

IN THE SUPREME COURT OF MISSISSIPPI

ANTHONY JOSEPH CUCCIA

APPELLANT

VS.

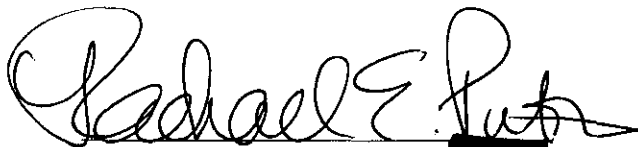
Case #2010-CA-00083

JULIE ANNE CUCCIA

APPELLEE

**APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY
BRIEF OF THE APPELLANT, ANTHONY JOSEPH CUCCIA**

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Rachael E. Putnam". The signature is fluid and cursive, with the first name "Rachael" being the most prominent.

Rachael Emily Putnam TN # [REDACTED]

Kay Farese Turner MS # [REDACTED]

Attorney for Appellant

2148 Monroe Ave

Memphis, TN 38104

ORAL ARGUMENT REQUESTED

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

ANTHONY JOSEPH CUCCIA

APPELLANT

VS.

Case #2010-CA-00083

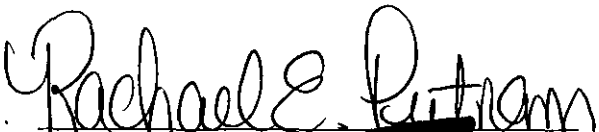
JULIE ANNE CUCCIA

APPELLEE

I. CERTIFICATE OF INTERESTED PERSONS

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

1. Mr. Anthony Joseph Cuccia, Appellant
2. Ms. Julie Anne Cuccia, Appellee
3. Malenda Meachum, Counsel for Appellee
P. O. Box 566
Hernando, MS 38632
4. Kay Farese Turner, Counsel for Appellant
Attorney at Law
530 Oak Court Drive, Suite 255
Memphis, TN 38117
5. Honorable Percy Lynchard
Chancellor, 17th Judicial District
DeSoto County Courthouse
2535 Highway 51 South
Hernando, MS 38632


Rachael Emily Putnam
Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ANTHONY JOSEPH CUCCIA

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III. TABLE OF AUHORITIES

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III. STATEMENT OF THE ISSUES

- A. Whether or not the Chancellor manifestly erred in awarding sole legal and physical custody of the two minor children to Ms. Cuccia.
- B. Whether or not the Chancellor erred in granting Mr. Cuccia visitation based on the standard Farese schedule.
- C. Whether or not the Chancellor manifestly erred in classifying Mr. Cuccia's FedEx company performance bonus as marital property.
- D. Whether or not the Chancellor manifestly erred in classifying Ms. Cuccia's residence as her separate property.
- E. Whether or not the Chancellor manifestly erred in valuing the acreage owned jointly by Mr. and Ms. Cuccia with Mr. Cuccia's mother and Mr. Cuccia.
- F. Whether or not the Chancellor manifestly erred in failing to consider the marital debt of the parties and equitably divide such debt between the parties.
- G. Whether or not the Chancellor manifestly erred in awarding Ms. Cuccia rehabilitative alimony in the amount of \$2,000.00 per month for forty-eight months.

IV. STATEMENT OF THE CASE

Throughout this brief, references to the Record Excerpts will be indicated as (RE. __) and references to the record itself will be indicated as (V. __ p. __). Exhibits will be indicated as (Ex. No. __). Appellant shall be referred to as “Mr. Cuccia” and Appellee shall be referred to as “Ms. Cuccia.”

Procedural History

This Appeal arises from an original divorce action commenced by Mr. Cuccia on January 31, 2008 with the filing of his Complaint for Divorce in the Desoto County Chancery Court of Mississippi following the parties’ separation on December 26, 2007. (V. 1 p. 8, RE.4) Mr. Cuccia’s original complaint alleged that irreconcilable differences has arisen between the parties to such an extent that the marriage could not be saved. (V.1 p. 9, RE.4) The case was originally assigned to Chancellor Mitchell M. Lundy, Jr. (V. 1 p. 1, RE.4) The parties to the divorce had two minor children born of the union, namely, Alicia Marie Cuccia, born July 20, 1998, presently age 11, and Joseph Anthony Cuccia, born May 28, 2002, presently age 8. (V. 1 p. 9, RE.4) Mr. Cuccia initially sought joint legal and physical custody. (V. 1 p. 9, RE.4)

Following the filing of the original Complaint for Divorce, Mr. Cuccia filed an Amended Complaint for Divorce on March 12, 2008, wherein he alleged he was entitled to a divorce from Ms. Cuccia on the grounds of habitual cruel and inhumane treatment on the part of Ms. Cuccia. (V. 1, p. 12) Mr. Cuccia also filed a Motion for Temporary Relief and an Application and a Motion for Temporary Restraining Order on March 12, 2008, wherein he sought physical custody of the minor children due to the hazardous conditions which existed in Ms. Cuccia home. (V. 1 p. 16 through 22) Specifically, Mr. Cuccia alleged that Ms. Cuccia was housing

multiple dogs, including Rottweilers and Pit Bulls, at the marital residence where the children were residing. (V. 1, p. 16, RE.3)

Incident to the filing of the Motion for Temporary Restraining Order, Chancellor Lundy entered a Temporary Restraining Order and granted Mr. Cuccia custody of the two minor children pending a hearing which was set for March 21, 2008. (V. 1 p. 23, RE.3) Ms. Cuccia filed an Answer and Counter-Complaint for Divorce and Other Relief on March 17, 2008, wherein she denied that she was guilty of cruel and inhumane treatment of Mr. Cuccia, but admitted that irreconcilable differences existed between the parties. (V. 1, p. 33) Ms. Cuccia sought sole physical and legal custody of the two minor children, child support and temporary and permanent alimony. (V. 1, p. 33-37)

On March 25, 2008, Chancellor Lundy conducted an evidentiary hearing on the Motion for Temporary Relief and Motion for Temporary Restraining Order filed by Mr. Cuccia. Ms. Cuccia testified at the hearing that she was housing a total of **thirty-six (36) dogs** at the marital residence. (V. 1, p. 46, RE.3) (V. 2, p. 190)

On May 6, 2008, Chancellor Lundy entered a Temporary Order *nunc pro tunc* to the date of the hearing on March 25, 2008. (V. 1, p. 46, RE.3) Pursuant to the Temporary Order, Mr. and Ms. Cuccia were granted joint legal and physical custody of the two minor children, with Mr. Cuccia having three weekends per month from Friday to Sunday, as well as Wednesday evening every week. (V. 1, p. 46, RE.3) The Court granted Ms. Cuccia temporary exclusive use of the marital residence and ordered Mr. Cuccia to pay the mortgage, property insurance, property taxes and utilities on the same. (V. 1, p. 47, RE.3) Additionally, Mr. Cuccia was ordered to pay Ms. Cuccia \$500.00 per month in cash support; to provide one tank of gas per week for Ms. Cuccia;

to continue paying for car insurance on Ms. Cuccia's vehicle; and to maintain the health insurance for Ms. Cuccia and the children.

As it related to the condition of the home and the thirty-six (36) dogs living in the home, the Court specifically enjoined Ms. Cuccia from allowing any more than three (3) dogs, with each dog weighing no more than thirty (30) pounds, to run loose or occupy that portion of the marital residence utilized by the family, or more particularly, the parties' minor children. (V. 1, p. 47) Chancellor Lundy further Ordered the Department of Human Services to conduct a home study of the marital residence. (V. 1, p. 47, RE.3)

On June 6, 2008, Ms. Cuccia's counsel, Leigh A. Rutherford, filed a Motion to Withdraw and Substitute Counsel due to Ms. Cuccia retaining Malenda Meacham to represent her in the divorce proceedings. (V. 1, p. 59) As a result of Ms. Cuccia retaining Malenda Meacham to represent her, Chancellor Lundy recused himself and the case was assigned to Chancellor Percy Lynchard. (V. 1, p. 60, RE.3)

On July 11, 2008, Ms. Cuccia filed a Petition for Additional Temporary Relief. (V. 1, p. 63) In the Petition for Additional Relief, Ms. Cuccia alleged that she was in need of a modification of the Temporary Order entered by the Court on May 9, 2008 *nunc pro tunc* to March 25, 2008. Specifically, Ms. Cuccia sought a modification of the temporary support due to the marital residence being sold; a reduction of Mr. Cuccia's visitation to two weekends per month; removal of the restrictions contained in the prior order relative to the number and weight of the dogs allowed in the marital residence; an order requiring Mr. Cuccia to pay for all uncovered medical expenses; an Order requiring Mr. Cuccia to pay all bonus income received by him into a trust account pending further Orders of the Court; and an Order requiring him to pay

into a trust account any money received by him incident to a personal injury lawsuit which was pending at the time.(V. 1, p. 63) The Petition was set for hearing on July 23, 2008. (V.1, p. 69)

Without Mr. Cuccia's knowledge or consent, an Agreed Order was entered on July 23, 2008. (V. 1, p. 75, RE.3) The Agreed Order continued the hearing on the Petition for Additional Relief and granted Ms. Cuccia's request that all bonus monies received by Mr. Cuccia be placed in a trust account in the name of his counsel at that time, namely, George McFall. (V.1, p. 75, RE.3) The Trial Court further ordered that Ms. Cuccia receive the remaining \$1,000.00 from the sale of the tractor and directed Mr. Cuccia's counsel to issue a check to Ms. Cuccia in the amount of \$2,000.00 from Mr. Cuccia's bonus monies to assist Ms. Cuccia with her moving expenses. (V.1, p. 75-76) A Re-Notice of Hearing was filed on August 11, 2008 setting the Petition for Additional Relief for hearing on August 20, 2008. (V.1, p.77)

On August 27, 2008, an Order of Continuance was entered reflecting that on August 20, 2008, neither Mr. Cuccia nor his counsel appeared for the hearing on the Petition for Additional Relief and on the Court's own Motion said hearing was continued until August 27, 2008. (V. 1, p. 80) The Court awarded Ms. Meachum the sum of \$832.50 in attorneys' fees, which the Court ordered Mr. Cuccia to pay immediately. (V. 1, p. 80-82, RE.3) On August 27, 2008, the Court awarded Ms. Cuccia \$3,750.00 per month in Temporary Support. (V. 1, p. 80-82, RE.3) On October 3, 2008, Ms. Cuccia filed a Petition for Contempt against Mr. Cuccia for failing to deposit his bonus into his attorney's trust account. The Petition for Contempt was set for hearing on November 19, 2008.

On November 19, 2008, the Court found Mr. Cuccia in contempt of Court for failing to place his bonus funds in the trust account of his attorney pursuant to the Agreed Order of July

23, 2008. The Court gave Mr. Cuccia thirty (30) days to deposit the sum of \$43,367.26 into his attorney's trust account and awarded Ms. Cuccia the sum of \$1,500.00 in attorneys' fees.

On November 20, 2008, Mr. Cuccia filed a Motion for Contempt against Ms. Cuccia for her failure to share information with Mr. Cuccia regarding the minor children's education, extracurricular activities, medical care and general welfare. Mr. Cuccia further alleged that Ms. Cuccia was making unilateral decisions regarding the minor children without Mr. Cuccia's knowledge, input, or consent. Specifically, Ms. Cuccia began taking Alicia to see a psychologist without Mr. Cuccia's knowledge. The Motion for Contempt filed by Mr. Cuccia was set for hearing on December 17, 2008.

On December 17, 2008, Mr. Cuccia's counsel, George McFall, filed a Motion to Withdraw as counsel and a Motion to Interplead the Funds he was holding in trust for Mr. Cuccia. (V. 1, p. 101-104) On December 17, 2008, the Court entered an Order Allowing Withdrawal of Mr. Cuccia's counsel, an Order Granting Motion to Interplead Funds, and an Order of Contempt incident to the November 19, 2008 hearing. (V. 1, p. 105-107, RE.3)

On December 31, 2008, a Notice of Appearance of Counsel was filed by Ms. Kay Farese Turner on behalf of Mr. Cuccia. On February 5, 2009, Mr. Cuccia filed an Amended Petition for Contempt, for Modification of Order on Temporary Custody and Motion for Appointment of Guardian ad Litem. Mr. Cuccia alleged in his Amended Petition that Ms. Cuccia was violating the prior Orders of the Court prohibiting her from having more than three (3) dogs under thirty (30) pounds in the house with the minor children, by and through her housing numerous Rottweilers and Pitbulls. Additionally, Mr. Cuccia alleged that the youngest child, Joey Cuccia, was failing first grade due to Ms. Cuccia's failure to provide Joey the appropriate and necessary assistance and supervision with his homework, and further due to Ms. Cuccia repeatedly

dropping Joey off at school late causing him to be tardy. (V. 2, p. 231) On February 5, 2009, Mr. Cuccia also filed a Motion to Modify Temporary Support and for Disbursement of Funds on Deposit with Desoto County Chancery Clerk's Office, wherein he alleged that he was in immediate need of a modification of his Temporary Support Obligation due to his reduction in compensation at FedEx, as well as his having to service multiple loans which he was caused to incur in order to fulfill the Court's Order directing him to deposit his bonus earnings with the Clerk's office. (V. 2, p.261) Both the Petition for Modification of Custody and Motion for Modification of Temporary Support were set for hearing on February 25, 2009. On February 25, 2009, the Court entered an Order continuing the hearing until March 18, 2009. On March 18, 2009, the Court decided in lieu of a temporary hearing the matter would be set for Trial on April 15, 2009. (V. 2, p. 289, RE.3)

On April 15, 2009, the parties appeared before the Court, stipulated to a divorce, and submitted all other issues to the Court for determination. In the middle of Mr. Cuccia's testimony, the Court recessed the proceedings and requested to meet with counsel in chambers. When the Court returned to the bench, the Court recessed the proceedings due to the home study report from DCS never having been received by the Court and further due to the appraisal obtained by Wife of the acreage being erroneous. (V. 3, p. 341, RE.3) The Court ensured the parties an expedited resetting of the trial, however, repeated continuances were granted to Ms. Cuccia's counsel, and not until Mr. Cuccia filed a Motion for Trial Setting did the Court reset the trial for August 11, 2009. (V. 3, p.350, RE.3)

At the conclusion of the Trial, the Court ordered counsel for both parties to prepare proposed Findings of Fact and Conclusions of Law and to submit the same to the Court, but not to counsel opposite. On September 21, 2009, the Court issued the Opinion of the Court. (V. 3, p.

370, RE.4) The Decree of Divorce was entered on October 19, 2009. Pursuant to the Decree of Divorce, Ms. Cuccia was awarded sole physical and legal custody of the two minor children and Mr. Cuccia's visitation was drastically reduced to the Standard Farese Schedule, despite his having three weekends per month and one night during the school week for over a year. (Vol.3 p.371, RE.2) The Court found that Mr. Cuccia had an income of \$129,000 per year and a net monthly income of \$7,268.75. Based on said income, the Court awarded Ms. Cuccia forty-eight (48) months of rehabilitative alimony at the rate of \$2,000.00 per month for the purpose of allowing Ms. Cuccia to finish any education requirements she may have. The Court further ordered Mr. Cuccia to pay the sum of \$1,453.00 per month in child support. (Vol.3, p. 371 and 377, RE.2)

The Court found that the total marital estate was worth \$92,204.00. (RE.2, 4) The estate value was made up of the borrowed funds on deposit with the clerk's office in the amount of \$43,367.26; 100% of the net equity of the 100 acres owned by Mr. and Ms. Cuccia and Mr. Cuccia's parents; the parties' camper; and Mr. Cuccia's retirement account. (V. 3, p. 370-389, RE.4) The Court did not include the equity contained in Ms. Cuccia's residence, despite Ms. Cuccia having paid the mortgage on her residence from the temporary support paid to her by Mr. Cuccia. The Final Decree of Divorce is devoid of any provision regarding the marital debt and how such debt was to be divided.

Mr. Cuccia filed a Motion to Alter or Amend Judgment on October 29, 2009. (V.3, p. 390) The Court denied Mr. Cuccia a hearing on the Motion to Alter or Amend Judgment and on March 9, 2010, entered an Order summarily denying all relief sought therein. (V. 4, p. 645, RE.3)

Statement of Relevant Facts

Custody: The record reflects that Mr. Cuccia left the marital residence in December of 2007 due to his coming home from work and finding that Ms. Cuccia unilaterally decided to adopt four (4) additional large breed dogs bringing the total number of dogs living in the house to twelve. (V. 1, p. 126) Additionally, Mr. Cuccia testified that as a result of Ms. Cuccia allowing so many dogs to live in the home, the sanitary conditions of the home began to deteriorate as a result of the dog hair, vomit, and feces which accompanied that many dogs living in the home. (V. 3, p. 127, line 8-15) Mr. Cuccia explained that Ms. Cuccia began a business of training dogs which led to the establishment of Good Dog University. (V. 1, p. 127-129, beginning line 18) Ms. Cuccia also began a rescue operation for beagles called, Mostly Beagles, which provided a temporary home for beagles that were facing euthanization. (V.1, p.129. line 6) Mr. Cuccia explained that these two operations quickly evolved into something much different than what had been initially contemplated. Specifically, Mr. Cuccia testified that Ms. Cuccia began rescuing not only beagles, but many large breed dogs that had been abused, specifically, Rottweilers and Pitt Bulls. (V. 1. p. 129) Mr. Cuccia testified that as the dogs grew in number and in size, he voiced his objections to Ms. Cuccia but she paid no attention. (V. 1, p. 26) Mr. Cuccia also began having safety concerns for the two minor children due to the breed of the dogs which Ms. Cuccia was rescuing, being Rottweilers and mixed breed Pitt Bulls. Mr. Cuccia testified that one of the male Rottweilers housed at the marital residence had been adopted out to a family who returned him to Ms. Cuccia two weeks later after he attacked a vet tech. (V. 1, p. 132) Upon being returned to the marital residence, the Rottweiler killed another dog at the marital residence and was eventually put down. (V. 1, p. 133) Mr. Cuccia further testified that the two male Rottweilers had gotten into a fight inside the marital residence and

but for both dogs being on leashes there would have been no way to stop the fight. (V. 1, p. 134)

Mr. Cuccia testified that he filed the Motion for Temporary Relief and Motion for Temporary Restraining Order in March 2008, due to his noticing a drastic increase in the number of large breed dogs at the marital residence. (V. 1, p. 135-136) At the hearing in March of 2008, Ms. Cuccia acknowledged that she was housing thirty-six (36) dogs at the marital residence (V. 2, p. 190) Ms. Cuccia further acknowledged that she had increased the number of dogs at the marital residence after Mr. Cuccia moved out of the marital residence, due to her having the ability to use the game room to house additional dogs. (V. 2. p. 208)

As a result of Ms. Cuccia caring for thirty-six (36) dogs by herself, the minor children's educational and medical needs were neglected. Specifically, Ms. Cuccia repeatedly demonstrated an inability to manage the most basic health care needs of the children throughout the parties' marriage and during the pendency of the divorce proceedings. Mr. Cuccia would refer to the children's medical records wherein it is reflected that the children had not been taken to the pediatrician for an annual well-child check up in over four (4) years. (Trial Ex. 4) Mr. Cuccia took the children to their annual well-child check up in March 2008 and January 2009 (Trial Exhibit 4, V. 6, p. 51)

It is also reflected in the children's medical records that Ms. Cuccia failed to take Alicia for a follow-up appointment as directed by Alicia's allergist or Pediatrician following their prescribing Alicia Singulair for her asthma. (Trial Exhibit 3, V. 6, p. 51-53, V. 4, p. 493-496) Rather, Ms. Cuccia simply chose to stop giving Alicia her prescription asthma medication when the prescription ran out. Ms. Cuccia failed to consult with Mr. Cuccia regarding any of the above medical decisions, which she unilaterally made despite Mr. Cuccia's having joint legal custody. Ms. Cuccia's failure to provide proper medical care to the children is also reflected in

Dr. Utley's medical records pertaining to Joseph Cuccia. (Trial Exhibit 3, V. 4, p. 490-49) Specifically, Ms. Cuccia unilaterally caused an orthodontic appliance to be placed in the child's mouth to stop his thumb sucking on June 4, 2008. (Trial Ex. 3, V. 6, p. 49-50) The record reflects that Ms. Cuccia did not return to Dr. Utley until October 29, 2008 despite being instructed to bring Joey back six weeks after the appliance was installed. (Id.) Ms. Cuccia again failed to return Joseph on November 17, 2008 for a follow up appointment, and the records reflected the doctors could not reach Ms. Cuccia on the telephone and called Mr. Cuccia to inquire as to how they could reach Ms. Cuccia (See Exhibit "3" p. 50-51). When Mr. Cuccia discovered in January that Ms. Cuccia had not taken Joseph to have his dental appliance inspected every four to six weeks, as required, and when he further observed the embarrassment and humiliation that the child was suffering as a result of the odor and speech impediment caused by the appliance, he immediately took the child to the doctor to have it removed. (Id.) Mr. Cuccia testified at trial that he believed Joseph's thumb sucking was attributable to the lack of affection and nurturing he receives from Ms. Cuccia. (V. 6, p. 50)

Ms. Cuccia further demonstrated disregard of the Court's Order granting joint legal and physical custody of the children and her inability to co-parent with Mr. Cuccia when she took the parties' daughter to see a psychologist without the knowledge or consent of Mr. Cuccia. (V. 4, p. 484, V. 6, p.48) Ms. Cuccia testified in her deposition and at trial that she did not feel it was necessary to advise Mr. Cuccia of her decision to take their child to a counselor until after she and the child decided whether or not they would continue in therapy. (Id.)

Mr. Cuccia testified at trial that Ms. Cuccia failed to advise him of important dates on which the children's activities were occurring. Specifically, in addition to Ms. Cuccia not advising Mr. Cuccia that she wanted to take the parties' daughter to a counselor, Ms. Cuccia

purposefully did not advise Mr. Cuccia of the school's open house or the time and date of parent teacher conferences which she unilaterally scheduled. (V. 6, p. 49) The parties' daughter, Alicia, had an awards program at school which was not posted on the school's website, and Ms. Cuccia purposefully did not share such information with Mr. Cuccia to the detriment of her daughter's best interest. (V. 6, p. 68 and V. 7, p. 292) Ms. Cuccia acknowledged at trial that she did not tell Mr. Cuccia about the awards ceremony because it she was not her job, even though she acknowledged that her daughter wanted her father to be there. (id.) As the custodial parent, Ms. Cuccia's continuous conduct of withholding information about the children's education, extra-curricular activities, and medical care demonstrates her inability to foster and encourage a close and loving relationship between the children and Mr. Cuccia.

As it relates to the children's educational needs, the children's school records reflect that when the Complaint for Divorce was filed on January 31 2008, Alicia Cuccia was in the 4th grade and Joseph Cuccia was in kindergarten. 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 (Exhibit "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." (Trial Exhibit 7) Joseph Cuccia's Personal Development markings reflected on his report card are very concerning. Specifically, the child received the lowest rating of "Needs Improvement" in the following areas:

1. Assumes responsibility for Learning;

2. Assumes responsibility for behavior;
3. Listens to and follows directions;
4. Works Independently;
5. Follows school and class Rules;
6. Completes Assignments on Time;
7. Displays self-control; uses appropriate strategies to resolve conflict;
8. Uses time wisely;
9. Organizational Skills.

Mr. Cuccia submits that his son's report card reflects that Ms. Cuccia does not have the willingness and/or ability to handle the academic and behavioral needs of Joseph. Mr. Cuccia further submits that if Joseph is left in the care of Ms. Cuccia during the school week, he will not reach his academic potential and will continue to struggle with academic and behavioral problems. Mr. Cuccia testified that once he received Joseph's report card he had him undergo a learning potential evaluation at Lindamood Bell Learning Processes to identify what, if any, tutoring or remedial assistance Joseph needed in order to improve his academic performance. (V.6, p. 43). Mr. Cuccia shared the results of the evaluation with Ms. Cuccia and requested that Joseph be allowed, at Mr. Cuccia's expense, to attend a remedial program during the summer to prepare him for second grade. Ms. Cuccia failed to respond, and as a result, the child did not attend the program. (V. 4 p. 506)

Mr. Cuccia respectfully submits that the proof before the Court reflects that Ms. Cuccia has been unsuccessful in meeting the children's academic and educational needs and that Mr. Cuccia took the initiative to have Joseph evaluated, only to be met with no response from the Ms. Cuccia. In her deposition, when asked why she did not respond, Ms. Cuccia stated that she

thought the program was too time consuming and intensive for the child during the summer. (V. 4, p.506)

The record reflects that Mr. Cuccia consistently demonstrated a greater sensitivity to and awareness of Alicia's needs as a female child on the brink of puberty than Ms. Cuccia. Specifically, the record reflects that it was Mr. Cuccia, not Ms. Cuccia, who first raised the issue of Alicia needing a bra, and he was, in fact, the parent who obtained bras for her by and through the assistance of his Aunt, namely Loretta Evans, who testified at trial. (Vol.6, p. 47 - 48) The record reflects that Mr. Cuccia has a greater sensitivity and awareness of the needs of his daughter than Ms. Cuccia, and therefore has a greater willingness and ability to meet Alicia's needs than Ms. Cuccia.

Mr. Cuccia submits that the Trial Court erred in finding that the *Albright* factor of the **health and sex of the children** favored neither party. Specifically, the Trial Court stated that the female child would naturally favor Mother as she entered puberty despite the proof at trial which reflected that it was Mr. Cuccia, not Ms. Cuccia, who tended to the personal needs of Alicia as she entered puberty. (V. 6, p. 47) Furthermore, it was Mr. Cuccia, not Ms. Cuccia, who took care of the children's medical needs. Ms. Cuccia failed to take the children for well child exams for four years, and further it was Ms. Cuccia who failed to take the children back for necessary follow up appointments with the physicians who were actively treating the children for their medical and dental needs. (V.6 p. 49-51) Accordingly, the record reflects that this factor should have favored Mr. Cuccia.

Mr. Cuccia would show that the Trial Court's erred in performing the Albright analysis as it relates to the **continuity of care** by finding that such factor favored Ms. Cuccia. Mr. Cuccia would show that the Court erroneously stated in support of its finding that Ms. Cuccia

had continuity of care of the children post separation that the children were in Ms. Cuccia's primary care post-separation for a period of three (3) months and prior to the Temporary Order. (V. 3, p. 370-381) Mr. Cuccia would show that the parties separated on or about December 26, 2007 upon his leaving the marital residence and that on March 12, 2008, seventy-six (76) days later, Mr. Cuccia filed an Application and Motion for Temporary Restraining Order requesting that the children be placed in his immediate and full-time custody, which Application was granted by the Court on March 12, 2008. Mr. Cuccia would further show that from the entry of the Temporary Restraining Order on March 12, 2008 until March 25, 2008, the minor children resided with Mr. Cuccia, and following the hearing, Mr. Cuccia had joint physical and legal custody of the minor children. The Trial Court's finding of fact is therefore erroneous.

Mr. Cuccia would show that in the Court's *Albright* analysis contained in the Opinion of the Court, the Court found that Ms. Cuccia possessed the **best parenting skills**. The record is replete with evidence reflecting Ms. Cuccia's lack of parenting skills by and through her decision to place her children in harm's way by owning and possessing thirty (36) dogs at the time Mr. Cuccia filed his Emergency Motion for Temporary Custody, which was granted to him by the Court, and further based upon her possessing over twenty (20) dogs, including abused Rottweilers at the time of trial.(Id.) Additionally, the record reflects that Ms. Cuccia repeatedly dropped the children off to school late and failed to tend to their medical needs. Mr. Cuccia respectfully submits that the Court's application of this *Albright* factor was erroneous, in that such factor favored Mr. Cuccia.

As it relates to the *Albright* factor of each party's willingness to provide **primary child care**, the Trial Court found that such factor favored Ms. Cuccia. (Id.) The Court erroneously stated in paragraph D on pages 372 and 373 of the Opinion of the Court, that Mr. Cuccia consented to the natural mother having joint legal and physical custody of the children and therefore Mr. Cuccia had affirmed the willingness and ability of the natural mother to care for

the children. Mr. Cuccia would show that 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 Mr. Cuccia's Motion for Temporary Restraining Order.(V. 1, p. 46) Accordingly, Mr. Cuccia submits that the Court's finding of fact was erroneous, as it is clearly reflected in the record of this proceeding, and that Mr. Cuccia never, at any time, entered into an Agreed Order of joint physical custody affirming Ms. Cuccia's willingness and/or her abilities to care for the minor children. To the contrary, Mr. Cuccia filed on February 5, 2009 an Amended Petition for Contempt, Modification of Temporary Custody and Motion for Appointment of Guardian ad Litem, wherein he alleged that he was in need of an immediate Order modifying the Temporary Order on custody to grant him sole physical custody of the minor children due to Ms. Cuccia's lack of ability to properly care for the minor children. (V. 2, p. 231) Despite Mr. Cuccia repeatedly pleading with the Court for a hearing on said Petition, the Court never held a hearing until the final trial of this matter. (V. 2, p. 282-286) Mr. Cuccia respectfully submits that the Trial Court erred finding that this *Albright* factor favored Ms. Cuccia due to the Trial Court making an erroneous finding of fact.

Mr. Cuccia would show the Trial Court erred in finding that the *Albright* factor concerning the **stability of employment**, favored neither party based upon the Trial Court finding that both parties had been employed in their respective fields for a reasonable period of time and that neither was in jeopardy at the time of trial of being displaced from their employment. Mr. Cuccia would show that at the trial of this matter, Ms. Cuccia gave contradictory testimony regarding her employment status. Specifically, on direct examination by Ms. Cuccia's counsel, Ms. Cuccia testified that she was not employed and that she intended to return to school to obtain a nursing degree. (V. 7, p. 265) On cross-examination by Mr. Cuccia's counsel, Ms. Cuccia testified that she was self-employed and had misunderstood her counsel's question. (V. 7, p. 277) In Ms. Cuccia's deposition taken on April 8, 2009, when asked about her plans for the future, she stated that she was researching several options, but that she did not know what she

needed in order to graduate. (V. 4, p. 470) Mr. Cuccia would further show that in the Opinion of the Court, the Trial Court, in addressing the award of rehabilitative alimony on page 377, the Court stated that Ms. Cuccia is attempting to educate herself in the medical field. Mr. Cuccia respectfully submits that the Trial Court erred in its analysis of this *Albright* factor in finding that the parties' have equal stability in their employment, and directly contradicts the Trial Court's subsequent finding that Ms. Cuccia is attempting to educate herself in the medical field. Mr. Cuccia submits that Ms. Cuccia's employment and/or unemployment status was not clearly established at the trial of this matter and is anything but stable.

Mr. Cuccia submits that the Trial Court erred in finding that the *Albright* factor concerning the **stability of home environment**, favored neither party. Mr. Cuccia submits that the record reflects that Ms. Cuccia continuously housed between twenty (20) and thirty-six (36) dogs in her home throughout the pendency of this matter. Mr. Cuccia avers that not only does the presence of thirty-six (36) large dogs in a home create a risk of harm to the children's health and safety, it creates total chaos and leaves Ms. Cuccia little, if any time, to tend to the children's needs due to her having to tend to the needs of thirty-six (36) dogs.

Classification and Division of Property:

The parties to this divorce accumulated minimal assets over the course of their twelve (12) year marriage. Mr. Cuccia's Rule 8.05 Affidavit reflected assets totaling \$110,059.00. The assets listed by Mr. Cuccia were his vehicle, which had a negative equity of (\$1,228), an RV valued at \$3,600, household furnishings valued at \$34,970, the funds on deposit with the Chancery Court in the amount of \$43,367.00, a bank balance of \$250.00 and a 401(K) account balance of \$13,000.00. (Trial Ex. 1) The total liabilities reflected on Mr. Cuccia's 8.05 Affidavit totaled \$109,003.00. (Id.) The net value of the assets and liabilities listed by Mr. Cuccia totaled \$1,056.00.

The money on deposit with the Chancery Court Clerk was borrowed by Mr. Cuccia to replace the bonus monies which he received in July of 2008. (V. 2, p. 250-260) Mr. Cuccia had no knowledge of the Agreed Order entered into by his counsel on July 23, 2008. Mr. Cuccia had already paid off the parties' marital debt, including the children's tuition with the bonus money as he had historically done when he learned of the Order of the Court requiring him to pay such funds into his attorney's trust account. (V. 2, p. 261-264) Ms. Cuccia acknowledged that in the past years, the parties had paid off outstanding indebtedness, as well as the children's tuition with the bonus monies received by Mr. Cuccia. (V. 4, p. 534-542) At the time Mr. Cuccia received his bonus in July of 2008, a Temporary Order of support had already been entered incident to the March 25, 2008 hearing before Chancellor Lundy. The bonus received by Mr. Cuccia was not based on his performance, but was based on the performance of the company, not Mr. Cuccia's individual performance. (V. 6, p. 56-58) No proof was presented at trial that Ms. Cuccia in any way contributed to Mr. Cuccia receiving this bonus nor was any proof presented that the bonus money could be traced back to an asset that existed prior to the entry of the Temporary Order.

In August of 2008, Ms. Cuccia purchased a home after the parties' separation for \$256,339.30. (V. 4, p. 415, Trial Exhibit 8) Ms. Cuccia made a down payment on her residence in the amount of \$53,478.16. In Section VI., entitled, "Assets and Liabilities" on Ms. Cuccia's mortgage application, she listed funds in the amount of \$56,100.00 as "Gifted funds". The title of the property is held in Ms. Cuccia name. Ms. Cuccia represented to the bank on her mortgage application, completed via telephone on July 30, 2008, that she was a single woman with zero dependents. (Trial Exhibit 8) Ms. Cuccia further represented on her mortgage application that she had a base monthly income of \$3,750.00. This figure was represented as income, not

alimony or child support, which section was left blank on the application. (Trial Exhibit 8) At the time Ms. Cuccia completed this application, the Trial Court had not awarded Ms. Cuccia temporary support over and above the \$500.00 cash support awarded to her in March 2008 by Chancellor Lundy. Coincidentally the \$3,750.00 income figure which Ms. Cuccia listed on her mortgage application completed over the telephone on July 30, 2008, was the same amount that she was awarded by Chancellor Lynchard on August 27, 2008. (V. 1, p. 83) Ms. Cuccia incurred a \$1,270.00 per month mortgage payment incident to the purchase of this home. (Trial Exhibit 2) Ms. Cuccia acknowledged in her deposition taken on April 8, 2009 that she used the temporary support paid by Mr. Cuccia to pay the monthly mortgage note on this residence. (Vol.4, p. 529) Ms. Cuccia testified at trial that the gifted funds listed on her mortgage application in the amount of \$56,100.00 were borrowed funds that she was obligated to repay to her parents. (Vol. 2, p. 378)

The Trial Court in its Opinion of the Court found Mr. Cuccia's hunting property should be valued pursuant to the appraisal obtained by Ms. Cuccia based upon the fact that the Court found both parties had agreed to said appraiser. (V.3, p. 379) Mr. Cuccia hired an appraiser after the Court recessed the proceedings in April of 2009 due to Ms. Cuccia having obtained an erroneous appraisal of the land. (V. 3, p. 341) When Mr. Cuccia presented the appraisal during the trial, counsel for Ms. Cuccia objected to the appraisal, and as a result, two appraisals of the property were admitted as Trial Exhibits 10 and 11. (V. 6, p. 75-76) Trial Exhibit 10 is the appraisal obtained by Mr. Cuccia reflecting a value of \$70,000.00. Trial Exhibit 11 is the appraisal obtained by Ms. Cuccia valuing the property at \$124,000.00, which was the appraisal found to be erroneous by the Court pursuant to the Order Continuing Trial entered May 27, 2009.

(V.3, p. 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. (Volume 6, p. 62)

The Trial Court utilized the value of \$124,000.00 for this property based upon the Trial Court's erroneous finding of fact that the parties had agreed to this appraisal. (V.3, p. 370) The record reflects that Mr. Cuccia's appraisal was performed by a qualified appraiser and accurately appraised the acreage owned by the parties and the assessment of \$70,000.00 should have been utilized by the Court in valuing this asset. The net equity of the property based upon the appraised value of \$70,000.00 less the outstanding indebtedness of \$33,900.00 equals \$36,100.00. The parties held a 50% interest in said property. Fifty percent of \$36,100.00 equals \$18,050.00, which Mr. Cuccia submits accurately reflects the value of this asset.

Income of the Parties:

The Trial Court awarded Ms. Cuccia rehabilitative alimony in the sum of \$2,000.00 for a period of forty-eight (48) months. (V. 3, p. 370) The proof presented at trial established that Ms. Cuccia represented her employment income on her mortgage application completed in July 30 2008 to be \$3,750.00 per month. (Trial Exhibit 8) The record further reflects that Ms. Cuccia represented to the Department of Human Services Caseworker in October 2008 that her income was \$6,500.00 per month. (V. 7, p. 288) Ms. Cuccia testified that she earned \$20 per night for boarding animals and that she had between four to eight dogs boarded per night. (V. 2, p. 210) Ms. Cuccia testified that her bank statements reflected expenses of \$1,700.00 per month in business related expenses, and that Mr. Cuccia was paying for some of those expenses. (V. 7, p. 284 V. 4, p.547) The Trial Court failed to assess an income to Ms. Cuccia and further failed to analyze Mr. Cuccia's ability to pay alimony to Ms. Cuccia.

The Court found Mr. Cuccia to have annual income of \$129,000.00 and a net income of \$7,268.75 per month. (V. 3, p. 371) The record reflects \$1,555.00 in monthly marital debt payments and \$4,526.00 in monthly living expenses. (Trial Exhibit 1) The Trial Court awarded

Ms. Cuccia a combined monthly support award \$3,453.00. As a result, Mr. Cuccia has been left with \$3,815.75 per month to pay his monthly living expenses. The schedule prepared by Mr. Cuccia marked as Trial Exhibit 12, reflects a deficit of \$2,308.00 per month. Ms Cuccia received a total of \$61,632.61 in support from the commencement of the divorce action through August 2009. (Trial Exhibit 12) Ms. Cuccia made no effort to secure employment throughout the proceedings but rather continued to pay for the expenses associated with caring for thirty-six dogs and running a business that incurred business expenses of \$1,700.00 per month which were paid for with the temporary support money paid by Mr. Cuccia.

Marital Debt:

Mr. Cuccia 's Rule 8.05 Affidavit reflects total outstanding indebtedness of \$109,003.00 all of which is marital. The Trial Court failed to even mention the marital debt and further failed to equitably divide the same.

Summary of the Argument

Based upon the weight of the evidence, the Court erred in awarding sole legal and physical custody of the two minor children to Ms. Cuccia pursuant to *Albright v. Albright*, 437 So.2d 1003, (1983). The record reflects that the best interest of the minor children would be served by placing them in the full time care of Mr. Cuccia.

The Trial Court erred in classifying Mr. Cuccia's FedEx bonus as marital property when said bonus was received by him four months after the Trial Court held a Temporary Hearing and awarded Temporary Support to Ms. Cuccia. Pursuant to *Pittman vs. Pittman*, 791 So.2d 857, (Miss.App. 2001) all property acquired by the parties after the entry of a Temporary Support Order is the separate property of that party unless it can be shown that said asset was acquired through the use of marital assets or that the other party contributed to the acquisition of said asset. Ms. Cuccia could not have contributed to the acquisition of Mr. Cuccia's 2008 FedEx

bonus due to such bonus being based solely on the performance of the company. The Trial Court failed to classify this bonus as Mr. Cuccia's separate property.

The Trial Court erred in classifying Ms. Cuccia's residence as her separate property. Ms. Cuccia paid the monthly mortgage note on her residence with the temporary support being paid by Mr. Cuccia in the amount of \$3,750.00 per month. Ms. Cuccia made twelve months (12) of mortgage payments at the rate of \$1,270.00 per month for a total payment of \$25,400.00. At the very minimum, the amount of \$25,400.00 should be included in the marital estate as said sum represents the contribution of funds on the part of Mr. Cuccia towards the preservation of said asset.

The Trial Court erred in utilizing the appraisal obtained by Ms. Cuccia valuing the property at \$124,000.00. Said appraisal was erroneous in that it was not an appraisal of the acreage owned by the parties. The Court found said appraisal to be erroneous and continued the proceedings so that Ms. Cuccia could correct the appraisal. No correction was made of the appraisal, and the Chancellor, for unknown reasons, chose to rely upon the appraisal in assessing a value to this property. The property was purchased in 2001 for \$50,000.00. It 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. The appraisal obtained by Mr. Cuccia reflected the accurate fair market value of \$70,000.00.

The marital debt of the parties must be considered in dividing the marital estate. Additionally, the Trial Court should have equitably divided the marital debt. No consideration was given to the outstanding marital indebtedness which constitutes reversible error on the part of the Trial Court.

The Trial Court erred in awarding Ms. Cuccia \$3,453.00 in rehabilitative alimony for forty-eight (48) months in light of the factors to be considered by the Court pursuant to *Craft vs. Craft*, 825 So.2d 605, (2002). The Trial Court awarded Ms. Cuccia close to the same amount of support she was awarded when Mr. Cuccia was earning in excess of \$175,000.00, despite Mr.

Cuccia's earnings being reduced to \$129,000.00. The Trial Court failed to consider the amount of marital debt Mr. Cuccia was obligated to service, and as a result, was placed in a position of being unable to meet even his most basic needs. Ms. Cuccia continued to waste money caring for thirty-six (36) animals and operating a business which incurred \$1,700.00 a month in expenses. Ms. Cuccia's representations to the Court regarding her income were less than credible. Ms. Cuccia represented to a financial institution that she had monthly earnings of \$3,750.00, which is the income she should be imputed by the Trial Court in considering an award of alimony. The Trial Court's failure to consider all of the above factors constitutes reversible error.

Argument

The standard review in child custody cases is quite limited and reversal is only proper when it is found that a Chancellor was manifestly wrong, clearly erroneous, or applied an erroneous illegal standard. *Chamblee v. Chamblee*, 637 So.2d 850, 860 (Miss. 1994).

a. Health and sex of the children:

The Trial Court erred in its *Albright* analysis based upon the weight of evidence presented at trial. The parties have one female child and one male child. The female child, Alicia Cuccia, is eleven years old, and the male child, Joseph Cuccia, is eight years old. Both children are in good health except that Alicia Cuccia suffers from Asthma for which, on March 24, 2008, she was prescribed a maintenance medication, namely Singulair, to manage the symptoms. Ms. Cuccia has repeatedly demonstrated an inability to manage the most basic health care needs of the children throughout the parties' marriage and during the pendency of the divorce proceedings. Mr. Cuccia would refer to the children's medical records wherein it is reflected that the children had not been taken to the pediatrician for an annual well-child check up in over four (4) years. Mr. Cuccia took the children to their annual well-child check up in March 2008 and January 2009 and he has demonstrated the ability and desire to tend to the children's medical

needs.

It is also reflected in the children's medical records that Ms. Cuccia failed to take Alicia for a follow-up appointment as directed by Alicia's allergist or Pediatrician, following their prescribing Alicia Singulair for her asthma. Rather, Ms. Cuccia simply chose to stop giving Alicia her prescription asthma medication when the prescription ran out. Ms. Cuccia failed to consult with Mr. Cuccia regarding any of the above medical decisions, which she unilaterally made despite Mr. Cuccia's having joint legal custody. Ms. Cuccia's failure to provide proper medical care to the children is also reflected in Dr. Utley's medical records pertaining to Joseph Cuccia. Specifically, Ms. Cuccia unilaterally caused an orthodontic appliance to be placed in the child's mouth to stop his thumb sucking on June 4, 2008. The record reflects that Ms. Cuccia did not return to Dr. Utley until October 29, 2008, despite being instructed to bring him back six weeks after the appliance was installed. Ms. Cuccia again failed to return Joseph on November 17, 2008 for a follow up appointment, and the records reflect the doctors could not reach Ms. Cuccia on the telephone and called Mr. Cuccia to inquire as to how they could reach Ms. Cuccia. When Mr. Cuccia discovered in January, that Ms. Cuccia had not taken Joseph to have his dental appliance inspected every four to six weeks as required and when he further observed the embarrassment and humiliation that the child was suffering as a result of the odor and speech impediment caused by the appliance, he immediately took him to the doctor to have it removed. Mr. Cuccia testified at trial that he believed Joseph's thumb sucking was attributable to the lack of affection and nurturing he receives from the Ms. Cuccia.

As it relates to the sex of the children, given that there is one boy and one girl, this factor could favor both parties equally, however, Mr. Cuccia has consistently demonstrated a greater sensitivity to and awareness of Alicia's needs as a female child on the brink of puberty than the Ms. Cuccia. Specifically, the record reflects that it was Mr. Cuccia, not the female Ms. Cuccia,

who first raised the issue of Alicia needing a bra, and he was, in fact, the parent who obtained bras for her by and through the assistance of his Aunt, namely Loretta Evans, who testified at trial. Mr. Cuccia clearly has a greater sensitivity to and awareness of the needs of his daughter than does the Ms. Cuccia, and he has a greater willingness and ability to meet her needs than the Ms. Cuccia.

As it relates to the parties' son, Joseph Cuccia, Mr. Cuccia and his Aunt both testified that Mr. Cuccia has a closely bonded relationship with his son and that Ms. Cuccia has been detached, unaffectionate and distant from him. The record reflects that Mr. Cuccia and his son enjoy camping and hunting together, and Mr. Cuccia testified that he believes that his son desperately needs to be in his full-time care and custody in order to receive the type of affection and love which every child needs in order to grow into a happy productive adult.

Mr. Cuccia submits that, in light of all of the above facts, this factor should be found to favor him because he has demonstrated his ability to be sensitive to the unique personalities and needs of both his daughter and his son.

b. Continuity of Care:

While *Albright* states that one of the factors enumerated by the Supreme Court was "the continuity of care prior to the separation," the Supreme Court in the case of *Jerome v. Stroud*, 689 So.2d 755 (Miss. 1997), expanded the decision to include that the time between separation and the trial should also be considered in determining continuity for the children. *Jerome* at 757.

In their discussion of the case of *Jerome v. Stroud*, the Supreme Court found the Chancellor's failure to consider the continuity of care during the parties' three year separation to be manifestly erroneous. The Court states that the Chancellor misunderstood the Supreme Court's opinion in *Albright* and that this factor should have been weighed in favor of Mr. Cuccia.

Id. As a result of this decision, the continuity of care of children post-separation is now a consideration to be weighed along with the other *Albright* factors.

In the present case, prior to the parties' separation, although he was active, caring and loving in his children's life, Mr. Cuccia worked and relied upon Ms. Cuccia to be primarily responsible for the daily needs of the children. Upon separation, Mr. Cuccia was awarded sole temporary legal and physical custody of the minor children after his filing of an Application and Motion for Temporary Restraining Order, which was precipitated by Mr. Cuccia discovering the deteriorating conditions of Ms. Cuccia's home environment following his departure from the residence. Specifically, Ms. Cuccia had eight (8) dogs housed at the residence in December of 2007, and by March of 2008, the number had increased to thirty-six (36). Mr. Cuccia further discovered that Ms. Cuccia's care for the children had been woefully neglectful and that Ms. Cuccia had allowed serious health concerns to develop for the children. Once he obtained sole legal and physical custody of the children, Mr. Cuccia immediately began taking steps to correct the problems. Specifically, after finding that Ms. Cuccia had not taken the children for their annual immunizations and check-ups in three (3) years, Mr. Cuccia immediately took the children for well-child check-ups. Additionally, Mr. Cuccia also discovered that Ms. Cuccia had allowed Alicia's asthma medication to run out and never bothered to take the child to the doctor or request a refill. With the assistance of the physician, Mr. Cuccia immediately got Alicia back on the proper medication.

Following the separation, Mr. Cuccia also realized that Ms. Cuccia had been feeding the children a diet consisting primarily of fast food, and Mr. Cuccia made it a priority to cook healthy meals for the children.

Whereas during the marriage Mr. Cuccia detrimentally relied upon Ms. Cuccia while he was working, Mr. Cuccia's schedule with FedEx has the necessary flexibility which allows him to address any and all aspects of the children's lives, and he is willing to take on this full-time responsibility. Moreover, Mr. Cuccia has a close, loving, and bonded relationship with his extended family, who has been involved since the births of both children and has expressed willingness and desire to support and assist him in his efforts to rear the minor children. Finally, Mr. Cuccia testified at trial regarding his desire for the children to have a close, loving, and bonded relationship with Ms. Cuccia and his willingness to encourage that relationship.

As *Jerome* 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 clearly weigh heavily in favor of Mr. Cuccia, especially since the parties' separation.

c. *Best Parenting Skills and Willingness and Capacity to Provide Primary Child Care:*

The uncontroverted proof in this case is that Mr. Cuccia's parenting skills are far superior to those of Ms. Cuccia. The record clearly reflects that Ms. Cuccia lacks the most basic and common sense principles of parenting. Specifically, at the time Mr. Cuccia filed his Complaint for Divorce in January of 2008, Ms. Cuccia had acquired thirty-six (36) dogs, all of whom were residing at the marital residence where the two minor children, who were then ages five (5) and nine (9) resided. Amongst the thirty-six (36) dogs, were four (4) male Rottweilers that had been "rescued" from abusive owners and/or who had been abandoned. The lack of good judgment and common sense demonstrated by Ms. Cuccia, by and through her decision to house thirty-six (36) dogs with her two small children, is overwhelming and resulted in both children being placed at risk of suffering irreparable bodily injury and even death.

Ms. Cuccia testified in her deposition on April 8, 2009 and at trial on August 11, 2009,

that she is presently housing a minimum of twenty (20) dogs at all times and at other times more than twenty (20) dogs. Ms. Cuccia's continuous course of reckless endangerment of the children since the parties' separation and throughout these proceedings demonstrates her inability to place the children's best interests before her own bizarre fetish. Mr. Cuccia testified that the dogs defecated and urinated in the home, most often in the minor son's bedroom, on a routine basis prior to and following the parties' separation. Putting aside the sanitation and safety issues, it is simply impossible for one adult to care for thirty-six (36) dogs, some of whom are very ill, and at the same time, properly care for two young children. As a result of Ms. Cuccia's conduct following the parties' separation, the marital residence became intolerable and unhealthy due to the dog hair, dander, urine and feces, not to mention the noise level of thirty-six (36) dogs. At the time Mr. Cuccia vacated the marital residence, Ms. Cuccia was housing eight (8) dogs against Mr. Cuccia's wishes and over his stated objections. Ms. Cuccia testified that Alicia's asthma is not caused by the presence of the dogs in the residence, however, Alicia's medical records reflect that pets of any kind are triggers for asthma attacks.

Mr. Cuccia testified 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.

The record reflects that, upon the filing of Mr. Cuccia's Complaint for Divorce, he was awarded emergency custody of the two children due to the risk of harm to the children which the Court found to exist in Ms. Cuccia's residence. The Court later modified the Order to give each party joint physical and legal custody and Ordered that Ms. Cuccia was to have no more than three (3) dogs in the home and all were to be under thirty (30) pounds.

The testimony at trial revealed that Ms. Cuccia, having full knowledge of the Court's

concerns about the safety of the children around the dogs, promptly violated the spirit of the Court's Order and allowed a 120 pound Rottweiler to ride in the back seat of the car with the two minor children, claiming it did not come under the Court's injunction due to the dog not being in the home. Ms. Cuccia also testified that the Rottweiler chewed apart the seatbelts making Ms. Cuccia's vehicle unsafe for transporting the children. At the time of Trial, Ms. Cuccia testified that she had twenty (20) dogs permanently residing at her residence and that she boarded other animals as a way of earning money.

Mr. Cuccia submits that his number one priority above all else is rearing his two children on a full-time basis and ensuring that they grow into happy, healthy, productive adults with Christian values. As the record reflects, Mr. Cuccia possessed the willingness and all of the skills, wisdom, and judgment necessary to meet the needs of the children on a day-to-day basis and provide them with a loving, nurturing home environment which is free of the dangers, chaos, and filth which exists at Ms. Cuccia's home. One needs to look only at what Ms. Cuccia has done when confronted with the possibility of losing custody of her children to clearly see that Ms. Cuccia's number one priority is the dogs, not her children.

d. The Employment of the Parent and Responsibilities of that Employment:

Mr. Cuccia is employed as a managing director at Federal Express. He has worked at Federal Express for the past nine years. Mr. Cuccia has no set work hours due to his being in the upper management division of Federal Express and further due to his being able to perform the majority of his duties from remote locations electronically via his laptop. Because of Mr. Cuccia's flexible work schedule, he has the absolute ability to structure his life around the children's school schedule and their extra-curricular activities. *Id.* Mr. Cuccia's employment at Federal Express is stable and secure, and the Corporate Vice President and Chief Information

Security Officer of Federal Express testified that Federal Express would support Mr. Cuccia in serving as the primary custodial parent of his two children. 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. 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 her employment status. *Id.*

The proof at trial established that Ms. Cuccia stated on her August 2008 mortgage application, Trial Exhibit “8,” that she was self-employed and earned a “Base Employment Income” of \$3,750.00 per month as a “Dog Trainer/Rescue/Animal.” The mortgage application reflects that Ms. Cuccia understands the concept of self-employment, yet Ms. Cuccia lied under oath when asked by her own counsel about her employment status.

Ms. Cuccia also advised the social worker from the Department of Human Services that she was self-employed and is the Owner of Good Dog University and the Vice –President of Mid-South Animal Rescue League earning an income of \$6,500.00 per month with monthly expenses of \$4,000.00. Ms. Cuccia confirmed this information on cross-examination. Furthermore, Ms. Cuccia acknowledged that she rents office space and pays business related expenses totaling \$1,700.00 each month.

The only explanation for Ms. Cuccia stating under oath at trial that she was unemployed is that Ms. Cuccia is well aware that her work of rescuing, boarding, and training dogs in her home is not conducive to serving as the sole custodial parent of the two minor children. Ms. Cuccia’s responsibilities of caring for twenty (20) to thirty-six (36) dogs on a full-time basis, in addition to holding dog training classes and serving as the Vice-President for the Mid-South Animal Rescue League are so immense, that it is impossible to imagine how Ms. Cuccia could

meet all of her job related responsibilities, much less care for two young children on the side. Ms. Cuccia demonstrated, on a consistent basis, that her work and her obsession with dogs is more important to her than the health, well-being, safety, and residential status of her children.

As the Court stated at the hearing on March 26, 2008, the time it takes to clean up after that number of animals on a daily basis is in and of itself a full time job, not to mention the feeding, grooming, training, and medical care required by the animals. Moreover, Ms. Cuccia's employment is a seven day a week, 24 hour per day job. The ability to travel out of town is non-existent, as is the thought of the children having friends over to their house. Most parents with common sense would not allow their children within a ten mile radius of Ms. Cuccia's home due to the number of dogs roaming the property and defecating and urinating in the home. It is imperative to remember these dogs are not household pets that Ms. Cuccia has had since they were puppies. To the contrary, these animals have been abused and neglected and come from a variety of unpleasant backgrounds which normally cause dogs to be aggressive, defensive and certainly not suitable to be around children. In Ms. Cuccia's deposition, the main activity Ms. Cuccia reported that she participated in with her children was attending dog shows and training dogs. As previously stated, Ms. Cuccia's priority is her business of training, rescuing, and boarding animals, and, due to the nature of such business, Ms. Cuccia's employment responsibilities are far too great for her to be able to serve as the sole custodial parent for the children.

Mr. Cuccia respectfully submits that this *Albright* factor should be found to favor him.

e. Physical and Mental Health and Age of the Parent:

Mr. Cuccia is thirty-six years of age and in excellent health. Ms. Cuccia is nearly thirty-five years of age and is in good physical health. Mr. Cuccia has questioned the mental health of

Ms. Cuccia based upon her decision to have thirty-six (36) animals in the marital residence, however, to his knowledge, Ms. Cuccia has not been diagnosed with a mental illness as of yet. Mr. Cuccia avers that this factor does not favor either party.

f. Emotional Ties of Parent and Child:

Mr. Cuccia is closely bonded with both children. Ms. Cuccia is closely bonded to Alicia but not to Joseph Cuccia. Mr. Cuccia testified that, following the birth of Joseph Cuccia, Ms. Cuccia was detached and unaffectionate towards him, which pattern of conduct has continued throughout the little boy's life. Mr. Cuccia submits this factor should be found to favor him.

g. Moral Fitness of the Parents:

Mr. Cuccia is a devout Catholic. Mr. Cuccia's character is founded upon strong moral principles deeply seeded in his faith as a Christian. Ms. Cuccia is a liar and a manipulator. Specifically, Ms. Cuccia has made the following misrepresentations:

1. On Ms. Cuccia's mortgage application dated August 2008, she stated that she was unmarried and had no dependent children.
2. On the same mortgage application, Ms. Cuccia listed the down payment of \$56,100.00 as a gift, yet, on her Rule 8.05, and in her deposition testimony, and during her testimony at trial, Ms. Cuccia claimed this amount is a loan from her parents.
3. On the Deed of Trust dated 8/21/08 to Ms. Cuccia's home, Ms. Cuccia is listed as an unmarried female.
4. On the children's aftercare forms completed by Ms. Cuccia in August of 2008, Ms. Cuccia stated on the form that she had sole custody of the children and that Mr. Cuccia only had them on Tuesdays. The truth is that the parties had joint physical and legal custody of the children at that time, and Mr. Cuccia has consistently had the children much more than just

Tuesdays (Exhibit "25").

Mr. Cuccia submits that the record reflects that Ms. Cuccia has repeatedly lied and misrepresented facts to various organizations and individuals to serve her own agenda. Mr. Cuccia avers that Ms. Cuccia's deceitfulness demonstrates that she is not morally fit to properly rear the two minor children to become productive, upstanding citizens.

h. Home, School, and Community Record of the Child:

When the Complaint for Divorce was filed on January 31 2008, Alicia Cuccia was in fourth grade and Joseph Cuccia was in kindergarten. 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 (Exhibit "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."

Mr. Cuccia submits that his son's report card reflects that Ms. Cuccia does not have the willingness and/or ability to handle the academic and behavioral needs of Joseph. Mr. Cuccia further submits that if Joseph is left in the care of Ms. Cuccia during the school week, he will not reach his academic potential and will continue to struggle with academic and behavioral problems.

As it relates to the religious upbringing of the children, the record reflects that it was Mr. Cuccia, 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 Mr. Cuccia who

will serve in the same capacity for his son when the time comes for him to receive his First Communion.

The record reflects that Mr. Cuccia has been involved in coaching Joseph's soccer team during the 2008-2009 school year and that Mr. Cuccia will continue to encourage his children's participation in extra-curricular activities offered in their school and community.

Mr. Cuccia submits that this *Albright* factor should be found to favor him.

i. Preference of the Child at the Age Sufficient to Express a Preference by Law:

Not Applicable.

j. Stability of Home Environment and Employment of Each Parent and other Factors of relevance to the Parent-Child Relationship:

In addition to all of the above stated facts, Mr. Cuccia would reiterate that he is the best suited parent to serve as the sole custodial parent of these two minor children, and he is the only parent who will ensure that the children continue to have a close and loving relationship with the non-custodial parent.

Alimony

Pursuant to *Craft vs. Craft*, 825 So.2d 605, (2002), the following factors should be considered in the Court's determination of whether or not a party should receive an award of alimony. Mr. Cuccia respectfully submits that Ms. Cuccia is not entitled to receive alimony based upon an application of the factors listed below to the facts and circumstances of this case. Moreover, the proof at trial revealed that Ms. Cuccia received the uncontroverted amount of \$61,632.61 in temporary support from January 1, 2008 through the present, during which time Ms. Cuccia reported employment income between \$3,750.00 and \$6,500.00 per month. Ms. Cuccia acknowledged that she is a self-employed business owner of Good Dog University, for which business Ms. Cuccia incurs business expenses in the amount of \$1,700.00 per month. Ms.

Cuccia qualified for a \$200,000.00 mortgage based solely upon the income earned from her business, as the mortgage application does not reflect that Ms. Cuccia disclosed to the bank the additional income she received from Mr. Cuccia. Despite Ms. Cuccia's perjurious statements at trial that she was unemployed, the overwhelming evidence, including Ms. Cuccia's own testimony on cross-examination, reflects that Ms. Cuccia earns a sufficient income to support herself and maintain a standard of living which is much higher than that of Mr. Cuccia.

If Ms. Cuccia does not own a business, then she has engaged in the most egregious dissipation and waste of marital assets by and through her payment of \$1,700.00 per month in business related expenses. Mr. Cuccia submits the following analysis:

1. The income and expenses of the parties:

Pursuant to Ms. Cuccia's Rule 8.05 Financial Declaration, Ms. Cuccia's monthly expenses, not including expenses related to her business, total \$3,197.82. Pursuant to her testimony at trial, mortgage application, and the DHS home study report, Ms. Cuccia has a monthly income of \$3,750.00 to \$6,500.00, which amount is clearly sufficient to cover Ms. Cuccia's stated expenses. Conversely, Mr. Cuccia, as reflected in Trial Exhibit 11, does not have sufficient income to pay his monthly living expenses after paying Ms. Cuccia temporary support in the amount of \$3,750.00. Moreover, Mr. Cuccia testified at trial that the monthly expenses listed on his Rule 8.05 totaling \$4,526.00 per month did not include the \$750.00 tuition payment, which Mr. Cuccia contractually bound himself to pay in August 2009 in order to enable the children to remain in their private school. In addition to Mr. Cuccia's monthly living expenses, Mr. Cuccia has a total of \$1,379.00 in monthly debt service payments, bringing Mr. Cuccia's total monthly expenses to \$6,655.00. Mr. Cuccia's income, as testified to at trial by Mr. Cuccia and Denise Wood, the Corporate Vice President and Chief Information Security Officer of

Federal Express, was reduced in January 2009 to \$129,000.00 per year resulting in a net income to Mr. Cuccia of \$7,268.75 per month. Mr. Cuccia, like Ms. Cuccia, is in need of a permanent residence for his benefit and the benefit of the minor children, however, under the present Order of the Court, Mr. Cuccia cannot afford to rent a residence, much less purchase one. In light of Ms. Cuccia's representation regarding her monthly income to a financial institution, Mr. Cuccia submits that no disparity exists between the parties' incomes and no alimony should have been awarded to Ms. Cuccia.

2. The health and earning capacities of the parties:

Both parties are in good health, and, as stated above, due to Mr. Cuccia's drastic reduction in compensation, the parties' earning capacities are comparable.

3. The needs of the each party:

Ms. Cuccia's need for alimony would be greatly reduced if she did not incur the expense of caring for thirty-six (36) dogs. Her choice to do so should not result in Mr. Cuccia having to pay alimony.

4. The obligations and assets of each party:

Mr. Cuccia was assigned through default, a total of \$73,511.00 in unsecured indebtedness, which all such indebtedness was incurred for the benefit of the parties and/or their minor children during the course of the marriage. Ms. Cuccia's vehicle is debt free, whereas Mr. Cuccia's is encumbered in the amount of \$10,003.00, which amount is over and above the actual value of the vehicle. Ms. Cuccia currently owns a residence, which had a purchase price of \$248,000.00 and presently has equity in excess of \$50,000.00, whereas Mr. Cuccia was forced to give up his rental home due to his being unable to pay the monthly rent. Based upon all of the foregoing facts, Ms. Cuccia's financial condition is far superior than that of Mr. Cuccia.

5. The Length of the marriage:

The parties were married on November 30, 1996, and were married for 12 years at the time of trial. The parties have been separated since December 2007. Ms. Cuccia represented on her mortgage application, completed by her in August 2008, that she was an unmarried, single female with zero dependents.

6. The presence of the minor children in the home that may require that one or both parties either pay or personally provide childcare:

Mr. Cuccia has requested that he receive sole legal and physical custody of the two minor children for which he will personally provide childcare, both before and after school and on weekends.

7. Age of the parties:

Mr. Cuccia is 36 years of age, and Ms. Cuccia is nearly 35 years of age.

8. The standard of living of the parties, both during the marriage and at the time of the support determination:

Due to the ages of the parties, the standard of living during the marriage was modest with the parties often living paycheck to paycheck and/or using credit cards to supplement their lifestyle. Ms. Cuccia has enjoyed a much higher standard of living since August 2008, when she purchased her \$248,000.00 home and received temporary support in the amount of \$3,750.00 per month. Mr. Cuccia requested relief from the Temporary Support Order since February 2009, at which time he filed a Motion to Modify the Temporary Support Order and custody due to his drastic reduction in compensation. Unfortunately Mr. Cuccia was not afforded a hearing on his Motion, and, therefore, has continued to pay Ms. Cuccia the sum of \$3,750.00, all the while being unable to pay his own basic monthly living expenses.

9. The tax consequences of the spousal support order:

Not applicable

10. Fault or misconduct:

Mr. Cuccia would show that due to Ms. Cuccia's obsessive and compulsive conduct of hoarding thirty-six (36) dogs in the marital residence, in addition to her lack of hygiene and emotional and physical withdrawal from the marriage, Mr. Cuccia was caused to seek a divorce from her in order to protect himself and his two minor children from the filthy, disgusting environment created by and through Ms. Cuccia's business activities of rescuing, training, boarding, and adopting abused and neglected dogs.

11. Wasteful dissipation of assets by either party:

If the Court finds that Ms. Cuccia does not have a business which provides income to her in the amount of \$3,750.00 to \$6,500.00 per month, then the Court must find that Ms. Cuccia has engaged in the most egregious dissipation of assets due to her payment of business/dog related expenses in excess of \$1,700.00 per month for the past four (4) years.

12. Any other factor deemed by the Court to be "just and equitable" in connection with the setting of spousal support:

Ms. Cuccia should be bound to her own representations contained in her mortgage application, statements and representations to DHS, and her trial testimony as it relates to her income and employment status. If Ms. Cuccia's statements are untrue, Ms. Cuccia committed bank fraud and perjury for which she should be prosecuted.

Division of Property

Mr. Cuccia alleges the Trial Court erred in its classification and division of the marital estate, pursuant to Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994) and Pittman vs. Pittman, 791 So.2d 857, (Miss.App. 2001). There were few assets in this estate to be divided. Mr. Cuccia avers that the bonus in the amount of \$43,360.00, which he received in July 2008 following the entry of the Temporary Order on May 9, 2008, is his separate property pursuant to the Mississippi Court of Appeals' ruling in Pittman vs. Pittman, 791 So.2d 857, (Miss.App. 2001). Mr. Cuccia was ordered by the Trial Court to interplead all such funds with the Chancery Court Clerk's Office, which he did in December 2008. Due to Mr. Cuccia's prior counsel's failure to advise Mr. Cuccia of the Court's Order, Mr. Cuccia used the bonus money to pay marital debt for the benefit of both parties and the minor children, as he had historically done throughout the parties' marriage. As a result, Mr. Cuccia was caused to borrow all of the \$43,360.00 in order to comply with the Court's Order. Mr. Cuccia would show, pursuant to the testimony at trial that such funds were not based upon any contribution made by Ms. Cuccia prior to the entry of the Temporary Order, and, therefore, the exceptions stated in the *Pittman* decision do not apply.

Pursuant to *Ferguson*, the factors to be considered in determining contribution to the acquisition of assets are as follows:

- a. Direct or indirect economic contribution to the acquisition of the property:

Mr. Cuccia was the primary breadwinner prior to the parties' separation and also assisted in the day-to-day care of the two minor children. Prior to the parties' separation, the primary duty of Ms. Cuccia was to care for the needs of the minor children, which duty she failed to satisfactorily perform to the detriment of the minor children as stated hereinabove.

b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage:

Ms. Cuccia was at fault in the break-up of this marriage and the break-down of the stability and harmony of the family as a result of her boarding of dogs in the marital residence during the course of her business. Despite Mr. Cuccia's repeated requests that Ms. Cuccia attend marital counseling, Ms. Cuccia refused to do so.

c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets:

The parties were both in college at the time of their engagement. Ms. Cuccia unilaterally chose, after three and a half years, prior to the parties' marriage, to quit college, which, in her deposition, she attributed to the fact that she had insufficient funds to support herself and needed to secure full-time employment.

d. The market value and the emotional value of the assets subject to distribution:

The only assets subject to distribution which had an emotional value to either party were the residence in which Ms. Cuccia resided and the one hundred acres owned by the parties with Mr. Cuccia's parents.

e. The degree to which spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise:

Ms. Cuccia continued to waste money caring for thirty-six (36) dogs all of which was an unnecessary waste of Mr. Cuccia's money and Ms. Cuccia's time.

f. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse:

This factor is not applicable in this case.

- g.** Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution:

The Trial Court erred in failing to consider the fact that the monies which Mr. Cuccia placed on deposit with the Chancery Court Clerk were borrowed. As a result of said funds being awarded to Wife, Mr. Cuccia is faced with servicing the outstanding indebtedness with no ability to do so.

- h.** The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties:

This factor was not applicable to this case.

- i.** The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity:

There were insufficient assets to offer either party financial security. Moreover, as detailed above, the parties have comparable incomes, and both are of a young age and in good health.

The Trial Court erred in failing to account for the \$25,400.00 which Mr. Cuccia paid to Ms. Cuccia in temporary support which she in turn paid towards the outstanding mortgage indebtedness on her residence. Pursuant to *Pittman*, Mr. Cuccia's direct contribution of his separate earnings towards the preservation of this asset by and through the payment of the monthly mortgage note causes a portion of the equity contained in this property to be marital and subject to an equitable division.

Based upon the above analysis of the applicable case law, Mr. Cuccia submits that the Trial court committed reversible error in classifying, valuing and equitably dividing the marital estate.

CONCLUSION

Based on all the foregoing alleged errors, and the overwhelming evidence contained in the record which supports such alleged errors, Mr. Cuccia respectfully submits unto this Court that the Decree of Divorce entered by the Trial Court should be reversed. Mr. Cuccia incurred attorneys' fees and suit expenses in bringing this appeal, none of which he has the ability to pay and would ask this Court to award him all such attorneys' fees and suit expenses.