

IN THE ALABAMA COURT OF CIVIL APPEALS

MAUREENE BASS DEES,)
)
 Appellant,)
)
 -vs-) CASE NO. CIV. 2114
)
 MORRIS S. DEES,)
)
 Appellee. :)

ON APPEAL FROM THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

BREIF OF APPELLANT

MAURY SMITH
JULIA S. WATERS
CHARLES M. CROOK
Attorneys for the Appellant

OF COUNSEL:

SMITH, BOWMAN, THAGARD,
CROOK & CULPEPPER
P.O. Box 78
Montgomery, Al 36101
Telephone: (205) 834-6500

ORAL ARGUMENT REQUESTED

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I. STATEMENT OF THE CASE

This action was commenced when the Appellant Wife, Maureen Dees, on March 8, 1979, filed her petition seeking an absolute divorce, custody of the child of the parties, alimony and child support, property division, and attorney's fees (R. 1, et seq). On March 26, 1979, the Husband, Morris S. Dees, filed his answer and counter claim seeking a divorce. The Husband alleged that it would be in the best interests of the parties' minor daughter that her custody be granted to the Wife (R. 7, et seq). Following extensive discovery and preliminary proceedings not important to this appeal, the case went to trial before the Honorable Newman C. Sankey, District Court Judge sitting as Judge of the Circuit Court (R. 191). The trial was held on August 6th through 9th, August 20th through 24th, and September 21st, 1979 (R. 191). On September 26, 1979, Judge Sankey rendered his "Findings of Fact" (R. 154, et seq), and on the same day, rendered his "Final Decree of Divorce" (R. 159, et seq). The said decree granted a divorce, granted custody of the child to the Wife, established the Husband's visitation privileges, required child support in the amount of \$1,500 per month, and awarded the Wife the amount of \$120,000 "as alimony-in-gross", with the provision that the Husband at his election may pay this amount in monthly installments of \$2,000 over a period of five years, such payments to terminate in the event of the Wife's remarriage, but the entire balance to be payable to her estate in the event of her death.

The Wife duly perfected this appeal (R. 185, et seq).

II. THE ISSUES

1. Are the terms and amount of the trial judge's alimony award arbitrary under the circumstances?

2. Where the Husband by his own calculations has a net worth of \$3,867,029, and an annual income in excess of \$200,000, and where his Wife of eleven years has been compelled to seek a divorce by the Husband's obstinate refusal to give up his mistress who he is supporting and who has become pregnant by him, did the trial judge abuse his discretion by awarding "alimony-in-gross" of only \$120,000, payable over five years and terminable in the event of the Wife's remarriage?

3. Where the evidence is clear and undisputed that property which the Husband owned prior to the marriage, or income produced by such property, was used regularly for the common benefit of the parties and their family during the marriage, as provided in Act No. 79-486, Ala. Leg. Reg. Sess. 1979, did the trial court err in failing to make findings of fact to that effect and in failing to consider such property in determining the Wife's alimony?

4. Where the Husband, prior to the marriage, owned 89% of the stock of Fuller & Dees Marketing Group, Inc., which, one year after the marriage he exchanged for stock in the Times Mirror Corporation, and where he thereafter sold a portion of Times Mirror stock and acquired a portfolio of municipal tax-exempt bonds, does his remaining Times Mirror Stock and his portfolio of municipal bonds constitute "property acquired prior to the marriage" within the meaning of Act Number 79-486, Reg. Sess. 1979 so as to be excluded from consideration in determining alimony?

5. Where the Husband had designated himself as a potential trial witness on

his own behalf pursuant to the pre-trial order, and was present in the courtroom at the beginning of the trial, and where the Husband's attorneys stated in open court that they planned to call the Husband as a part of the case-in-chief, did the trial judge err in prohibiting the case from calling the Husband first, as a part of her case-in-chief, on the ground that the Wife had not previously designated the Husband as a potential trial witness?

III. STATEMENT OF THE FACTS

Maureene Dees grew up in Albany, Georgia, where she attended Albany High School (R. 250). She received a Bachelor of Fine Arts degree in Dramatics from Wesleyan College in Macon, Georgia, in June, 1959 (R. 250). In 1960 she married Richard C. Buck of Macon, Georgia, and they had two children, Holly T. Buck and Harold Blakley Buck (R. 251). Mrs. Dees came to Montgomery in 1965 (R. 250). She taught dramatics at Huntingdon for about one year in 1967 (R. 429). She was divorced from Mr. Buck in 1968 (R. 250).

Morris Dees was born in Shorter, Alabama and grew up in Mt. Meigs. He graduated from Sidney Lanier High School with a diploma in vocational agriculture in 1955 (R. 1145). Prior to his graduation in that year he married Beverly Crum on April 15, 1955 (R. 1145). In 1955 he entered the University of Alabama School of Commerce. At the University he met Millard Fuller, and they started Fuller & Dees Heart of Dixie Products, which carried out various business enterprises (R. 1150). He practiced law briefly, but thereafter became fully involved in Fuller & Dees Marketing Group (R. 1152).

Morris and Maureene met in about 1966 (R. 251), and were married on August 11, 1968 (R. 251). At the time of the marriage, Morris was living at the Rolling Hills Ranch in Mathews, Alabama, and following the marriage they immediately took up residence there (R. 252). Morris had two boys from a prior marriage who lived with them, Morris Dees, III, called "Scooter" and John, who, at the time of the marriage were twelve years and nine years old respectively (R. 254). Maureene's two children by the prior marriage Holly, seven, and Blakley, five, also lived with them. Maureene and Morris had one child, Ellie, who was born in 1970, while the family lived in the home at Mathews (R. 256).

A. Morris' Financial Condition

At the time of their marriage, Morris was President, Chairman of the Board, and 89% stockholder of Fuller & Dees Marketing Group (R. 1152; 1238). A year after the marriage, on March 10, 1969, a transaction was consummated by which Morris sold all of his stock in Fuller & Dees to the Los Angeles Times Mirror Corporation, in exchange for stock in the Times Mirror Corporation (R. 1245). Morris received 110,000 shares of Times Mirror stock valued at \$47.00 per share, for a total value of \$5,150,000 (R. 1245), but over the years its value declined somewhat (R. 1259). From time-to-time Morris has sold portions of his Times Mirror stock for various purposes. A large portion of the proceeds from the sale of Times Mirror stock was invested in tax-free municipal bonds (R. 1258-1259).

From 1968 through October, 1975, the family was supported exclusively by Morris' income from these investments. Beginning in October, 1975, this income began to be supplemented by a salary from the Southern Poverty Law Center, which Morris had founded earlier (Morris' Answers to Interrogatories; Pl. Ex. 84).

At the time of the divorce, Morris' net worth, based upon his own calculations, was \$3,876,029 (R. 1252, et seq.; Def. Ex. 86-87; Stipulation, R. 231). His annual income exceeds \$230,000 (Def. Ex. 76-79), of which more than \$160,000 annually is derived from municipal bonds upon which Morris pays no income tax (Def. Ex. 28).

B. The Cause Of The Break-up: Vicki Booker McGaha

Although Maureene was subjected to a number of degrading sexual episodes by Morris during the marriage which will be discussed hereafter, neither Morris nor Maureene ever wanted or sought a divorce until Morris established his permanent relationship with Vicki Booker McGaha in August of 1977. It was Morris' absolute refusal to give up his mistress, whom he was supporting and whom he had made pregnant, that directly caused termination of Maureene's marriage and forced her to institute these divorce proceedings.

In August, 1977, Morris tried the "Weisenhunt case" in Birmingham, and became acquainted with Vicki Booker McGaha, who was a member of that jury (R. 1459). Thereafter, Morris and Vicki began a sexual affair which has still not ended, and which was the cause of termination of two marriages. Following their meeting in Birmingham during the Weisenhunt trial in August, 1977, Morris had sexual relations with Vicki at Oak Mountain State Park in Shelby County (R. 1461), the Prattville Holiday Inn, the Holiday Inn East, the Governor's House Hotel, and the Howard Johnson Motel (R. 1462). The first trip that he took with her was a four day trip to the "Cajun Country" in Louisiana on a motorcycle in April, 1978 (R. 1464-1465). In August, 1978, Vicki joined Morris in Columbus, Georgia, where she stayed with him at the Holiday Inn (R. 1468).

Maureene first found out about Vicki when she was contacted by Vicki's husband, who subsequently turned over to her letters that Morris had written to Vicki and tape recordings of conversations that Morris had had with Vicki (R. 361-362). Mr. McGaha divorced Vicki McGaha in May, 1978 (R. 1469). Around this time, at Morris' request, Maureene met with Morris and Vicki at the Sheraton Mountain Brook Inn to discuss the situation (R. 358). During this conversation Morris told Maureene that he was in love with Vicki, that they wanted to be together, and they didn't care if they had anything but a shack with a dirt floor if they could be together (R. 358). Morris told Maureene that he and Vicki were going to live together and they they hoped she would understand. Maureene learned that the affair had been going on since August of 1977 (R. 280-281, et seq). In later conversations Morris cried and told Maureene that he loved them both, and that "Vicki has such beautiful blue eyes and she can see right through you" (R. 360). Following this meeting, Maureene separated from Morris for the first time and filed the first suit for divorce (R. 361).

C. The Reconciliation

After Maureene and Morris had been separated for about four to six weeks, Morris telephoned her and said that he had made a mistake, that he did love Maureene and wanted her back, and he swore never to see Vicki McGaha again (R. 282). To assure her of this Morris arranged another meeting among the three of them at Joe Levin's lake cabin on July 3, 1978 (R. 367, et seq). This meeting was bizarre. In a three-way conversation Morris could first ask Vicki to state how much she loved him, and he would then turn to Maureene to ask her to state how much she loved him (R. 367). It was as if he were staging a contest to see who loved him the most, or who would do the most for him (R. 367). After a

lengthy conversation, during which Morris had taken his socks off, he announced, "Alright, I'll tell you girls my answer when I get my socks on." After taking an inordinate amount of time putting his socks on, he got up, walked around behind them, put an arm on each girl, and ceremoniously stated, "I tell you this day, July 3, 1978, I, Morris Dees, can't live without either one of you." (R. 368). At that point, Maureene said, "I'll tell you what, Vicki, you can have him." (R. 368).

In response to these statements by Morris, Maureene made it clear once again that Morris could not have them both, that he could not remain married to her and live with Vicki, and that he must make up his mind one way or another. At the conclusion of the meeting, Morris promised never to see Vicki again (R. 282). He told Vicki that he and Maureene had reconciled, and that he could not see her anymore (R. 1357). Morris himself testified that in Maureene's presence he told Vicki that it was all over and that he wouldn't see her anymore (R. 1357; 1522-1523).

D. Morris Can't Give Up His Mistress

Morris' promises did not last long. Although Maureene didn't know it at the time, less than two weeks later he resumed his relationship with Vicki (R. 1523). By his own admission, he found himself unable to terminate the relationship with Vicki, in response to questions by his own attorney:

"(At R. 366)

Q. (By Mr. Byrne) Now, give the Court some judgement about how many times you attempted during 1978 and 1979 to break off your relationship with Vicki Booker?

A. Oh, gosh, about every month I'd say. It was a continual off and on relationship.

* * *

(At. R. 1367)

A. (By Morris, describing Defendant's Exhibit 103, a letter from Morris to Vicki) Well, its an undated letter. I think it was in January of 1979, and it basically described the continuing problem of we ought to end this relationship. I'm telling her that I don't really think I've got the strength to and I wish she would do it herself."

* * *

(At R. 1434)

Q. (By Mr. Smith) Let me ask you if you said this or this in substance in response to a question by Mr. Byrne. 'I attempted every month to break off my relationship with Vicki'.

A. I think that would be a pretty accurate statement before

Maureene left home."

Morris had been supporting Vicki since her divorce from her husband in May, 1979, and he continued to do so as they continued their affair even after promising Maureene in July, 1978 that the affair was over for good. Morris admits to having provided the following support to Vicki during the eleven-month period from May, 1978 through March, 1979 (R. 1504, et seq):

May 30, 1978	\$1,500
June 4, 1978	500
June 22, 1978	1,500
<u>July 4, 1978</u>	<u>1,000</u> (after "reconciling" with
July 30, 1978	1,500 Maureene July 3rd)
Aug. 26, 1978	1,500
Aug. 27, 1978	1,625
Sept. 20, 1978	1,500
Nov. 27, 1978	5,000
Jan. 25, 1979	5,000
March, 1979	<u>2,000</u>
Total	\$22,625

Morris stopped sending Vicki money only when the present divorce suit was filed (R. 1506). In addition, Morris loaned Vicki \$28,000, at 8% interest, to enable her to purchase her former husband's interest in their home at the time of her divorce (R. 1351).

E. Maureene Is Compelled To Seek Divorce

In November, 1978, Morris finally admitted to Maureene that, notwithstanding the promises that he had made in July to abandon Vicki and reconcile with Maureene, he had continued to see Vicki in Birmingham, that she was then five months pregnant with his child, and that he would be going to Birmingham in a few days to be with her while she had an abortion which Morris was paying for (R. 364). Over the next sixty days, Maureene concluded that she simply could not accept the situation any longer. It was apparent to Maureene that Morris was not going to go stop seeing Vicki, and Maureene was not willing to live in a situation where she knew for a fact that her husband really had, in effect, two wives (R. 412). Morris was supporting Vicki and had been doing so for almost a year. He treated Vicki like a wife, supplying all of her financial and emotional needs. He was there when she needed him. He was spending almost half a week going back and forth to Birmingham two or three times a week, attempting to divide his time between them (R. 412). In January or February, 1979, Maureene told Morris that she could simply no longer accept the situation, and that she was going to leave (R. 385). Following this conversation, Morris started trying to induce Maureene to execute certain agreements (which will be discussed in detail hereafter) that would permit each of them to have sexual relations with other parties (R. 385). Maureene refused to sign any of these agreements (R. 387). While trying to induce her to sign these agreements, Morris continued to tell Maureene that he loved her and that he would stop seeing Vicki (R. 390). However, he did not stop seeing her. During this period he took Vicki and her children to the ballet in Birmingham, and spent the night at Vicki's house (R. 390). He met Vicki in New Orleans for the Sugar Bowl in January, 1979, where they spent two days together (R. 1473).

In March, 1979, Maureen left Morris for the last time, and she has lived separate and apart from him ever since (R. 370¹⁰). Morris and Vicki moved into the family home in Mathews (R. 370). Maureen commenced the present suit on March 8, 1979.

Following the final separation, Morris openly continued his relationship with Vicki. Taking his daughter, Ellie, with him, Morris met Vicki in Los Angeles on March 10, 1979 (R. 1473). Morris and Vicki stayed in a hotel while Ellie stayed with a friend (R. 1475). He introduced Vicki to Ellie as "Pat" (R. 1475), and after leaving Los Angeles the three of them flew to Las Vegas together (R. 1475). They had only one room for the three of them, but Morris claimed that Vicki sat up all night in the hotel lobby (R. 1476). Morris took Vicki to the White House signing of the Israel-Egypt Peace Treaty on March 26, 1979 (R. 1518). On June 4, 1979, Morris took his daughter Ellie, and Vicki and her family, to the Grand Hotel (R. 1479).

F. Morris Sets A Trap

In February, 1979, Morris Dees realized that he was in a precarious legal position. He had been conducting an affair with Vicki McGaha for almost two years; she had become pregnant by him and had received an abortion which he had paid for; he was supporting her and spending most of his time with her and planned to continue to do so; and Maureen, who was fully aware of all of these facts, had stated that she could not tolerate the situation any more and was leaving him to institute divorce proceedings. To protect himself in the impending litigation, Morris had to find a way to neutralize Maureen. In February, 1979, after Maureen informed Morris that she was leaving him, Morris wrote out an agreement, which he showed to her on a Sunday afternoon, and asked her to stay and live by this agreement (R. 385). This agreement, identified and introduced as Plaintiff's Exhibit 30, purported to permit the parties to lead separate lives but stay married, and provided that they would not hold anything against each other that had happened either before or after the date of the agreement (R. 386). The first such purported agreement (Pl. Ex. 30) provided in part as follows:

"Whereas they (Morris and Maureen) feel that they can better work toward a more complete and satisfying relationship in their marriage if they have an open marriage, i.e., where each party, while still living together as man and wife, be free to have relationships with the opposite sex, which said relationships may consist of sexual intercourse..."

During the time that he was discussing this agreement and urging her to sign it, Morris continued to tell Maureen that he loved her and that he had stopped seeing Vicki (R. 390), which was another lie. Plaintiff's Exhibit 31 is another agreement which Morris drafted because he did not like the language of the first agreement, and contains this provision:

(f) The parties will encourage a high degree of freedom in regard to relationships with members of the opposite sex, even to the point of extra-marital sexual relationships if the need arise; and will not use these relationships against each other, in the future, in any court of law for any purpose. This is important because it is the belief of the parties that during a recent traumatic time in their marriage when divorce was contemplated both parties were fearful of the other party using past extra-marital relationships between the parties to gain some advance in the divorce proceedings.

(g) The parties agree that if their relationship ever has to be dissolved by a divorce, that the proceeding will be no fault, i.e., the parties will enter the proceedings with only the issue of financial responsibilities and child custody at stake without these issue being affected by the past conduct of the parties. Morris agrees that Maureene should have custody of their daughter, Ellie Maureene Dees, should the parties ever separate. This agreement, Morris believes is important to eliminate any distrust Maureene might harbor about Morris' desire to remove Ellie from her in the event of a divorce.

Maureene had no part in the preparation of either of these agreements (R. 392-393). They were prepared solely by Morris and presented to her, and she refused to sign either of them (R. 387). On one occasion Morris accompanied Maureene to Maury Smith's office and Maury told her in the presence of both that he would not advise her to sign it (R. 398). Even following that time, Morris continued to urge her to sign the agreement (R. 398), while at the same time telling her that he wanted her to have a sexual relationship with someone else, and encouraging her to have sexual intercourse with other men (R. 396). In his deposition (Pl. Ex. 102), Morris admits that at this time he was encouraging Maureene to have relationships with other men, or, as he put it, he "agreed" that she might. Upon deposition, he testified as follows:

(At Morris' Depo. Page 246, questions by Wife's Counsel)

Q. But you had discussed them (the agreements), Mr. Dees?

A. We had discussed it -- let me answer the question.

Q. Well, you are not answering the question.

A. I am going to answer it. I told her that as far as I was concerned that she could have sex with whoever she wanted to."

* * *

(At Page 252)

A. I didn't encourage her, I agreed that she could.

Q. You agreed that she could?

A. Exactly.

Q. When did you agree that she could have sexual intercourse with other people?

A. Prior to even drawing up these agreements, I agreed to it orally. I have already said that over.

Q. When did you first orally agree that your wife, your lawful wife, could have sexual intercourse with other people?

A. About a day before this agreement was drawn up --

Q. This was some time in February?

A. Yes

Q. And it was one day preceding the first agreement?

A. Approximately."

* * *

(At page 253)

Q. You knew she (Maureene) knew about you and Vicki?

A. About the abortion, and she said, I am going to use that and I said, Maureene, look if you have somebody you want to have sex with, go ahead and have sex with them. We said that that night at the bar.

Q. That was clear and unmistakable?

A. Clear and unmistakable.

Q. You encouraged her to and if there was anybody --

A. If you call that encouragement, --"

G. Morris' Trap Works: The Hotel Room Agreement

On March 4, 1979, Maureene walked naively into the trap which Morris had set. On that date, she flew to Washington, D.C., where she met Brian O'Daugherty (R. 576). Maureene knew Mr. O'Daugherty in connection with her work on the National Endowment, and he was the Director of the Media Arts Program (R. 341). Morris had told her she could see anyone she wanted, as long as she was discreet (R. 578), and her flight to Washington was booked under the name of Betty Foster (R. 576). Maureene and O'Daugherty had dinner together on the night of March 4th, and returned to her hotel room (R. 578). When they were in bed together, Morris and a Montgomery private detective, both of whom had been hiding in the bathroom, jumped out and started taking photographs, Morris said word in substance as follows:

"Alright sister, you wanted a divorce. Now I want one, because I've got you where I want you." (R. 586)

Morris was acting crazy, and Maureene thought he was going to kill everybody in sight. He told her that he had five detectives with him (R. 592). He hit her and gave her a busted jaw. (R. 592). He then started writing something on paper which he then gave her to sign (R. 422-423). This document, entered unto evidence as Plaintiff's Exhibit 43, was a separation agreement (R. 423). The agreement provided that Morris was to have custody of Ellie, the parties' nine-year old daughter. Maureene was to receive "25,000 alimony-in-gross upon the "execution" (sic) of a divorce, and that in addition she was to receive \$1,500 per month as alimony for a period of three years from the divorce. Under this agreement, Maureene relinquished all claims to any real estate owned by Morris, and agreed to return to him the diamond ring which he had given to her. The agreement recites that, although it is execute on March 5th in Washington, D.C., it will be notarized by an Alabama notary (the detective) and shall be

governed by the laws of Alabama. Maureene signed the agreement because she was afraid not to (R. 423).

After returning to Montgomery, Morris asked attorney Paul Lowery to handle the divorce based upon the hotel room agreement (R. 412). Although he knew that Maureene was already represented by Maury Smith, Morris instructed her to go to Paul Lowery's office for this purpose (R. 427). She declined to do this, and later Paul Lowery came to the house where Maureene was staying, with papers for her to sign, but she refused to do so (R. 428-429).

Apparently in a last effort to induce a settlement with Maureene, Morris later told her that he was sorry he had the photograph taken in the hotel room, that he should not have taken them, and that he wanted her to have them (R. 426). He gave them to her with instructions to destroy them, telling her that these were the only copies (R. 426). He also gave the original signed copy of the hotel room agreement. She tore up both envelopes without looking inside (R. 426). Morris' statement that these were the only copies of the photographs was another lie, since he introduced the photographs into evidence at the trial.

H. Morris' Sexual Appetite

Maureene was literally forced to file suit for divorce in March, 1979, because of Morris' obstinate refusal to give up the mistress who he was then supporting and who had become pregnant by him. However, Maureene did not give up her marriage easily. Prior to Morris' permanent involvement with the McGaña woman, Maureene had endured a long series of degrading incidents which evidenced Morris' voracious and eclectic sexual appetite. Since early in their marriage, Morris repeatedly bragged to Maureene that with his looks and his money he could have any woman he wanted, and he constantly bragged about women propositioning him (R. 350, et seq). [Some insight into the size of Morris' ego is provided by his letter of January 22, 1979, to "Ham" Jordan (a copy of which he sent to Vicki), in which he makes application to be appointed Attorney General of the United States to replace Griffin Bell, giving as one of his principal qualifications the fact that "... all my life, I have been a winner." (Pl. Ex. 91). Later in the marriage he repeatedly told her of women that he had had sexual intercourse with during the marriage (R. 354). He said further that he enjoyed trying to turn on gay people and he expressed a desire to have an experience with a gay (R. 354). Early in the marriage, Morris gave her a book on "Open Marriage" and started encouraging her to have sexual intercourse with other men (R. 419-420). During the year or so after they were married, Maureene became aware that her husband was having an affair with a woman named Becky Logan (R. 458). During the same period, she began receiving anonymous telephone calls concerning her husband and a black woman in town (R. 459).

A. Dianne Hicks. In his deposition, Morris admits that in the spring of 1973 (Morris depo. p. 27), or during the summer of 1973 (Morris depo. p. 25), he had an affair with Dianne Hicks, a Mobile lawyer who was working for the Southern Poverty Law Center (Morris depo. p. 25). He had sex with her during a canoe trip down the Tallapoosa River (Morris depo. p. 25), and also in Brewton where they were working together on a trial (Morris depo. p. 26-27).

B. Cathy Bennett. In the fall of 1974, Morris brought to the family home in Mathews a girl named Cathy Bennett who was a psychologist who had worked with Morris on several cases (R. 284). She stayed in their home in Mathews for about a week, during which time they had Bobby Kennedy there as a guest (R. 285). Maureene was suspicious of her husband's relationship with this girl (R. 286), and later Morris admitted having an affair with her (R. 1325). Morris told Mrs.

Dees that his affair with her was over in December, 1974, but she later found that he and Cathy continued to conduct an affair in Atlanta where Morris lived for a period during the Jimmy Carter campaign (R. 287, 291).

C. Judith Rogers. In the fall of 1977 (R. 1344), Morris and Maureene held a Little Theatre party at their home, attended by Dr. Rogers, a Montgomery physician, and his wife Judith, who is a criminal psychologist (R. 292, 1344, 1345). During the party Morris admits that he took Judith into a back room of his house, while the party was going on, and had intercourse with her (R. 1344, 293).

D. Deborah Levy. In the spring of 1976, Morris invited to the house Deborah Levy who worked for the American Civil Liberties Union in New York, and the man with whom she lived in New York, Michael Gaas (R. 299, 303). The Southern Poverty Law Center was considering starting a magazine in opposition to the death penalty, and Morris was interviewing Deborah Levy for the job of running the magazine (R. 301). She was not hired for the job, but she and her boyfriend did visit the Dees home in Mathews for several days on two different occasions (R. 301). In August, 1976, Morris and Maureene took them on a canoe trip down the river (R. 202-203). After supper, they had all gone to bed in sleeping bags, when Maureene woke up and found Morris and Deborah naked, having sex on the sandbar (R. 306). Morris turned to Maureene and insisted that she have sex with the other man. (R. 306). Later Maureene went back to sleep and woke up shortly before dawn, and found Morris and Deborah having intercourse again right next to her (R. 307). While having intercourse with Deborah, Morris leaned over and kissed Maureene (R. 308). The next morning Maureene objected strongly to the night's events and stated emphatically that she did not want anything of that nature to happen again (R. 309). The following month, in September, 1976, she and Morris went to New York for a tennis tournament and to take one of the children to a special school in Boston (R. 310). Over Maureene's objections, Morris insisted upon visiting Deborah Levy and Michael Gaas (R. 310). While the group was having dinner together in a restaurant Maureene, returning from the restroom, overheard Morris and Deborah making plans to be together the following afternoon (R. 315). Later when confronted with this Morris admitted having such plans (R. 320). Later in a conversation among the four of them, Morris stopped the conversation in the middle and said to Michael Gaas "I've just got to tell you this because I feel bad about it. I want to tell you that Deborah and I were planning to go off this afternoon and make love and I just want to tell you that." (R. 322). This embarrassed Maureene and made her furious (R. 324). Gaas responded that if that's what Morris as here to do he should just get up and go do it, following which Morris and Deborah got up and went into the bedroom where they remained for about forty-five minutes (R. 325, et seq). While they were gone Maureene had sexual intercourse with Michael (R. 326). Afterward Morris left the apartment, returned in about thirty minutes and hit Michael in the face (R. 327).

E. Pamela Horowitz. In the spring of 1977 Morris planned a trip to Kentucky and invited Maureene to go with him,

knowing that she could not go because she was in rehearsal for a play (R. 330). Over Maureene's objection, he took with him, on his motorcycle Pamela Horowitz, a lawyer working for the Southern Poverty Law Center at that time (R. 331). He drove the motorcycle and she rode behind him from Montgomery to Kentucky, and they were gone for four or five days, during which they shared the same hotel accommodations (R. 331-332).

F. Charlie Springman (homosexual). On August 11, 1978, Maureene and Morris' tenth anniversary, they were having dinner at the Watergate Hotel in Washington, D.C., and afterward had drinks in the bar (R. 333, et seq). In the bar, they saw Charlie Springman, who Maureene knew as a Regional Coordinator for the National Endowment of the Arts (R. 335). She had told Morris that Springman was gay, but Morris had never met him. When they saw him in the bar, Morris suggested inviting him over for a drink (R. 335). After a while, to Maureene's surprise, Morris suggested that Charlie come up to the room with them (R. 336). In the room, they drank wine and talked, and Morris unbuttoned his shirt to the waist (R. 336). Charlie tried to leave several times but Morris wouldn't let him (R. 337). Finally Morris proposed that Charlie spend the night with them (R. 337). Mrs. Dees protested, and put on her robe and nightgown to go to bed (R. 337-338). Soon Charlie and Morris were in the bed naked, with Maureene in the middle with her gown on (R. 338-339). Springman and Morris hugged and kissed, and Morris tried to get Charlie to have relations with Maureene, but Springman was physically unable to because he was not interested (R. 340). In fact, no one made any effort to have sex with Mrs. Dees during this incident (R. 341). Springman kissed Morris' penis, and in fact, Morris complained that he bit him and that it hurt (R. 340). Morris kissed Springman on Springman's penis (R. 341). After about thirty minutes they all went to sleep (R. 342). When Maureene woke up the next morning, Morris was gone (R. 342), but Springman was still asleep in the bed. After five or ten minutes Morris returned and found Maureene crying. He apologized for the incident and said that he would not let anything like that happen again (R. 343). Morris denies parts of this episode, he admits its essential features: Morris admits that he invited Springman to the room (R. 1571); that Maureene put on a nightgown and robe and got into bed (R. 1537); that Morris got into bed with nothing but his underclothes on (R. 1575); and that Springman got in the bed naked (R. 1590).

G. Morris' Step-Daughter. Holly Buck, Maureene's daughter by a previous marriage, is eighteen years old (R. 728). She was seven years old when her mother and Morris married, and she has lived with them in the house at Mathews from then until the separation (R. 728). Holly testified that, in the summer of 1977, Morris attempted to molest her in the following incident (R. 729): One night Maureene and Morris were sitting drinking wine and discussing a case Morris was trying. She was with them. Around eleven or twelve o'clock Maureene went to bed and Holly stayed up with Morris discussing the case. Morris kept offering Holly wine, some of which she accepted. At Morris' suggestion, they went outside to the pool, and he suggested that they go for a swim, but Holly was tired and declined (R. 731). She went to her room and then went into the bathroom. Looking out the window, she saw Morris in the bushes beside the bathroom window looking in (R. 731). She said "Morris, is that you", but he said nothing and ran away (R. 732). Two months later, she was asleep one night and Morris entered her room from Ellie's room, through the bathroom. he was in his underwear and he sat on the bed where Holly was lying on her stomach facing away from the door. He touched her on the back and woker her up. He told her that he had brought her a present, and he presented her with a vibrator. He plugged it in and said he had

brought it to her. He proceeded to rub it on her back and said, "Let me show you how to use it" (R. 733). She said that's not necessary, but he started to place it between her legs when she raised her voice and said no loudly. He then took the vibrator and left (R. 734). All he had on was a pair of bikini underwear shorts (R. 734). About two hours later, she had fallen back asleep and he came back in (R. 735). He brought the vibrator with him, plugged it in and said again, "Let me show you how to use it." He tried to show her again by putting it between her legs, but she raised her voice again and he stopped. He took it and left (R. 635). She did not tell her mother about this incident until the separation when they moved out of the Mathews house in the spring of 1979 (R. 736).

H. Morris' Future Daughter-in-law. Karen Sherman Dees is Morris' daughter-in-law, who is married to Morris' son Scooter (Morris, III) (R. 345). Before Karen and Scooter were married, when they were eighteen or nineteen, which was three or four years ago, an incident occurred on Mother's Day at the family home in Mathews (R. 345). The Dees had Karen and Scooter to dinner at the house, and they cooked out (R. 346). While Scooter and Maureene were cleaning up and washing dishes, Karen and Morris went out to go swimming (R. 345). Five or ten minutes later, Maureene and Scooter started down the path toward the pool, with Maureene in front. As she approached the gate, she could see Morris and Karen standing with their arms around each other with no clothes on, and Morris had an erection. Maureene immediately turned and told Scooter that she did not want to go swimming and the two of them headed back to the house without Scooter having seen anything (R. 347). Later, Karen and Morris returned from the pool, fully dressed, and the group stayed in the den for a little while (R. 349). Morris got up and went to bed, and Maureene joined him a few minutes later. While lying in the bed, Maureene looked up and saw that Karen had entered the room (R. 349). She didn't have any clothes on but had a towel or sheet wrapped around her (R. 350). She came over and got in the bed on Morris' side (R. 350). Nothing happened, but she remained there for about ten minutes, and eventually got up and left (R. 350-351). Morris told Maureene that he just couldn't understand why she came in the room (R. 351).

In 1974 and 1976, after Maureene had become aware of some of Morris' infidelities, she had two brief sexual liaisons; one with Charles Morgan, with whom she was co-starring in a Little Theatre production, and the other with Steve Denton, who was visiting in Montgomery for a tennis tournament.

IV. ARGUMENT

A. The Trial Judge Plainly And Palpably Abused His Discretion

If the trial judge's decree is allowed to stand, Morris will have succeeded in discarding his wife of eleven years at an unheard of bargain cost. If she receives it, Maureene's "alimony-in-gross" will cost Morris exactly three percent of his total wealth, or about one-half of his income for one year, and it will be fully tax deductible. The judge has made it entirely possible that he will not even have to pay that. Although the trial judge denominated his \$120,000 award as "alimony-in-gross" he then granted Morris the election (which, unsurprisingly, has been exercised) to pay this amount in monthly installments of \$2,000 each for five years, terminable in the event Maureene remarries. (Although she forfeits the award if she remarries, Maureene's estate receives the balance due if she dies). Both the amount and the terms of this arbitrary award constitute a palpable and gross abuse of discretion by the trial judge.

In the first place, if the trial court concluded that alimony-in-gross was

appropriate under the circumstances, it was arbitrary and unfair for him to then convert the award to periodic alimony by providing that it would be lost in the event of the wife's remarriage. Periodic alimony is normally unlimited as to amount but it is subject to the disadvantage of being terminable upon death or remarriage. Alimony-in-gross on the other hand is expressly limited in amount, but has the advantage of not being subject to termination because of some future event such as death or remarriage. The trial court in the present case has denied Maureene the advantages of either, and has given her the disadvantages of both, (and the award has been rendered taxable to Maureene and deductible to Morris). There is absolutely no logic in providing that her "alimony-in-gross" shall be terminated upon remarriage but shall be paid in full upon her death. In adopting this unusual provision, we assume the Court was thinking of the children's interests, but this is not the purpose of alimony. She needs the money while she is living.

Even more arbitrary and unreasonable than the terms is the unconscionably small amount of the alimony award. Assuming she dies, or lives unmarried for five years, Maureene (or her estate) will receive \$120,000, which is exactly three percent of Morris' total estate of \$3,867,029 (R. 1256, Def. Ex. 86, 87). It is about one-half of Morris' income for one year (Pl. Ex. 76-79). This token allowance under the circumstances of this case flies in the face of all the factors upon which Alabama courts have traditionally based awards of alimony. Morris will contend that the normal alimony standards do not apply to his estate because of the terms of the new alimony statute, i.e., Act Number 79-486, Reg. Sess. 1979, exempting from consideration the Husband's property acquired prior to the marriage. However, as we will show in a subsequent section of this brief; the exceptions to that provision render it inapplicable to Morris' estate, and the present alimony award must be judged in the light of the traditional standards which have been followed by the Alabama courts for many years. The application of each of these traditional standards to the present case indicates that if Maureene is entitled to any alimony at all (and the trial judge found that she is), she is entitled to considerably more than the pittance which the trial judge saw fit to grant.

These factors are numurated in the case of Smith v. Smith, So. 16 1235 (Ala. 1979), and they can be enumerated as follows:

1. The economic circumstances of both husband and wife.
2. The parties' future prospects.
3. The parties' standard of living during their marriage and their potential for maintaining or of exceeding that standard after their divorce.
4. The parties' ages, sex, health and the length of their marriage.
5. The source of their common property.
6. The conduct of the parties with reference to the case of divorce.

In Reynolds v. Reynolds, 376 So.2d 732 (Ala. 1979), The Court of Appeals reversed the trial court decision in setting the wife's alimony with reservations.

After enumerating the traditional factors, the Court of Appeals in Reynolds reached these conclusions:

"Notwithstanding the short length of the marriage, i.e. five

years, the amount awarded to the wife from the estate of the husband amounted to less than two percent of his net estate. The wife was awarded \$2,500 as alimony gross, \$10,000 from the sale of a waterfront lot, and an automobile, part of the cost of which was paid for by the trade-in of an automobile she owned prior to the marriage.

Also, it should be noted that the house the parties built and furnished during their marriage, and which was valued between \$120,000 and \$140,000 was given to the husband. The wife received nothing from this marital asset.

After a careful consideration of all the evidence, including the shortness of the marriage, it is the opinion of this court that the award to the wife as alimony in gross and property division of less than two percent of the estate of the husband is totally inadequate and amounts to an abuse of the trial court's discretion."

The case of Smith v. Smith, 369 So.2d 1235 (Ala. 1979), in analogous to the present case in important ways and the principles expressed there are important here. First, the court made clear that the ore tenus rule and its attendant presumptions will not prevent appellate courts from reversing the trial court's alimony award where the record discloses that the trial court's discretion was plainly abused, observing as follows:

"... in those instances where the record before the appellate court discloses that the trial court's discretion in a matter was plainly and palpably abused, the ore tenus rule does not prevail. Based on an examination of the circumstances of the parties involved in this case and the various factors relevant thereto, we are persuaded that the trial court abused its discretion in the division of the parties' property. Succinctly stated, we find that the trial court failed to award the wife a sufficient amount of the husband's property."

The Court in Smith observed that the husband was a man of substantial wealth; that his adjusted gross income during recent tax years was never less than \$72,000; that his net worth at the time of the parties' divorce was approximately \$1.7 million dollars; that as a result of the husband's wealth the parties enjoyed a high standard of living throughout their marriage; that the husband's future prospects and potential for maintaining that standard were excellent due to the diversity and value of his financial holdings; and that the wife's future prospects and potential for maintaining her former standard of living were not as bright as those of her ex-husband. The Court reached these conclusions:

"Based on real estate appraisals as well as ^{the} consideration of the husband's actual interest in various property, a certified public accountant testified that the real estate holdings of the husband had a fair market value of almost \$1.7 million dollars. Moreover, the testimony review by this Court demonstrates the husband's net worth between \$826,000 and \$1,800,000. Despite these facts, the wife received as her portion of the property division, property which was roughly valued as \$150,000. Using the figure most favorable to the husband regarding his net worth, the \$150,000 awarded the wife in terms of a property division represented only 18 percent of the husband's total estate."

The Court went on to find that a property division of between 20 and 50 percent of the husband's estate was justified, and it increased the trial court's award by \$250,000.

In Shirley v. Shirley, 350 So.2d 1041 (Ala. 1977), this Court reversed the trial court and greatly increased the wife's alimony award based upon these circumstances:

"It is clear that the distinguished trial judge, in the matter now before this court, relied heavily on the aspect of the wife's conduct. It is equally clear that there is ample evidence that her conduct in large measure caused the marriage to fail. However, the fact remains that the parties were married for 10 years, the wife having married the husband when she was 16 years old; that the wife during this time performed normal household duties; that she was a good mother; that she has no marketable skill; that she has only a high school education; that she has some slight psychiatric or emotional problem.

On the other hand, the husband is a prosperous, industrious young business man. His income is over \$100,000 a year; he has \$171,000 in savings; indebtedness thereon of approximately \$80,000; his health is apparently good; his prospects in life are good."

It is appropriate to apply the facts of the Dees case to the traditionally recognized factors and principles enumerated above:

1. The Conduct Of The Parties
With Reference To The Cause Of Divorce

Even though the courts have held this factor to be a significant one in assessing the adequacy of alimony, and even though well over one-half of the testimony in the trial court concerned the conduct of the parties, the trial judge carefully avoided making any reference to this subject in his otherwise-lengthy findings of fact. Having concluded that he wished to decide the case in favor of Morris Dees, it is entirely understandable why the trial judge omitted any reference to the parties' conduct, because Morris Dees' conduct in this marriage cannot withstand scrutiny in the light of day. Even under the permissive attitudes of the 1980's, the course of conduct by Morris Dees revealed in this record must be described as barbaric. It is not contended that Maureene's conduct is without blemish, but her failings pale into

insignificance beside Morris' catalog of sexual excess and perversion. Morris is clearly estopped from finger-pointing.

The holdings of this Court advise us to examine "the conduct of the parties with reference to the cause of divorce." Smith, supra. Accordingly, we are to put aside all of Morris' conduct prior to 1977, and to omit further discussion of Dianne Hicks, Cathy Bennett, Judith Rogers, Deborah Levy, Pamela Horowitz, the homosexual Charlie Springman, Morris' step-daughter Holly Buck, and Morris' future daughter-in-law Karen Sherman Dees. Instead it is appropriate to consider Morris' absolute refusal (or, if his own testimony is believed, his inability) to give up his permanent affair with Vicki Booker McGaha which started in August, 1977, and had not ended when the trial of this case took place. This woman became Morris Dees' second wife in all but name: She divorced her husband, following which Morris supported her up until the trial of this case, by paying her an average of \$2,000 per month. (Ironically, this is the same amount which the trial judge has awarded Maureene, if she remains single for five years, who was the victim of the arrangement). Morris gave Vicki a low-interest loan to enable her to purchase a home, (a benefit the trial judge refused to provide for Maureene). Morris drove to Birmingham two or three times a week and spent more than half of his time with her. He took her and her family on public excursions, and even took her to the White House on the occasion of the Egypt-Israel Treaty signing. When Morris requested a reconciliation, Maureene readily agreed, only to learn later that he had resumed the affair two weeks after making solemn promises to the contrary.

At this point Maureene had two alternatives: (1) She could accept the arrangement and permit Morris to have both of his women, or (2) she could seek a divorce. For a period of years she had tried to save her marriage by ignoring Morris' sexual escapades. But Vicki McGaha was no passing "escapade". Maureene was now presented with an entirely different situation which no human being with an ounce of self-respect could possibly accept. She was literally forced to seek divorce. We respectfully submit that Maureene had every right to seek a divorce under these circumstances and to expect that she would be permitted to retain a reasonable part of her prior standard of living and financial security. Having been thrust aside by Morris in favor of another woman, it is unconscionable for Maureene, rather than Morris, to suffer the adverse financial consequences.

When advised of Maureene's decision to leave him and seek a divorce, Morris realized that he must improve his legal position, and he cynically set out to ensnare Maureene in a simple but ruthless trap. He first attempted to induce her to sign agreements which would have exonerated his past conduct, while at the same time encouraging her to have whatever relationship she might wish with other men. Morris Dees' entire career attests to his salesmanship ability, and it is not difficult to understand how Maureene was duped. Her marriage was in a shamble, her pride was shattered, she was being publicly humiliated, she was about to be embroiled in litigation, and she was being urged by Morris to seek an outlet with other men. Maureene's dilemma is best described by Morris himself: Plaintiff's Exhibit 95 is a letter which Morris wrote to Vicki in early January, soon after spending several days with Vicki in New Orleans for the Sugar Bowl game (R. 1455.)

"Dearest Vickie

Its 12:00 p.m. and I sit here, unable to sleep, thinking about you. I enjoyed talking to you tonight. Our days together were so wonderful.

Maureene came and I was so at peace. When I'm with you, it makes things easier. She was so happy to spend a day with me--all alone and away from the house. Since you and I met, Maureene and I have done very little together. Sometimes I feel for her because I have relegated her to being alone--to being busy with projects--and from being with me "

In this state of mind Maureene thought she could start rebuilding her own private life. She made the mistake of following Morris' example and advice; she sought physical solace with a man. Whatever judgment one makes of Maureene, it must be conceded that it was not Maureene's conduct that terminated this marriage, it was Morris'. Maureene's error with Brian O'Daugherty was not the cause of this divorce, but one of its side-effects. When Morris and his private-eye jumped out of the hotel bathroom with their cameras, they revealed much more about Morris Dees than about Maureene, and we are shown the depths to which Morris will stoop in order to gain some small advantage for himself. The hotel room "agreement, by which Maureene was coerced into agreeing to give up her child, is the most vivid possible evidence of the character of the person Maureene has endured for eleven years. Morris' lawyers had the good judgment not to try to enforce this document.

If "the conduct of the parties with reference to the cause of divorce" is to be anything more than a meaningless phrase, the lower court's alimony award must be reversed. It is a clearly punitive decree, which punished the wrong person.

(a) Even If the Parties Were Equally At Fault,
The Present Decree is Indefensible

It is our strongly-held view that Morris' misconduct overshadows and far outweighs any mistakes that Maureene has made. However, in the event this Court should adopt a different view and should conclude that the parties are equally at fault (certainly no one could conclude that Morris is less culpable than Maureene), then we offer these comments: if both parties are equally guilty, the misconduct of each cancels that of the other, and any justification for punishing Maureene with the present unfair decree disappears. If we simply say "a plague on both sides", and let the present decree stand, Morris has succeeded in discarding a wife cheaply. The parties' mutual misconduct, if that be the case, should estop each from profiting from the wrong-doing of the other, so that the case can be governed by the other traditional factors for determining alimony. If the fault issue is thus eliminated, the trial will show, under the evidence in this case, this court's traditional alimony standards entitle Maureene to retain some portion of the standard of living and financial security which was hers before she was put aside. The present decree affords her no standard of living beyond the subsistence level, and provides no financial stability or security whatsoever.

2. The Source Of Their Property

As in many marriages, the financial resources of this family were derived entirely from Morris' business activities. Admittedly, Maureene brought no separate financial estate to the marriage. However, she brought other, equally important assets.

Morris married his first wife, Beverly, prior to graduating from high school in 1955 (R. 1145). This wife of his empecunious youth was discarded in 1968, after Morris had become a wealthy man, and shortly thereafter, on August 11, 1968, he married Maureene. Morris sought and found a second wife whom he viewed as being better-suited to his improved status in the world. He wanted a wife who could provide glamour and sophistication, and he viewed Maureene as having these attributes. She as a striking woman in appearance, she was young, but mature, and her education was in the dramatic arts (R. 250). She precisely fit Morris' needs as he reached for another rung in his climb to fame and fortune. And it cannot be disputed that Maureene fulfilled to perfection her intended role (R. 699, et seq). It was after his marriage to Maureene that Morris consummated his negotiations with the Los Angeles Times Mirror for the sale of his company. Although he now attempts to minimize Maureene's participation in this transaction, she carried out her role perfectly. It is not contended that she contributed business judgement, but in the important social functions with high-ranking executives and their wives from Los Angeles and New York, she was able to provide a social grace which was very important to Morris at that time, whether he is willing to admit it now or not (R. 272, et seq). Following the consummation of his transaction with the Times Mirror, Morris' status as a multimillionaire was confirmed (R. 276), and thereafter Maureene was an important factor in his enjoyment of his wealth. It was under Maureene's supervision that the modest ranch-style house which Morris and his first wife had built in Mathews in 1964 was transformed into a millionaire's estate. Two renovations costing almost \$200,000 were carried out (R. 255, et seq). Under Maureene's supervision, antiques, furnishings, and accessories now valued at over \$150,000 (Pl. Ex. 75) were acquired (R. 255). Maureene capably performed the duties that the lady of such a house should carry out. Maureene's competence and suitability as a mother has been conceded in these proceedings (R. 7,8). As Morris' activities shifted into the political area after the sale of Fuller & Dees, Maureene entertained a wide variety of business, legal and political associates of Morris' (R. 269). This entertainment was not catered, but was conducted by Maureene herself, who supervised servants and prepared food herself (R. 269). Houseguests thus entertained included the President's sister, Ruth Carter Stapleton; Bobby Kennedy; Joan Little; reporters for the New York Times and other major newspapers; legal associates; and other prominent names of the day (R. 269). Morris was well pleased with the manner in which she carried on these social functions, and he complimented her frequently (R. 270). Maureene worked with Morris to plan parties and family activities, picnics, and out-of-town guests (R. 705). If Morris couldn't attend a meeting and needed a representative, she would stand in for him (R. 750). The house was always decorated, and she could effectively entertain on short notice (R. 707). Maureene's principal activity outside the home was the Montgomery Little Theatre. She was very active in this organization and performed several starring roles with Morris' encouragement and approval (R. 430). Indeed, he seemed quite proud of her accomplishments (R. 430). Morris' pride in his wife's abilities extended to the point that, through his political contacts, she was appointed to the National Council of the Endowments for the Arts (R. 430, et seq). Her qualifications made her eligible

for this board, and she was appointed by President Carter and still serves on that board (R. 431).

In summary, although Maureene brought no financial resources to this marriage, she made other equally important contributions to the family and to Morris' success. She provided glamour and sophistication at a stage in Morris' life when that was what he wanted and needed. Now that Morris' needs and objectives have apparently shifted, we respectfully urge that he should not be permitted to toss her aside with nothing. Her contributions to the marriage should be recognized and she should be awarded a commensurate portion of his estate.

3. The Parties' Standard of Living During The Marriage And Their Potential For Maintaining Or Exceeding That Standard After Their Divorce

If this factor is to actually be accorded influence over the terms of the Wife's alimony, the lower court's award cannot stand. Throughout their marriage Morris and Maureene Dees enjoyed a standard of living which some heads of state would envy. They lived on a palatial estate (Def. Ex. 90-91) consisting of a richly furnished home (Pl. E. 10-28; 57-68) surrounded by 210 acres (Pl. Ex. 1). They had servants, tennis courts, a swimming pool, and several Mercedes automobiles (Pl. Ex. 46-56). Their Children attended the best schools. They traveled extensively in the United States and abroad (R. 279). They socialized with leading political figures, and entertained them in the Dees home in Mathews (R. 269). They attended social functions at the White House. During a typical twelve-month period, i.e., March, 1978 through March, 1979, the actual checks written for family expenses totaled \$83,966.50, or almost \$7,000 per month (Pl. Ex. 103; Def. Ex. 94), which amount includes no house or car payment. The family literally spent whatever it wanted to, whenever it wanted to. Morris told his Wife that they were in the top two percent in the nation in wealth, and that they didn't have to worry about anything (R. 685)

After the divorce, Morris of course remains a wealthy man, and will continue to life in any style he wishes. Maureene and her child however must shift into an entirely different world. The trial judge's alimony award does not even provide her with the ability to acquire a home. The two thousand dollars per month alimony, from which she must pay taxes of approximately \$400 per month, terminates in five years. If the inflation rate over the next five years approaches that of the last five, the entire \$120,000 award represents actual purchasing power of approximately one-half, or only \$60,000. The child support, of course, terminates when Ellie reaches her majority, in nine years. While she is receiving both alimony and child support, it is possible that Maureene can pay her taxes, rent a modest apartment, and meet the other necessary living expenses of the family, if they live in an extremely frugal and austere manner. Such a situation is entirely unnecessary. Moreover, Maureene will not be able to save or invest any of her alimony income for the future, and when it is cut off she will be left penniless. If she had been awarded some amount of lump-sum alimony, she would at least have had the option of investing it and attempting to live on the income and save the principal, but the terms of the lower court's award do not even extend this small benefit. Far from maintaining her standard of living during the marriage, Maureene and her family will barely survive. If Morris had only a modest estate, such a situation would be understandably unavoidable. But

in view of Morris' wealth and the circumstances of the divorce, such a result is simply inexcusable.

4. The Financial Circumstances Of the Parties

The Wife's financial circumstances are easy to summarize: She has nothing: no source of income, no property, no separate estate of any kind (R. 431). The husband is an extremely wealthy man, and there is no dispute about how much he is worth. By his own calculations, he has a net worth of \$3,867,029¹ (Def. Ex. 86 and 87, R. 1252, et seq).

Morris' investment portfolio and other earnings produce the following annual income:

1974	\$203,063.00	(Pl. Ex. 76).
1975	\$154,964.50	(Pl. Ex. 77).
1976	\$204,201.50	(Pl. Ex. 78).
1978	\$232,488.50	(Pl. Ex. 79).

Most of the foregoing income, i.e., approximately \$163,000 (Def. Ex. 128), is derive from municipal and other bonds upon which Morris pays no income tax whatsoever.

Thus, not only does the entire award of "alimony-in-gross" constitute a mere three percent of Morris' net worth, the amount which he is required to pay each year, i.e., \$24,000 per year, constitutes only ten percent of his annual income. The whole award is about one-half of Morris' income for one year. The disparity between what Morris has and the pittance awarded to his wife of eleven years is brutally inequitable. The award could be increased five-fold and Morris would hardly notice the effect. There is no justification for the trial judge's arbitrarily low award.

¹Consistent with his decision favoring Morris, in his findings of fact the trial judge looked at the bottom line of Morris' 1979 financial statement (Def. Ex. 86-87) and made a finding that his 1979 net worth was \$2,937,252 (R. 157). Even Morris pointed out in his testimony that this figure included his real estate as cost, and that in order to get his true net worth, it would be necessary to add the increase in value of the land and improvements (R. 1254, et seq). Morris stipulated and agreed to accept Ed Auerbach, Jr.'s, appraisal of the current fair market value of the property (R. 231; 1256; Pl. Ex. 87). This is Morris' figure and is not a matter of dispute (R. 1256). Because of the judge's error in this respect, the judge has overstated by about \$1,000,000 (in paragraph 8 of his findings, R. 157) the amount of decrease in Morris' net worth between the time of the marriage and the time of the divorce. The actual decrease is shown by Morris' own calculations at page 2, column 3 of Def. Ex. 87. The point is irrelevant however, because this decrease (which still leaves Morris an extremely rich man), was not the result of anything Maureen did or failed to do. It was principally the result of a decline in the price of Times Mirror stock due to unfavorable stock market conditions (R. 1259).

5. The Parties' Future Prospects

Maureene has not been gainfully employed during the marriage (R. 430). The highest salary which the record discloses she has ever made was \$500 per month which she received from Fuller & Dees during the brief period when she was employed there prior to her marriage to Morris (R. 252, 430). Her college degree is Bachelor of Fine Arts in Dramatics, which hardly qualifies her to earn substantial income (R. 250). During the marriage, she did volunteer work in the Little Theatre with Morris' encouragement and approval (R. 430). She has no source of income, no separate estate, and owns no property whatsoever (R. 431). During the marriage she and Morris started a business in Montgomery called the Carriage Trade, which deals in antiques, women's accessories, and clothes, because Morris wanted her to have something to do (R. 604). It has never yielded a profit or produced any income for her nor has she ever received a salary from it (R. 432, et seq). Indeed, it is a serious liability because she owes debts to banks totalling \$30,000 arising from this business (R. 602). Her future financial prospects can only be described as bleak.

On the other hand, the "prospects" are that Morris Dees will continue to be a wealthy man, particularly since he has not been required to share any significant portion of his wealth with his wife.

6. The Length Of The Marriage

Maureene and Morris Dees married on August 11, 1968, when she was 31 years old (R. 439). They were divorced eleven years later on September 26, 1979, when she was 42 years old. Although both parties had been married before, this marriage was in no sense a "secondary", or short-lived marriage. This marriage lasted only slightly less than Morris' first marriage, which lasted thirteen years (R. p. 1145). The present marriage is considerably longer than Maureene's first marriage, which terminated after eight years (R. P. 250). Both parties were in the prime of their lives, and the marriage produced one child. There is nothing in the facts of the case relating to this factor which supports the trial court's meager award.

B. Morris Dees' Entire Estate Has Been Used Regularly For The Common Benefit Of The Parties

To sustain the grossly unfair alimony award of the trial court, it will be necessary for Morris to argue the applicability of Alabama's new alimony statute, as amended by Act. Numbr 79-486, Reg. Sess. 1979, which provides that, in determining the amount of alimony and property division due a spouse who has no separate estate,

". . . the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the trial court finds from the evidence that such property, or income produced by such property, has been used regularly for the common benefit of the parties during the marriage."

In an effort to make the foregoing provision applicable to Morris' estate, the trial court made the following finding of fact (R. 157):

"All of the assets presently owned ^{by} the husband have been shown by the testimony adduced in this cause or to have been acquired in exchange for assets owned by the husband prior to the marriage."

What the court has reference to here is the fact that, at the time of Morris' marriage to Maureene, he owned substantially all of the stock of Fuller & Dees Marketing Group, Inc., which, one year after the marriage, he exchanged for stock in the Times Mirror Corporation, and he thereafter sold some of his Times Mirror stock and purchased still other securities, i.e., tax-exempt municipal bonds. Thus it is clear that Morris' present assets, consisting of Times Mirror stock and a portfolio of other securities (Def. Ex. 86), were not in fact acquired prior to the marriage, but represent the fruits of sales, exchanges, and reinvestments of property acquired prior to the marriage. We dispute the court's interpretation of the statute, which explicitly provides that - the judge may not take into consideration any property acquired prior to the marriage. If the legislature had intended to exclude the co-mingled fruits of reinvestments of property acquired before the marriage, it would have not been difficult to draft a statute which said that, but this was not done. The logical extension of the trial court's view is that, in computing a spouse's net worth for alimony purposes, the court will deduct from the spouse's current net worth his net worth at the time of the marriage, and base the alimony award upon the difference. This is not what the statute says, either expressly or by implication, and we do not believe this was the intent of the legislature. We believe that the legislature intended to exclude only those specific assets which had the character of having actually been received by the spouse as a gift, inheritance, or by purchase prior to the marriage, and that the statute was not intended to apply to situations where a spouse has disposed of such specific assets and has co-mingled the fruits of the sale with the rest of his estate.

Actually, however, the foregoing issue is secondary. Even assuming that we are incorrect in this respect, and that the court's construction of the statute is correct, the court has chosen to ignore one of the most important parts of the statute, i.e., the provision that even property acquired prior to the marriage is to be taken into consideration if - such property, or income produced by such property has been used regularly for the common benefit of the parties during the marriage. The trial court, although it made lengthy findings of facts on much less important subjects, chose to ignore this issue completely, and made no findings of fact on this question. The trial court's silence is understandable, because the evidence clearly shows, and it is hardly disputed, that Morris' real estate, his Times Mirror stock, his portfolio of other securities, and the income from such assets, were regularly used throughout the marriage for the common benefit of the parties and their family. By refusing to recognize these clearly established (and partially undisputed) facts, the trial court has attempted to prevent Maureene from sharing any part of the bulk of Morris' estate, and in this respect the trial court committed serious error. The trial court having failed to do so, we will summarize the evidence to this effect.

1. The Real Estate

The part of Morris' estate which was most obviously used for the common benefit of the parties is the marital residence known as Rolling Hills Ranch, in Mathews, Alabama. This home, together with the 210 acres upon which it is located, is referred to as the "Home Place" and is described in detail in Ed Auerbach's appraisal (Pl. Ex. 1), which values it at \$415,500. When the parties married on August 11, 1968, they immediately went to live there, the Ranch being a portion of the real estate which the court found to have been owned by Morris prior to the marriage (R. 252). The parties continued to reside at the Rolling Hills Ranch throughout the course of their eleven year marriage until they separated in March, 1979. While they lived at Mathews, their daughter Ellie was born (R. 256), and the three of them lived at the Ranch, along with Morris' two children from a prior marriage and Maureene's two children from a prior marriage (R. 255).

When Maureene first moved out to the property, the house was a basic farm house (R. 255: 703). There were very little furnishings left in the house after Morris' first wife, Beverly, moved her furniture out (R. 1729). Morris and Maureene during their marriage proceeded to expand and add on to the house. There were two additions to the house; the plans for the first addition were completed on March 3, 1969 (Def. Ex. 88). The first addition added a playroom, storage area, sitting room, two bedrooms, and a bathroom (Def. Ex. 88). These additions cost approximately \$25,000 (R. 260). The cost of the original house was only \$30,000 (R. 260).

The second renovation was in 1971, and Robert Cole, architect, designed the additions. The second addition was extensive, and the whole house was virtually torn down and built over (R. 257). Walls were torn out, all the windows were removed, new entrances were made, six rooms were added, swimming pool and tennis court were added, three bedrooms were added, two porches were added, and a new shingle roof was put on (R. 257; Addenda to Ed Auerbach's Appraisal; Pl. Ex. 1). The parties also added a paved road and big front gates (R. 258). The second renovations were completed in 1971 (Def. Ex. 89), and cost approximately \$160,000 (R. 260).

Ed Auerbach stated in his appraisal of the Home Place:

"the major improvement on the Home Place is the extremely beautiful and quality constructed residence of the owner. Floor plans are included in the appraisal report and show house and amenities. The quality of construction is outstanding as is finish, design, and condition. There are no known repairs. The house itself contains approximately 6,020 square feet of living area, 744 square feet of screened porch, 197 feet of master bedroom screened porch, 282 square feet side entry, 913 square feet front terrace plus a pool approximately 20' x 40', surrounded by a walled terrace, gross area, including pool, some 2,861 feet, a carport storage and cabana combination building containing 782 square feet, a landscaped rear terrace off the house's screened porch of 2,548 square feet plus a 55' x 121' tennis court. An asphalt drive leads to the house from Hayneville Road. Located immediately in front of the house is a very attractive lake. The subject house is modern in all

respects, being centrally heated, and air-conditioned. Quality of construction is extremely high, design is excellent, and it presents a very handsome appearance. The main house area contains six bedrooms, four baths, study, living room, dining room, kitchen, den, breakfast room, game room, utility room plus a separate apartment which contains a maid's bedroom, living room, and bathroom. It has entrance foyer, a side foyer, halls, large screened porch, walled rear terrace, flag-stone front terrace, swimming pool, carport/cabana, and tennis courts."

This is the home where Maureene resided during her eleven year marriage to Morris. The uncontroverted evidence compels the conclusion that the home place and surrounding acreage, which the court found were owned by the Husband prior to the marriage, were used regularly for the common benefit of the parties during their marriage. This residence, or its equivalent value, should have been awarded to Maureene.

2. Morris' Other Assets

In addition to the 210 acre home place discussed above, Morris' other assets at the time of the divorce consisted of (1) a bloc of Times Mirror stock, (2) a portfolio of other securities consisting principally of tax-free municipal bonds, and (3) two other parcels of real estate known as the Square D Ranch and the Piney Grove Place (Def. Ex. 86 and 87; Pl. Ex. 1). For the period 1968 through 1975, it is not contended that Morris had any significant income other than his income from these assets. Morris does attempt to make such a contention with regard to the years after 1975, and therefore we will discuss these time periods separately.

1968 through 1975

At the time of his marriage to Maureene, Morris was President, Chairman of the Board, and 89% stockholder of Fuller & Dees (R. 1152, 1238), and there is no contention that his family was not supported from his general business operations in connection with Fuller & Dees and any other assets he owned at the time of the marriage, including his real estate. After Morris sold Fuller & Dees in 1969, there is no contention that he did not continue to support his family out of the income from his investment portfolio, including his Times Mirror stock and real estate. In 1971, Morris founded the Southern Poverty Law Center, but he received no salary from it until October, 1975. In Morris' Answers to Interrogatories (Pl. Ex. 84), he states:

"(From) 1971 (year of incorporation of Center) until October, 1975, the Husband was employed by the Center full time but received no salary. The Husband donated his services to the Center. The Husband received no tax benefit from the contribution of his services to the Center."

During this period of time when Morris was not being paid by the Center, Morris and Maureene renovated their house at Mathews, for a cost of approximately \$160,000 (R. 260). Morris sold 2,000 shares of Times Mirror stock on May 25, 1972, for \$110,892.02 which he testified went to pay for the additions to the

house and furniture (R. 1259). Obviously the proceeds from the stock sale were used for the parties' common benefit.

It was during this period of time, 1971-1975, while Morris was not being paid for his legal work with the Center, that he began to diversify his holdings of Times Mirror stock. Defendant's Exhibit 128 shows that in 1970-1971, Morris purchased \$2,095,000 worth of tax-free bonds from the proceeds derived from the sale of Times Mirror stock. Plaintiff's Exhibit 76, the Husband's personal financial statement of October 24, 1974, shows that the Husband had no salary or commissions in 1974, that he made \$135,000.00 in tax-exempt bond interest in 1974, that he received \$26,263.00 from dividends and \$10,800.00 from real estate income. For 1974, he showed a total of 203,063.00 in income. In this year he received no salary from employment.

On October 31, 1969, Morris sold 200 shares of Times Mirror stock for \$9,354.00 (Def. Ex. 127). When asked what was purchased with these proceeds, he replied:

"A. . . . It was probably for some furniture for the house cause its October 31, 1969, and we were buying some things in there. Everything that I paid for in that house or anything came from Fuller & Dees stock. I never had any other source of income anywhere for anything.

Q. Okay. So, basically you do not know exactly what that went for other than possibly home furnishings?

A. That or some living expenses or something like that. Probably home furnishings." (R. 1829).

Morris was asked about the proceeds of the sale of 98 shares of Times Mirror stock on January 21, 1971, for \$3,742, shown on Defendant's Exhibit 127. Morris replied:

"A. . . . I just probably needed some money for something. Going on a trip to Europe or something. Something you need extra money for." (R. 1829).

Thus there is no argument, and there can be no argument, that the income from Morris' premarital estate was not used for the common benefit of the family through 1975. It is with regard to years after 1975 only that Morris attempts to make an issue on this point, and during the trial he testified as follows (at page 1848):

"The last four to five years of my learning, my salary at Southern Poverty Law Center and what other earnings I picked up, not counting dividends you know, covered my living expenses."

In the first place, even if this were accurate (which it is not), under the terms of the statute it does not cause the exclusion of Morris' premarital estate for alimony purposes. Since it is uncontroverted that the income from Morris' premarital estate "has been used regularly for the common benefit of the parties" during the first seven years of this eleven-year marriage, this places such property within the statutory exception. This property is not removed from the

exception even if, after the first seven years, Morris' earned income increased to the point that the family no longer needed to rely upon the income from his premarital estate. Or put another way, once his premarital estate has been put into the "family pot" by being regularly used for the benefit of the family, the statute makes no provision for thereafter removing it from the "family pot" by no longer using its income for family purposes.

More importantly however, this is not what happened. Morris' income from the Southern Poverty Law Center and other sources never increased to the point of being able to cover the high standard of living which the Dees family enjoyed throughout their marriage. The record clearly shows the magnitude of the Dees family living expenses. During a typical twelve-month period from March, 1978 through March, 1979, the actual cancelled checks of the parties show that they spent for family and household purposes a total of \$83,966.50, or an average of almost \$7,000 per month (Pl. Ex. 103; Def. Ex. 94)¹. During 1978, his gross salary from the Southern Poverty Law Center was only \$49,225.08, which is the highest salary he had ever received from the Center (Answers to Interrogatories, Pl. Ex. 84).

During another time period, i.e., May, 1978 through March, 1979, Morris testified (upon pendente lite hearing) that he put \$5,000 to \$7,000 per month in their household account which was used to pay family expenses of various kinds (Def. Ex. 53, p. 88). Expenses of this magnitude could hardly have been covered by his salary from the Southern Poverty Law Center, which was paid in the following amounts (before withholding taxes) (Answers to Interrogatories, Pl. Ex. 84):

1975	\$9,500
1976	\$36,750
1977	\$45,100
1978	\$49,225

The following specific details for these years show even more clearly that Morris and his family were not living solely off his Southern Poverty Law Center and other earned income.

1975

In 1975 Morris made only \$9,500 in salary from the Southern Poverty Law Center (Pl. Ex. 37; Pl. Ex. 84). From this he paid \$9,045.87 in federal income taxes for the previous year (Pl. Ex. 38). Also in 1975 Morris and Maureene purchased a Mercedes automobile (Pl. Ex. 37; Pl. Ex. 43) What the family actually lived off during 1975 is shown on Morris' personal financial statement for that year (Pl. Ex. 77): dividends, \$13,532; real estate income, \$10,800; tax-exempt bond interest, \$120,632.50.

¹ In his testimony Morris attempts to classify some of these expenditures as "non-home" expenses, but he does not deny that all of these funds were spent for normal family-related purposes.

1976

In 1976 Morris' salary from the Center was \$36,750, from which federal income taxes were withheld in the amount of \$7,318 for net pay of \$29,432 (Pl. Ex. 36; Pl. Ex. 84). During that year, the parties incurred \$11,201 for medical expenses (Pl. Ex. 26), leaving disposable salary of \$18, 231. This is insufficient to support the Dees lifestyle which cost an average of \$7,000 per month (Pl. Ex. 103; Def. Ex. 94; Def. Ex. 53, p. 88). What they lived upon in 1976 is shown by Morris' financial statement for that year (Pl. Ex. 78): dividends of \$9,499; real estate income of \$17,500; and tax-exempt bond interest of \$137,202.50.

1977

In 1977 Morris' salary from the Center was \$45,100 (Pl. Ex. 35; Pl. Ex. 84). His tax return also shows other business income of \$9,066 (which we will assume was not derived from his premarital estate), for a total of \$54,166. From this, he paid medical expenses totaling \$11,441, taxes totaling \$1,051, and accounting fees of \$1,300, for total documented expenses of \$19, 957 (Pl. Ex. 35). In addition, in 1977 Morris purchased another Mercedes for \$17,029 (Pl. Ex. 35, form 2106), and a motorcycle for \$2,000. After allowing for all of these expenditures, this leaves a balance of \$15,000 of earned income, still not nearly enough to support the Dees family lifestyle. In fact, the family lived off of Morris' Times Mirror dividends and his tax-free municipal bond income.

1978

In 1978 Morris made \$49,225 from his salary at the Center (Pl. Ex. 84), and had \$5,300 in other business income which we will assume was not derived from his premarital estate (Pl. Ex. 34), for a total of \$54,525. From this, \$2,779 was withheld for federal income taxes, leaving a net of \$51,766. The actual cancelled checks of the parties show that during the ten-month period from March, 1978 through December, 1978 the parties spent \$49,889.49 on household and family related expenses (Pl. Ex. 103; Def. Ex. 94). What actually supported this lifestyle is shown on Morris' personal financial statement for 1978 (Pl. E. 79), which reflects dividends of \$14,536, real estate income of \$22,000, tax-exempt bond interest of \$137,202, and other bond interest of \$3,750. Also in 1978, Morris sold some of his Times Mirror stock, and with part of the proceeds he purchased a diamond ring for Maureen (Def. Ex. 127). He also made a contribution of bloc of Times Mirror stock valued at \$9,709 to the Montgomery Academy, where their daughter Ellie attends school (Pl. Ex. 34).

Under all of the circumstances, it is obvious that even after 1975, when Morris was earning some income, it was the income from his premarital estate, not just his current earnings, which supported the family. This being the case, the statutory exception quoted above becomes fully applicable, and for purposes of determining an appropriate amount of alimony, Morris' entire estate must be considered.

C. The Trial Court Erred In Prohibiting The Wife From Calling The Husband As A Witness

At the beginning of the trial, the Wife's attorneys called Morris Dees as

their first witness (R. 231). Morris' attorneys objected to his being called as a witness, on the ground that he had not been listed by the Wife as "a potential witness as required by the pretrial order (R. 232). However, Morris had been listed as a potential witness on behalf of himself, (R. 102, 104), and in making the objection, his attorneys stated that they planned to call him as a witness as part of their case-in-chief. Morris' attorneys argued that the Wife's attorneys would then have an opportunity to cross-examine him (R. 232, et seq). Incredibly, the trial judge sustained this objection, and refused to permit the Wife's attorneys to call Morris as a witness as part of the Wife's attorneys to call Morris as a witness as part of the Wife's case-in-chief (R. 233). Only after the Wife's case had been concluded, and after Morris had testified extensively on his own behalf, did the Wife's attorneys have an opportunity to question Morris. This is clear error. It gave Morris the obvious advantage of being able to hear the testimony of the Wife and all of her witnesses before being required to testify himself. He was thus given the opportunity to adjust his testimony as he might consider beneficial after hearing the testimony of the Wife and her witnesses.

The case of Hughes v. Hughes, 250 Ala. 519, 35 So.2d 112 (1948), is almost directly in point. In a hearing on the Husband's petition to modify an alimony award, the Husband called the Wife to testify as part of his case-in-chief. she declined to testify, and the Husband's insistence that she submit to an examination was overruled by the court. The Alabama Supreme Court held this to be error and granted a reversal, stating as follows:

" . . . The husband then proposed to examine the wife as a witness. She declined to testify. The husband's motion or insistence that she submit to an examination by the husband was overruled by the court. No point is made that the wife was not summoned as a witness, and she was actually present in court.

It is generally held that a party may be used as a witness for his opponent, and be required to give evidence of matters as to which he is competent. 70 Corpus Juris page 4, Section 13; Olive v. Adams, 50 Ala. 373; Ex parte Brooks, Ala. Sup. 32 So.2d 534. It was specifically held in Olive v. Adams, *supra*, that the right to propound interrogatories to adversary, Revised Code Section 2731, now section 477, Title 7, Code of 1940, does not destroy the right to compel him to testify for the opposite party in open court, in all cases where he is competent.

It will be argued that the Hughes case is distinguishable from the present case because here, the Wife did ultimately have an opportunity to cross-examine Morris. That is beside the point. The advantage given to Morris by allowing him to testify last was enormous, and the Wife's presentation was seriously injured thereby.

The purpose of the discovery procedures requiring parties to exchange witness lists is to prevent surprise witnesses. It cannot be contended here that Morris and his attorneys were not fully aware that Morris would be a witness. Everybody in the courtroom had been aware for weeks that Morris was to be a key witness in the trial, and thus the purposes of the pretrial order were satisfied. The pretrial order does not regulate the sequence in which known witnesses are to

be called. Morris was present in the courtroom, he had been designated as a witness on behalf of himself, and his lawyers stated that they planned to call him as a witness for their case. As petitioner, the Wife had the right and the burden of presenting evidence first, and there is not a shred of authority for the trial court's prohibiting the Wife from calling Morris as a witness first.

V. CONCLUSION

The appellant Wife respectfully requests this Court to reverse and set aside that portion of the lower court's decree setting alimony, and to render judgment requiring the Husband to pay to her, as alimony-in-gross, cash or equivalent assets of at least \$1,000,000, payable within thirty days of the date of this court's mandate. In the alternative, the Wife respectfully requests the Court to reverse the decree of the lower court and remand the cause for a new trial.

Upon a decision of this appeal, the Wife respectfully requests the Court to retain jurisdiction for the purpose of setting a reasonable fee for the services of her attorneys on appeal, and that at the proper time, they be permitted to file documentation concerning the appropriate amount of such a fee.

Respectfully submitted,

OF COUNSEL:

SMITH, BOWMAN, THAGARD
CROOK & CULPEPPER
P.O. Box 78
Montgomery, AL 36101
Telephone: (205) 834-6500