, R. 359-360; made only conclusory statements regarding the *Albright* analysis in his final opinion without considering the numerous acts of deceit made by Ms. Cuccia along with other facts which did

not support her obtaining custody, R. 370-381; and made no factual findings as required by *Lowrey v. Lowrey*, 25 So. 3d 274, 280-281 (Miss. 2009) in the property division and determination of alimony, R. 379-381. This resulted in Tony paying half of his income in child support and alimony, being personally responsible for all the marital debt, and receiving only limited assets which were encumbered, jointly owned, and/or had limited value. R. 379-381.

II. The chancellor erred in his Albright Analysis regarding custody of the minor children of the parties.

"Give not that which is holy unto the dogs..."

Matthew 7:6, Holy Bible, King James Version.

The brief of Ms. Cuccia fails to consider the numerous facts which reflected negatively against Julie Anne Cuccia. Mississippi Code Annotated Section 93-13-1 (Rev.2004) provides that parents are "the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare, and education, and the care and management of their estates" and that "neither has any right paramount to the right of the other concerning custody." In *Albright v. Albright,* 437 So.2d 1003, 1005 (Miss.1983), the supreme court "reaffirmed the rule that the polestar consideration in child custody cases is the best interest and welfare of the child." However, the *Albright* factors are a guide. They are not "the equivalent of a mathematical formula." *Lee v. Lee,* 798 So.2d 1284, 1288(¶ 15) (Miss.2001). The matter of child custody is normally matter within the sound discretion of the chancellor. *Delozier v. Delozier,* 724 So.2d 984 (¶ 4) (Miss.Ct.App.1998). To disturb the factual findings of the chancellor, this Court must determine that the factual findings are manifestly wrong, clearly erroneous or the chancellor abused his discretion. *Jerome v. Stroud,* 689 So.2d 755, 757 (Miss. 1997). However, the Mississippi Supreme Court will not hesitate to reverse a chancellor when his findings are manifestly wrong or when he has applied an erroneous legal standard. *Tilley v. Tilley,* 610 So.2d

348, 351 (Miss.1992); *Faries v. Faries,* 607 So.2d 1204, 1208 (Miss.1992). Further, where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error. *Stroud,* 689 So.2d at 757 (citing *Smith v. Smith,* 614 So.2d 394, 397 (Miss. 1993)).

The chancellor in this case rarely did anything but restate some of the pertinent evidence to be considered under each factor, only once or twice and then ruling that a factor favored one party over the other. R. 372-376. The Mississippi Supreme Court has held that the absence of specific findings prevented affirming the lower court with the confidence that the best result was reached. *Hayes v. Rounds,* 658 So.2d 863, 865 (Miss. 1995). A similar situation presents itself today. While the chancellor analyzed the applicable factors, he did not do so with specificity, assigning very few to a particular parent. This in and of itself amounts to error and is sufficient for the appellant court to reverse and render custody with the proof presented by Tony. *See Hollon v. Hollon,* 784 So.2d 943, 951 (Miss. 2001) (reversing and rendering custody determination by chancellor under similar circumstances for failing to consider other relevant information under each *Albright* factor and instructing trial court to vest custody in the Appellant with the Appellee receiving visitation).

a. Health and Sex of Children

Ms. Cuccia in her brief only states essentially the chancellor did not err in analyzing this factor. However, the appellee missed that Tony has consistently demonstrated a greater sensitivity to and awareness of Alicia's needs as a female child on the brink of puberty. Due to Alicia's age, she is in the need of a more attentive parent as puberty is a difficult period in anyone's life. Ms. Cuccia, based on the record, has ignored her own hygiene and personal grooming which young ladies are expected to know in our society. Tr. 330-331. Ms. Cuccia cannot even take care of her own needs, must less that of a teenage girl. The record reflected in

this case that the only activity Ms. Cuccia was interested in was dog shows. Tr. 283. Loreta Evans testified that Tony has a closely bonded relationship with his son and that Ms. Cuccia has been detached, unaffectionate and distant from him. Tr. 229-231. In light of Ms. Cuccia's inattention to her own needs and those of Alicia combined with the strong attachment Tony has with Joey, this factor favors Tony and the chancellor should have found as such.

b. Continuity of Care for the Minor Children

Ms. Cuccia fails to recognize the contributions of Tony to the continuity of care of the children of the parties. A chancellor must consider the continuity of care prior to and after separation. *See Caswell v. Caswell,* 763 So.2d 890, 893(¶ 8) (Miss.Ct.App.2000). To determine who has been the primary caretaker, courts consider who bathed and dressed the children, put them to bed, took them to school, prepared meals, arranged social activities and babysitters, dealt with medical care, purchased clothing, provided discipline, read to the children, played with them, and made education arrangements. *Watts v. Watts,* 854 So2d 11, 13 (Miss. Ct. App. 2003). The proof in this case showed that Tony did all of these things from day one of the children's lives. Tr. 24-25. He changed the children's diapers in the night. Tr. 24. He also attended the doctor's visits with Ms. Cuccia. R. 24. Tony often took off work to be involved with the children's daily activities based on his flexible work schedule. R. 25. He was extremely active in their religious upbringing. Tr. 25-26. After the separation of the parties, Tony was the only one attentive to the needs of the children. Tr.. 51-52. The parties had joint custody under the Court's temporary order and he was the one who took the children for their annual immunizations and check-ups. Tr. 51-52. Additionally, Tony took care of Alicia's asthma medication which had run out and that Ms. Cuccia never bothered to take the child to the doctor or even request a refill. R. 52-53.

As *Jerome* and *Caswell* outlined, continuity of care prior to and post separation must be viewed by the Court along with the other *Albright* factors. When viewing the facts of this case, these factors weigh heavily in favor of Tony, especially since the parties' separation. At the bare minimum this factor should have been seen as neutral based on Tony's significant contributions for the care of the minor children which surpass or equal that of Ms. Cuccia.

c. Best Parenting Skills

The position of the chancellor stating that Ms. Cuccia has the better parenting skills was supported by **zero** findings in the chancellor's written opinion. The chancellor made only a passing statement in analyzing this factor stating that since he found for Ms. Cuccia as having a greater continuity of care, she also therefore has the best parenting skills. Using this logic, a primary caregiver would always have better parenting skills which is illogical and unsupported by case law. A primary caregiver may lose custody to a parent with stronger parenting skills or a more stable home environment. *Clay v. Clay,* 837 So.2d 215, 218 (Miss. Ct. App. 2003).

The uncontradicted proof at trial was that Ms. Cuccia is always housing at minimum twenty (20) dogs in and at her home in violation of the Court's temporary order. Tr. 284. As the children of the parties were failing school, Ms. Cuccia was getting more dogs as opposed to providing for the needs of the children. Ms. Cuccia routinely had a large rottweiller in the vehicle unrestricted with the minor children present. Tr. 23. And, as outlined above in the continuity of care section above, Tony was more attentive to the children's medical needs. Parents are rated better on parenting skills based on a showing they are attentive to a child's personal hygiene and medical needs. *Hoggatt v. Hoggatt,* 796 So.2d 273, 274 (Miss. Ct. App. 2001)(persistent failure to attend to hygiene and medical needs); *Stark v. Anderson,* 748 So. 2d 838, 843 (Miss. Ct. App. 1999)(failure to provide adequate dental and medical care); *Brawley v.*

Brawley, 734 So.2d 237, 241-242 (Miss. Ct. App. 1999)(mother's failure to attend to child's hygiene and medical care one of the reasons to modify custody).

While in Ms. Cuccia's care, the children were repeatedly tardy for school which she refused to take responsibility for and blamed the line at the car pool lane which is obviously due to her refusal to get ready early enough the children at school on time. Tr. 27. A child's tardiness or absences in one parent's care reflects negatively on parenting skills. *Mercier v. Mercier,* 717 So.2d 304, 307 (Miss. 1998). In light of all of the above, this factor favored Tony and the chancellor should have found as such.

d. Willingness to Provide Primary Childcare

Contrary to assertions by the appellee, the Court erroneously stated in paragraph D on pages 372 and 373 of the Opinion of the Court, that Tony consented to the natural mother having joint legal and physical custody of the children and therefore Tony had affirmed the willingness and ability of the natural mother to care for the children. The Temporary Order entered on May 9, 2008 was not a Consent Order, but rather a temporary Order entered following a full hearing occurring before Chancellor Lundy on March 25, 2008 incident to Tony's Motion for Temporary Restraining Order.(V. 1, p. 46). Regardless, willingness to provide primary childcare reflects only a desire to be the primary custodian. The trial record contains over fifty (50) pages of trial transcript where Tony goes through his desire to be the primary custodian of Joey and Alicia. There was a full trial occurring on two separate days with two of his own attorneys and Tony consistently and repeatedly attempting to get custody, not to mention the original temporary restraining order, and a mountain of pleadings asking for custody of the minor children. As such, the chancellor's finding on this was plain error and not supported by anything in the record.

e. Stability and Responsibilities of Employment

The chancellor in this case only made a passing remark that this factor favored neither party because both parties were employed and not in danger of being displaced by their employment. The proof at trial on this matter was that Tony's work was more flexible and had less demanding set hours. Ms. Cuccia stated that, in addition to her current successful business, she was going to enter the medical field. Tr. 265. [2] A parent is to be favored if their employment is more flexible. *Marter v. Marter,* 914 So.2d 743, 750 (Miss. Ct. App. 2005). As such, this factor also favors Tony and the chancellor should have found as such.

f. Physical and Mental Health of the Parties

Ms. Cuccia in her brief stated that Tony admitted this factor favored neither party which is incorrect. Tony conceded that he had no documented medical proof of Ms. Cuccia's condition. However, the proof at trial reflected that Ms. Cuccia had numerous problems with her personal grooming, her appearance, and her hoarding of animals which indicates undiagnosed symptoms of mental illness. Contrary to the assertions by the Appellee, there is no requirement of expert testimony to opine regarding the mental condition of a party. *See Russell v. State,* 729 So. 2d 781 (Miss. 1997)(error to exclude lay testimony regarding mental condition to tell what an individual personally observed and to state opinions regarding mental condition at that time). The record is full of simple questions that Ms. Cuccia claimed she could not understand. For example, Ms. Cuccia, when asked on direct examination whether or not she was employed, stated that she was not. She later admitted, on cross-examination, that she owned a business and was, in fact, self-employed. Tr. 277. Ms. Cuccia claimed that the reason for her perjurious answer was that she did not understand the question she was asked by her own counsel regarding

[2] It should be noted from the trial record that Ms. Cuccia only stated that she was "thinking" about going into the medical field. Tr. 265. Her testimony at trial showed that she had made no attempts to gain other employment than to run her two businesses of Good Dog University and Mostly Beagles rescue since the divorce was filed. Tr. 278, 288-289.

her employment status. R. 277. As such, an inference can be drawn that Tony is more mentally stable than Ms. Cuccia and should have been favored by the chancellor on this factor.[3]

g. Emotional Ties of Parent and Child

The proof at trial on this issue was clear and unrefuted. Tony is extremely close to both children. The proof also showed that the mother was detached and not closely bonded to their son and often ignored him. Tr. 229-231. If the proof shows that a child is distant from one parent as opposed to another, the parent who the child is close to should be favored on this factor. *Steverson v. Steverson,* 846 So.2d 304, 306 (Miss. Ct. App. 2003). In light of all of the above, this factor favored Tony and the chancellor should have found as such.

h. Moral Fitness of the Parents

As more throughly analyzed in the Appellant's main brief, Ms. Cuccia lied on numerous occasions to her mortgage company, the children's school, and the Department of Human Services. [4] Misrepresenting facts and providing incomplete information to agencies and social workers supports not awarding custody to that parent. *Jernigan v. Jernigan,* 830 So.2d 651, 653 (Miss. Ct. App. 2002). Even the chancellor himself found that she had lied to the Court in claiming her parents gave her loan as opposed to a gift. R. 378. So either Ms. Cuccia committed fraud on the Court or mortgage fraud, either of which renders her hands unclean with regard to this case, and necessitates a finding for Tony regarding moral fitness under an *Albright* analysis.

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[3] It should be further noted that Ms. Cuccia had also stopped shaving her legs and was menstruating on the car seats and leaving the blood there also. Tr. 230-231

[4] Ms. Cuccia further listed herself as unmarried with no dependants on her loan application to get her home. Ex. 8 at the beginning of the Uniform Residential Loan Application. See further Exhibit 25 reflecting that she stated to the school she had sole custody of the children. Ms. Cuccia did not dispute that she represented to the DHS workers that she made $6,500.00 per month in income and does not dispute the validity of it. Tr. 288 Line 15-18 "Q: And you stated you had $6,500.00 per month in income and $4,000.00 in expenses, is that correct. A. At the time. This is when I just moved into my house, yes."

i. Home, School, and Community Record of the Children

The children's school records reflect that during the 2006-2007 school year, Alicia Cuccia, who was in third grade at the time, was tardy twenty-three (23) times. During the 2008 school year, Alicia Cuccia was tardy thirteen (13) times, and Joseph Cuccia was tardy eleven (11) times. Ms. Cuccia was responsible for transporting the children to school throughout this period. Ex.7. The children's report cards for the 2008-2009 school year reflect that Joseph Cuccia struggled throughout first grade, often receiving the lowest marking of "Not meeting grade level standards." Tr. 27. When Ms. Cuccia was asked about the tardies, she blamed traffic at the school instead of her inability to handle the children. As it relates to the religious upbringing of the children, the record reflects that it was Tony, not Ms. Cuccia, who sponsored, participated in, and/or attended the necessary classes and functions to prepare Alicia to receive her First Communion and that it is Tony who will serve in the same capacity for his son when the time comes for him to receive his First Communion. Tr. 25-26. The record reflects that Tony has been involved in coaching Joseph's soccer team during the 2008-2009 school year and that Tony will continue to encourage his children's participation in extra-curricular activities offered in their school and community. Tr. 25. This factor favors Tony and the chancellor should have found as such.

j. Stability of the Home Environment

Contrary to the assertions of Ms. Cuccia, this factor was thoroughly discussed in the original brief of Tony in his paragraphs regarding parenting skills. *Albright* has never required a party to provide case law to address a factor under it, only to address relevant facts to support it. The proof presented showed that Ms. Cuccia's home is full of anywhere from twenty (20) to thirty-six (36) dogs at any given time. Tr. 21, 284. The proof also showed that Ms. Cuccia kept the home in a state of filth which cause the parties separation and progressed further downward once

Tony left. The proof showed that Tony cooked healthy meals for the children while the mother fed them fast food which supports a finding of him on this factor. *See Pacheco v. Packeco,* 770 So. 2d 1007, 1010 (Miss. Ct. App. 2002)(father provided cleaner home and balanced meals.) Additionally, Chancellor Lundy had concerns of neglect regarding the minor children which mandated the appointment of a guardian ad litem pursuant to Mississippi Code Annotated Section 93-5-23 and 93-11-65. When there are allegations of abuse or neglect, the appointment of a guardian ad litem is **mandatory** not discretionary. The failure to appoint a guardian ad litem under a mandatory statute **requires reversal.** *In re Adoption of E.M.C.,* 695 So.2d 576, 581 (Miss. 1997). In the case at hand, Tony requested a guardian ad litem to investigate the neglect of the mother with regard to the children's care and living conditions. The chancellor refused to appoint a guardian ad litem and further the investigation that was later done by the Department of Human Services was at a brand new home the mother had moved into a short time earlier. As a result, the custody determination must be reversed in order for the guardian ad litem to properly investigate the Appellant's allegations before any *Albright* analysis can be conducted. However, Tony would submit to the Court that regardless of a guardian ad litem's recommendation, the record contains sufficient proof for the Court to reverse and render the custody determination in his favor with a guardian ad litem to determine the visitation for the appellee.

k. Other factors

The chancellor failed to consider various other factors which supported Tony having custody of the minor children. The record showed that Ms. Cuccia had substantially interfered with the parenting time of Tony. Ms. Cuccia repeatedly violated the Temporary Order by her own admission in failing to consult Tony regarding the children and also violated the injunction of Chancellor Lundy with regard to the animals in her home. Tr. 264, 284. The parental

interference of a parent is a significant factor in awarding custody to the other parent. Custody has been denied to a parent in several cases due to interference with the other's parent's relationship with a child. *Masino v. Masino,* 829 So.2d 1267, 1271 (Miss. Ct. App. 2002), *Richardson v. Richardson,* 790 So2d 239, 242-43 (Miss. Ct. App. 2001), *Williams v. Williams,* 656 So. 2d 325, 330 (Miss. 1995); and *Ferguson v. Ferguson,* 639 So.2d 921, 932 (Miss. 1994).

For the foregoing reasons, the custody determination of the chancellor must be reversed and rendered with Ms. Cuccia being awarded visitation after appropriate findings by the Court.

III. The chancellor erred in ordering only standard visitation.

Our Court has held that the best interest of the child is the main concern in determining visitation." *Rogers v. Morin,* 791 So.2d 815, 820 (Miss.2001) (citing *Dunn v. Dunn,* 609 So.2d 1277, 1286 (Miss.1992)). Courts may award more extended visitation if the evidence suggests that additional time with the noncustodial parent is in the child's best interest. Bell, Deborah H., *Bell on Mississippi Family Law* (2005), Section 5.08(2), 2009 Supplement p. 126. Visitation is considered so important that the appellate court may on its own motion find that the visitation as ordered by the chancellor is inappropriate based on the evidence presented. *See Jones v. Jones,* No. 2008-CA-0675-COA (¶ 37-40) decided December 15, 2009, cert. denied September 9, 2010. (court *sua sponte* found visitation awarded by chancellor inappropriate based on proof presented despite no challenge by the mother of the visitation awarded in appeal filed by father and remanded case to trial court). The chancellor himself found that he thought joint custody was appropriate in this situation if it was not for the problems between the parties. R. 376. However, as discussed above, this was due to Ms. Cuccia's own admitted violations of the Court's orders. As such, at a minimum, the chancellor should have ordered more than "standard visitation."

IV. The chancellor erred in awarding rehabilitative alimony to Julie Anne Cuccia and dividing the marital estate.

"... It is not meet to take the children's bread, and to cast it to the dogs."
Matthew 15:26, Holy Bible, King James Version.

a. Alimony

In *Lowrey v. Lowrey*, 25 So. 3d 274, 280-281 (Miss. 2009), the Mississippi Supreme Court ruled that factor tests such as provided in *Ferguson* for property division and *Armstrong* for alimony, must be considered on the record in every case. These factor considerations are not only essential for appellate purposes, but also for trial courts, as they provide a checklist to assist in the accuracy of their rulings. *Id.* Following these guidelines reduces unintended errors that may affect the court's ultimate decision. *Id.* The absence of an analysis of these factors and failure to apply the law to the facts at hand create error. *Id.* Failure to make an on-the-record *Armstrong* analysis is manifest error. *See Henderson v. Henderson,* 703 So.2d 262, 266 (Miss.1997); *Armstrong,* 618 So.2d 1278, 1280 (Miss. 1993). The Supreme Court has further held that "[t]he failure to consider all applicable *Ferguson* factors is error and mandates reversal." *Lowrey*, 25 So.3d 274,286 (¶29) (Miss. 2009). However, the chancellor need not make findings regarding each *Ferguson* factor but may consider only those factors "applicable" to the property in question. *Sproles v. Sproles*, 782 So.2d 742, 748 (¶25) (Miss. 2001) (citing *Weathersby v. Weathersby*, 693 So.2d 1348, 1354 (Miss. 1997)).

In *Sandlin v. Sandlin*, 699 So.2d 1198, 1204 (Miss. 1997), the chancellor made the marital property distribution and mentioned the *Ferguson* guidelines along with a representation that he applied them to the evidence presented. *Id.* at 1204. The chancellor's judgment failed to make the requisite findings of fact and conclusions of law. The Supreme Court held that it "could not evaluate the basis that [the chancellor] used to determine the division of property." *Id.* As a

result, the Supreme Court ruled that "the failure to make findings of fact and conclusions of law was manifest error requiring reversal and remand." *Id.*

In the case at hand, the combined awards to Ms. Cuccia result in the expenses of Tony exceeding his income which leaves him in hopeless, continuous contempt of court and is inequitable. This was the case in *Yelverton v. Yelverton,* 961 So.2d 19 (Miss.2007) also. In *Yelverton* the chancellor ordered the husband to pay $10,000 per month from his $12,000 monthly income. *Id.* at 28(¶ 16). The supreme court found the award per se unreasonable as it gave the wife " approximately $12,185.65 a month, although her monthly expenses totaled only $6,000, and [it left the husband] with a negative balance of $4,429 per month." *Id.* at (¶ 18).

This Court cannot affirm the award of periodic alimony where the chancellor has failed to provide an on-the-record analysis of the *Armstrong* factors. Indeed, this case required the chancellor to explain how he analyzed the alimony award as "just and equitable" in light of both parties' obligations to pay or otherwise satisfy the tremendous amount of marital debt that resulted from the marriage. Certainly, Tony's and Ms. Cuccia's lives will change. [5] The chancellor must explain his reasoning as to how, through the judgment of divorce, the marital debts were to be paid or how their lifestyles would be altered in order to satisfy their marital debts. The record below reflect that Ms. Cuccia has her own independent income which more than meets her living expenses even if she received no alimony or child support. Additionally, the record reflected that Ms. Cuccia had received $48,750 (13 months x $3,750.00 per month in temporary support) that she was awarded five (5) months after the temporary order was entered and despite her being able to qualify for a large mortgage loan on just her own income. This additional temporary support was error by the chancellor as the change in circumstances was

[5] The record as described more fully herein shows that Ms. Cuccia's life has changed little with her living in a large home valued in excess of $250,000 with Tony living in a small rental property.

foreseeable and Ms. Cuccia was able to qualify for a home loan with her own independent income. *See Magee v. Magee,* 754 So.2d 1275,1279 (Miss. Ct. App. 1999)(change in circumstances must be unforeseeable). Even the chancellor himself found that Ms. Cuccia was employed and found that "both parties are fortunate in that their respective employment allows the liberty to be with the children should emergencies arise." (R.374). Tony was stuck paying this amount for thirteen months with no recourse as one cannot appeal a temporary order. *Michael v. Michael,* 650 So.2d 469, 471 (Miss. 1995). *See also* Miss. Code Ann. § 11-51-3 (Supp. 2006). As such, the funds Ms. Cuccia **received by Court order after the Temporary Order** should be considered the separate property or, alternatively, marital property which subjects Ms. Cuccia's home to equitable distribution of the equity.

Based on this, there is no disparity in income or division justifying an award of alimony. As such, the determination of alimony must be reversed and rendered. At a minimum, this Court must reverse the award of rehabilitative alimony and remand for the chancellor to make specific findings of fact and conclusions of law to support the award of alimony which was not done. *Chmelicek v. Chmelicek,* 2008-CA-01736-COA (Miss. Ct. App. 2008).

b. Property Division

As discussed above under alimony, the chancellor made no factual findings as required by *Lowrey* and *Chmelicek* to justify the property division. The division as ordered by the chancellor and as thoroughly discussed in Tony's initial brief breaks down as follows:

Ms. Cuccia	Tony
$ 256,339.30 home	½ interest in jointly owned encumbered hunting land
$ 2,000.00 per month alimony	
$ 1,453.00 per month child support	$3,600.00 camper
$ 43, 367.26 cash	Pay all marital debt
$ 2, 735.00 cash	Pay $1,453.00 per month child support
½ of retirement of Tony	Pay $2,000.00 per month alimony
	½ of retirement account

Income:	$7, 203.00 based on DHS records and mortgage application, plus the child support and alimony ($3,750.00 + $2,000.00 + $1,453.00)	$3,815.75 after payment of alimony and child support
Expenses:	$3,197.82 includes business expenses of Dog Dog University	$6,665.00 (monthly expenses from 8.05, kids school tuition, and payment of marital debts

As the chancellor's judgment stands now, Ms. Cuccia got all of the cash assets and Tony got only property which is encumbered and/or of limited value while being responsible for all the marital debt.

i. Bonus

Ms. Cuccia fails to distinguish in her brief how the bonus was structured. The evidence at trial showed the bonus was made up of two separate bonuses. The annual long term incentive is received by an employee merely because he works for FedEx. Tr. 182. The annual incentive bonus is based on production of the employee combined with other factors. Tr. 182. [6] Martial property is defined as any property acquired or value created by a spouse's efforts during the marriage. Bell, Deborah H., *Bell on Mississippi Family Law* (2005), Section 6.02(2). In *Pittman vs. Pittman*, 791 So.2d 857, (Miss. Ct. App. 2001), the Court of Appeals recognized that a temporary order cuts off the accumulation of marital property. After the temporary order, Tony got both an annual long term incentive bonus and an annual incentive bonus. As such, the annual long term incentive bonus was not acquired during the marriage nor was it acquired by any efforts of Tony during the marriage. The annual incentive bonus arguably is partially marital since a portion of it was based on his efforts during the marriage, however a portion of it certainly was not. Under the circumstances, it would be inequitable to consider it marital property. Tony was ordered by the Trial Court to interplead all such funds with the Chancery

[6] A breakdown of the two amounts and how the bonus was spent prior to it being ordered interplead to the Court is Exhibit 20.

Court Clerk's Office, which he did in December 2008. Due to Tony's prior counsel's failure to advise him of the Court's Order, Tony used the bonus money to pay marital debt for the benefit of both parties and the minor children. Tr. 78-81. As a result, Tony was required to borrow all of the $43,360.00 in order to comply with the Court's Order. Tony is now paying off a portion of the marital debt twice since he had to borrow money to comply with an inappropriate and unappealable order along with being responsible for the remainder of the marital debt. The bonus is separate property or alternatively was converted to separate property by its use in the payment of marital debt. Thus, the bonus was separate property and the chancellor should have found as such.

ii. Valuation of Hunting Property

The record at trial reflected that the parties were going to use a new appraiser or possibly review the appraisal Tony's appraiser had provided. (p. 254-255). The appraiser produced a number of documents that Tony's counsel had not seen before. (p.254) Trial Exhibit 10 is the appraisal obtained by Tony reflecting a value of $70,000.00. Trial Exhibit 11 is the appraisal obtained by Ms. Cuccia valuing the property at $124,000.00. The Court made specific factual findings that the larger appraisal was erroneous pursuant to the Order Continuing Trial entered May 27, 2009. (Tr. 341). The record reflects that the property was purchased by Mr. and Ms. Cuccia and Mr. Cuccia's parents for $50,000.00 in 2001. (Tr. 62). As such, the only evidence before the Court was Tony's appraisal and testimony regarding the value of the property. Despite the chancellor's own finding that the larger appraisal was erroneous, he proceeded to use it in his valuation. This was error and the difference in values is illogical, unsupportable and reversible.

iii. Debt

In the Appellee's brief, the Appellee states that in *Selman v. Selman,* 722 So.2d 547, 553-54 (Miss. 1998), that the failure to not consider the marital debt is not reversable error. However, this is simply not the law. A court's failure to classify debt alleged to be marital is reversible error. *Owen v. Owens,* 950 So.2d 202, 207 (Miss. Ct. App. 2006). Tony was assigned, through default, a total of $73,511.00 in unsecured indebtedness, all of which was incurred for the benefit of the parties and/or their minor children during the course of the marriage. Additionally, in light of *Lowrey* and more recently *Chmelicek* as discussed above, marital debt of the parties is something the Court has to consider as part of property division under *Ferguson,* and since the chancellor made no findings with regard to *Ferguson* factors on the record, the failure to address the marital debt is reversible error.

iv. Summary of Property Division

With regard to the property division, the chancellor made no factual findings as required under *Lowrey* and *Chmelicek* as discussed in depth earlier. The chancellor made no specific written findings supporting its award of child support as Tony's income exceeds $50,000.00 as to the applicability of the guidelines and if the guidelines are used whether it would be unjust or inappropriate by reference to the statutory deviation criteria to explain the deviation. Miss. Code Ann. §43-19-101(4)(2004) and *Yelverton v. Yelverton,* 961 So.2d 19,27 (Miss. 2007). The chancellor failed to consider the excessive spending of Ms. Cuccia in her business nor the income and expenses of the parties. As the Decree of Divorce stands now, Tony is paying almost 50% of his income to Ms. Cuccia before any of his expenses are paid.

The fairness of property division can be determined only in conjunction with alimony. As the Mississippi Supreme Court stated in *Ferguson*, "Alimony and equitable distributions are distinct concepts, but together they command the entire field of financial settlement of divorce.

Therefore, where one expands, the other must recede. *Ferguson v. Ferguson,* 639 So.2d 921,929 (Miss. 1994). In *Brooks v. Brooks,* 652 So.2d 1113, 1124 (Miss. 1995), the Mississippi Supreme Court found that in order to achieve equitable and fair results incident to a divorce, awards of alimony and any division of property should be considered together by a chancellor. All property division, lump sum or periodic alimony payment, and mutual obligations for child support should be considered together. In the final analysis, all awards should be considered together to determine that they are equitable and fair. 652 So. 2d at 1124 (citing *Ferguson,* 639 So. 2d at 929). (Emphasis in original). Additionally, a "chancellor should consider the reasonable needs of the wife and the right of the husband to lead as normal a life as possible with a decent standard of living." *Brooks,* 652 So. 2d at 1122 (citing *Massey v. Massey,* 475 So. 2d 802, 803 (Miss. 1985)). Thus, the chancellor should consider all payments of support and division of property together to arrive at an equitable and fair result, on this issue and all other issues. Since the case must be remanded for further consideration of equitable division, the chancellor should be instructed "to revisit the awards of alimony and child support after he has properly classified and divided the marital assets." *See Brooks v. Brooks,* 652 So. 2d 1113, 1124 (Miss. 1995).

CONCLUSION

In this case, Ms. Cuccia has given her life, home, children, and property to the dogs. The Chancellor's Decree of Divorce of October 19, 2009, which incorporates the September 21, 2009 Opinion is not support by the law or the facts presented. The Court's opinion was tainted by the actions of Julie Anne Cuccia. Additionally, no findings were made on the record regarding the necessity of alimony in light of *Lowrey* and *Chmelicek.* Even if an analysis had been done, it would have shown that Julie Anne Cuccia was not entitled to alimony or the property division as ordered by the Court.

WHEREFORE, PREMISES CONSIDERED, Anthony Joseph Cuccia, respectfully prays to this Court to reverse and render the Chancellor's findings regarding custody; reverse and render the Chancellor's finding of alimony; reverse and remand the Chancellor's determination of property division and order that the bonus of Anthony Joseph Cuccia be his separate property; and instruct the Court to conduct a new hearing with regard to the remaining property. Anthony Joseph Cuccia further prays for attorney's fees and expenses as a result of the "judge shopping" of Ms. Cuccia, her own perjury, and any and all other relief as this Court may deem just and proper.

This the 22nd day of September, 2010.

Respectfully submitted,

ANTHONY JOSEPH CUCCIA

By: _____
JERRY WESLEY HISAW (MSB 101767)

CERTIFICATE OF SERVICE

I, Jerry Wesley Hisaw, hereby certify that I have this day served by United States first-class mail, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant to:

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