

2006-CA-01287

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

DEBORAH WEEKS, APPELLANT

VS.

ROLAND WEEKS, APPELLEE

ON APPEAL FROM
THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT
OF HARRISON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

I. Debby Weeks' financial circumstances have not improved relative to those of Roland Weeks since the awards of alimony and child support were made after the case was remanded from the Court of Appeals.

II. Roland Weeks' assertion that the Debby Weeks has not demonstrated an inability to pay her attorneys' fees is based on a misapprehension of the facts.

SUMMARY OF THE ARGUMENT

To the extent that Roland Weeks presents a meaningful argument in support of his assertion that the chancellor properly refused to modify alimony or child support, he avoids any discussion of the law and completely disregards the evidence in the record. Roland incorrectly perceives the insurance proceeds which Debby received from property losses resulting from Hurricane Katrina as a windfall, bolstering her net worth and totally negating her need for increased alimony or child support and providing a jackpot from which she should pay her attorneys' fees.

Roland, however, like the chancellor, ignores any discussion of the appropriate factors on which modification both of alimony and child support are to be based. With regard to child support, modification is not predicated solely upon a change in the parents' circumstances, but may be warranted, as in this case, by the increased needs and expenses of the child. As to modification of both alimony and child support, Debby suffered a profound change of circumstances as a result of Hurricane Katrina. The insurance proceeds which Roland now trumpets as Debby's pot of gold at the end of the rainbow are intended for one purpose – the repair and replacement of the property she lost. Moreover, Roland now complains that the only changes in circumstances which have occurred are decreasing assets, his advancing age, and the various physical ailments from which he suffers, any physical and economic ramifications of which were not made part of the record or even raised at trial.

As Roland points out, the chancellor's June 22, 2006 Order clearly inferred that Debby had insurance proceeds available to her from which she could pay her attorneys' fees. Those funds, however, were paid to Debby by her insurance company for one specific

purpose – the repair and replacement of real and personal property destroyed by Hurricane Katrina. For the chancellor to have found otherwise is an abuse of discretion.

ARGUMENTS AND DISCUSSION OF THE LAW

I. DEBBY WEEKS' FINANCIAL CIRCUMSTANCES HAVE NOT IMPROVED RELATIVE TO THOSE OF ROLAND WEEKS SINCE THE AWARDS OF ALIMONY AND CHILD SUPPORT WERE MADE AFTER THE CASE WAS REMANDED FROM THE COURT OF APPEALS.

Roland makes a single erroneous argument in response to the assignments of error Debby raised regarding modification of alimony and child support. (Appellee's Brief at 5-7). He contends that Debby's financial position was better at the time of the May, 2006 motions hearing than it was at the 2003 hearing after remand following this court's decision in *Weeks v. Weeks*, 832 So. 2d 583 (Miss. Ct. App. 2002) (R.E. 2). This assertion appears to be premised on Roland's selective analysis of information contained in Debby's Rule 8.05 Financial Disclosure Forms. (S.R.E. 1, 2).¹ He contends that Debby's net worth has increased substantially because of insurance proceeds she received for property losses sustained as a result of Hurricane Katrina in August, 2005, and thus, argues that modification of alimony or child support is not warranted. Contrary to Roland's inferences, the insurance proceeds Debby received are not a windfall to be used as she wishes, but money paid by the insurer for a specific purpose - the repair and replacement of real and personal property lost in Hurricane Katrina. Furthermore, like the chancellor, Roland erroneously characterizes the fact that Debby draws an annuity of only \$442.00 per month from her share of his retirement benefits as an improvident choice made without professional advice. (Appellee's Brief at 7, 11).

A. MODIFICATION OF ALIMONY

1. THE INSURANCE PROCEEDS DEBBY RECEIVED FROM LOSSES RESULTING FROM HURRICANE KATRINA ARE NOT AN ECONOMIC WINDFALL BOLSTERING HER NET WORTH.

¹ Citations to the Appellee's Supplemental Record Excerpts are designated as "S.R.E. ____."

That Debby received compensation from her insurer for losses sustained as a result of Hurricane Katrina tells only half the story. Debby was awarded the marital home, which at the time of the divorce was valued at approximately \$360,000.00. *Weeks*, 832 So. 2d at 585 (¶ 6). There was a mortgage remaining of \$18,000.00 on the property. (*Id.*). Subsequently, Debby was forced to take a second mortgage on the home in the amount of \$200,000.00 to pay her attorneys' fees from the divorce and appeal. (Tr. 7 at 194-96).

The house and its contents were substantially destroyed by Hurricane Katrina. (Tr. 2 at 928-38; Exh. 49). Although her March, 2006 8.05 Financial Declaration showed receipt of insurance proceeds in the amount of \$350,000.00, Debby testified that she had received between \$450,000.00 and \$500,000.00 in insurance proceeds for damage to her home and its contents. (Tr. 10 at 734). However, the damage to the home was so severe that the estimated cost of repairs was in excess of \$700,000.00. (Exh. 27).

What Roland perceives as an increase in Debby's net worth fails to factor her losses into the equation. Indeed, the economic consequences of Hurricane Katrina, without more, are sufficient to warrant a finding that Debby's circumstances have changed. *See Setser v. Piazza*, 644 So. 2d 1211, 1215-16 (Miss. 1994) (chancellor erroneously refused to consider parent's loss of home, possessions and job as a result of Hurricane Andrew as a change of circumstances in modification of support proceedings).

Debby receives only \$3,000.00 in alimony, which even prior to Hurricane Katrina, did not cover her expenses. In addition to facing the costs of rebuilding which exceed the amount of coverage provided by insurance, Debby's 8.05 Financial Declaration, as revised in 2006, indicates that she was paying a mortgage, insurance and taxes in the amount of \$2,129.00 on an uninhabitable dwelling whose market value is fraction of what it was prior

to the hurricane. (S.R.E. 2). She further was paying \$3,400.00 per month in apartment and storage costs, pending partial relief in the form of Loss of Use proceeds from her insurer. (S.R.E. 2). Debby now has a car note of \$1,300.00 on a new BMW which was purchased to replace a comparable model BMW which was irreparably damaged incidentally to Katrina. (S.R.E. 2; Tr.12 at 957-58). To meet her post-hurricane expenses and obligations, Debby further was forced to withdraw \$100,000.00 from the 401(k) plan she had received as part of the division of marital assets. (Tr. 11 at 856-57). Therefore, although Debby's financial disclosure reveals that she has a bank account holding funds specifically designated for hurricane losses, the cost of replacing her property exceeds the insurance proceeds received, her monthly expenses have increased since the hurricane and, she has suffered a diminution in value of two of the major assets she was awarded in the divorce decree – the marital home and her share of Roland's 401(k) plan.

2. DEBBY DID NOT 'ELECT' TO TAKE AN ANNUITY IN THE AMOUNT OF \$442.00 PER MONTH.

In making its determination that Debby was entitled to periodic alimony, the Court of Appeals contemplated that she would receive one-fourth of Roland's 401(k) plan and one-third of his defined benefit and pension plan. *Weeks*, 832 So. 2d at 585 (¶ 6). Looking at Debby's monthly income, Roland contends that her present monthly income is limited only because she "elected" to take an annuity of \$442.00 per month for life rather than a \$5,000.00 per month periodic payout. (Appellee's Brief at 7). Contrary to Roland's assertion, Debby did not blindly "elect" the annuity option provided by Knight Ridder; rather, as the record indicates, it was the only option available to her – a fact made known to her *after* the chancellor made an award of alimony predicated on higher numbers. (Appellant's Brief at 39-41, Exh. 50, 51).

Roland completely mischaracterizes Debby's testimony in his statement that she made this "election" without consulting a tax attorney or other consultant. (Appellee's Brief at 7). Although she initially consulted with a tax advisor, Debby testified that it took three years and several attorneys before she was able to take possession of the retirement assets she had been awarded in the divorce. (Tr. 12 at 942-45). Moreover, to the extent that any tax advice Debby received is relevant, Roland's own legal team discerned that the distribution plan approved for her by Knight Ridder provided Debby with the least adverse tax consequences. (Exh. 45). That Debby's present income stream from the retirement assets she received in the distribution of marital property is only \$442.00 per month was neither a matter of choice nor reasonably foreseeable at the time that the award of periodic alimony was made. Moreover, the tax consequences of such distribution must be considered by the court and Debby should not be penalized for receiving a distribution which minimizes her income tax liability. *Louk v. Louk*, 761 So. 2d 878, 883 (¶¶ 12-13) (Miss. 2000).

3. ROLAND FAILED TO ESTABLISH ANY CHANGE IN HIS CIRCUMSTANCES THAT WAS NOT REASONABLY FORESEEABLE AT THE TIME THE AWARD OF ALIMONY WAS MADE.

Roland now complains that the *only* changes in circumstances which have occurred subsequent to the divorce are his increased age, his failing health and his relatively diminished assets. (Appellee's Brief at 4). When considering modification of periodic alimony, the court must consider changes in circumstances which were not reasonably foreseeable at the time the prior award, based on the factors set forth in *Armstrong v. Armstrong*, 618 So. 2d 1278 (Miss. 1993). *Austin v. Austin*, 766 So. 2d 86, 90 (¶¶ 19-20) (Miss. Ct. App. 2000). The changes which Roland now alleges, however, all were reasonably foreseeable at the time alimony was awarded.

Like Roland, Debby, too, has aged since the award of periodic alimony was made. Their relative ages remain unchanged. In the Judgment After Remand, the chancellor found that Roland “suffers from arthritis, prostatitis, peripheral neuropathy, and sarcoidosis of the lungs which is in remission. Other than that, he is in good health.” (R. 3 at 312; R.E. 2). At the 2006 proceedings, Roland testified that he suffered from arthritis, prostatitis and peripheral neuropathy. (Tr. 13 at 1054-55; Appellee’s Brief at 6). Roland provided no evidence at the hearing showing either that his health had deteriorated since the remand proceedings or that his health concerns have impaired either his finances or his lifestyle.

As to his claimed diminution of assets, Roland’s Rule 8.05 Financial Declaration forms show little change in income, expenditures and assets between 2003 and 2006. (S.R.E. at 3, 4). In *Weeks*, the Court of Appeals, commenting on the chancellor’s finding that both parties had wasted assets, noted that “there is a large amount of money unaccounted for which Roland had access to, not Deborah.” *Weeks*, 832 So. 2d at 587 (¶ 19). Just as there was a large amount of money unaccounted for then, which remains unaccounted for to this day, there is no documentation of assets Roland has moved or transferred to other individuals. Roland further evaded questions at trial regarding any inheritances from his parents and a \$900,000.00 IRA rollover, as well other assets and sources of income. (Tr. 13 at 1065, 1068-69, 1115-17). His tax and financial records indicate an annual cash flow of over \$300,000.00 per year. (Exh. 7, 18, 48). Moreover, to the extent that Roland now complains that his assets have diminished, bank statements from the only of his checking accounts produced at trial, dating back to 2002, serve to establish a long-standing pattern of spending well in excess of \$25,000.00 to \$30,000.00 per month. (Exh. 42). Thus, any

diminution of Roland's assets is the result of lifestyle choices he has made and was reasonably foreseeable at the time alimony was awarded.

B. MODIFICATION OF CHILD SUPPORT

Roland makes no distinction in his argument between his assertions that Debby is not entitled to a modification of either alimony or child support. (Appellee's Brief at 5). While there is, of course, some overlap in the factors the court may consider in each instance, modification of child support, as Roland completely overlooks, also requires that the court examine factors relevant to the minor child. When applicable, the chancellor should consider the increased needs of older children and their increased needs and expenses. *Tedford v. Dempsey*, 437 So. 2d 410, 422 (Miss. 1983). However, because the parties' minor daughter, Alex, turned twenty-one before Debby's petition for modification was finally heard, the chancellor did not properly consider the changes affecting Alex between the 2003 hearing after remand and her April, 2005 petition.

1. THE INITIAL AWARD OF CHILD SUPPORT IS AMBIGUOUS.

The need for retroactive modification of child support has its genesis in the ambiguity of the chancellor's initial provision for Alex's support and education. The chancellor found that Roland should pay child support in the amount of \$1890.00 per month *and* that he was capable of fully funding Alex's college education. (R.3 at 320). What he actually ordered Roland to pay, including Alex's college expenses, was only \$100.00 per month more than what he had been required to pay under the terms of the temporary order in effect while she was in high school. (R.3 at 304). Debby, on the other hand, who was awarded periodic alimony in an amount that was less than half of the temporary support she previously had

received, ultimately paid the majority of Alex's expenses, including those Roland was originally ordered to pay. (Appellant's Brief at 25-26).

2. ALEX'S INCREASED NEEDS AND EXPENSES WARRANT MODIFICATION OF THE AWARD OF CHILD SUPPORT.

The evidence in the record clearly shows that contrary to the initial order of child support, it was Debby who was responsible for a disproportionate share of Alex's expenses, paying more than \$115,000 for Alex's educational expenses and support between June, 2003 and March, 2006. (Exh. 43). Alex's expenses increased each year she was at LSU, particularly after she moved from a sorority house, as contemplated by the 2004 order, to an apartment. (Exh. 26, 39). In addition to paying the difference between in-state tuition at Ole Miss and Alex's actual costs at LSU, Debby paid for Alex's apartment, furniture and food, as well as her clothes, gasoline, medicine and other necessities. Rather than summarily dismissing the issue of modification because Alex had turned twenty-one prior to the 2006 hearing, the chancellor should have considered the evidence of the minor child's increased expenses which were introduced at trial.

II. ROLAND WEEKS' ASSERTION THAT DEBBY WEEKS HAS NOT DEMONSTRATED AN INABILITY TO PAY HER ATTORNEYS' FEES IS BASED ON A MISAPPREHENSION OF THE FACTS.

Roland's contention that Debby is not entitled to attorneys' fees is based on the same misapprehension of the record presented his argument against the modification of the awards of alimony and child support. (Appellee's Brief at 11-12). Moreover, his argument that the chancellor correctly denied Debby's request for attorneys' fees based in part on the availability of insurance money she received for losses sustained as a result of Hurricane Katrina provides further grounds for finding that the chancellor abused his discretion. Roland

also fails to acknowledge that Debby's assignment of error goes beyond the denial of attorneys' fees for the June, 2006 hearing.

Roland again turns his focus to insurance proceeds held in Debby's bank account. He asserts that there is no merit to her argument that she has "no immediate liquid assets" with which to pay her attorneys' fees because she has money in the bank received from her insurance company for damages sustained to her home and personal property by Hurricane Katrina. (Appellee's Brief at 12). He provides no authority for his proposition that Debby's insurance proceeds should be diverted from their intended purposes to be used for attorneys' fees. *Grey v. Grey*, 638 So. 2d 488, 491 (Miss. 1994).

In support of his argument, Roland cites only the chancellor's finding, in discussing Debby's ability to pay her attorneys' fees, that she had money available to her which she had chosen not to use, including Katrina insurance proceeds which were being held by Wells Fargo Bank. (Appellee's Brief at 12, R.E. 3 at 1157-58). Indeed, the chancellor went so far as to state in his Bench Ruling that Debby's refusal to touch those funds was "somewhat inconsistent with economic reality and economic and financial responsibility," despite her express testimony that she had been advised by the SBA, through which she had applied for disaster assistance, against using the money. (R.E. 3 at 1158).

It is well established that a wife should not have to exhaust her savings or delve into retirement funds to pay her attorneys' fees. *Hemsley v. Hemsley*, 639 So. 2d 909, 915 (Miss. 1994). By the same token, for the chancellor to suggest that Debby should use money paid by the insurance company to repair and replace insured property, without any consideration of the terms and conditions under which those funds and any other hurricane relief to which she was entitled were payable to her, is an abuse of discretion and clearly erroneous.

CONCLUSION

The chancellor's rulings subsequent to the Judgment After Remand are based on findings which simply do not reflect the facts set forth in the record. Roland adroitly sidesteps any meaningful discussion of the law and adopts the same selective approach to the facts as the chancellor. In particular, Roland's insistence that the insurance proceeds Debby received to cover property losses from Hurricane Katrina served to bolster her net worth, thus precluding any modification of alimony or child support, tacitly ignores the financial realities wrought upon Debby by the hurricane as expressly set forth in the record. Moreover, the inferences made by Roland and the chancellor that those same insurance proceeds were liquid assets from which Debby could pay her attorneys' fees is contrary to the law and the facts.

This case should be reversed and remanded for reconsideration of the issues raised in this appeal. Debby Weeks also prays for attorneys' fees and any other relief to which she is entitled in the premises.

Respectfully submitted,

DEBORAH WEEKS

By: John Robert White
JOHN ROBERT WHITE

By: Pamela Guren Bach
PAMELA GUREN BACH

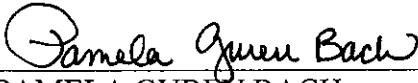
CERTIFICATE OF SERVICE

I, Pamela Guren Bach, Attorney for the Appellant, Deborah Weeks, hereby certify that I have this day caused to be served by first class mail, postage prepaid, a true and correct copy of the above Brief of Appellant on the following persons:

Chancellor Carter O. Bise
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Trial Court Judge

Hon. Henry Laird
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SO CERTIFIED, this the 11th day of July, 2007.



PAMELA GUREN BACH