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

DREW L. ANDERSON	**APPELLANT**
V.	**CAUSE NO. 2007-CA-00879**
JANET E. ANDERSON	**APPELLEE**

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

BRIEF OF APPELLEE

JANET E. ANDERSON

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following have an interest in this action. These representations are made so that the Justices of this Court may evaluate possible disqualifications of recusal:

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TABLE OF CONTENTS

Respectfully Submitted,

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TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES

I. THE CHANCELLOR PROPERLY AWARDED JANET PERMEANT/PERIODIC ALIMONY

II. THE CHANCELLOR PROPERLY AWARDED JANET ATTORNEYS FEES

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JANET E. ANDERSON — **APPELLEE**

INTRODUCTION

After more than twenty-two years of marriage, Drew Anderson asked his wife Janet for a divorce. Janet supported the household, raised two sons, and worked part-time while Drew had a successful civil engineering job with the government. The Chancellor properly awarded Janet permanent periodic alimony and most of her attorneys fees. The Chancellor awarded appropriate child support though half of the award goes directly to the son in college and not to Janet. This Court should affirm the Chancellor's learned decision.

LEGAL PROCEEDINGS

On June 9, 2006, after her husband requested a divorce, Janet Anderson filed for divorced against her husband Drew Anderson. (CP 5-9) Janet alleged grounds for her divorce as cruel and inhuman treatment or in the alternative irreconcilable differences.

On August 15, 2006, the couple entered into an Amended Agreed Temporary Order. (CP Pg. 10-11) The Amended Agreed Temporary Order granted joint legal custody of the two minor children Andrew Ryan Anderson, born October 17, 1986, and Adam Ross Anderson, born July 20, 1989, with Janet having primary physical custody and husband Drew having reasonable rights of visitation. Drew was ordered to pay Janet the sum of $1,200.00 per month in child support with Drew paying $600.00 per month directly to Andrew Ryan Anderson, who was currently in college at the time, with the other $600.00 payable to Janet for the benefit of their son Adam. Drew also was ordered and directed to pay Janet the sum of $700.00 per month as temporary support and maintenance. Additionally, Drew was ordered to pay temporary the sum of $650.00 for two months as totaling $1,300.00 for temporary child support for Adam and temporary support for Janet in $700.00.

On September 26, 2006, the parties filed their Joint Motion to Withdraw Plaintiff's Fault Grounds for Divorce and Defendant's Answer for Divorce and to Allow Parties to Proceed with Obtaining a Divorce on the Grounds of Irreconcilable Differences. (CP 18) The parties requested the Court to grant them a divorce on the grounds of irreconcilable differences and requested Court to hear the unresolved issues.

The parties signed a consent for divorce on irreconcilable differences pursuant to Miss. Code Ann. § 93-5-2(3) on October 6, 2006. (CP20-21) The parties represented to the Court the following issues would be heard by the Court: 1.) The adequate provisions for the support and maintenance of the minor children of the marriage; 2.) The equitable distribution of marital assets and liabilities of the marriage; 3.) The award of alimony, if any to Janet E. Anderson; and 4.) The award of attorneys fees, if any to Janet E. Anderson.

After submitting to the Court various issues and pursuant to the divorce on irreconcilable differences, the Court issued its final judgment on January 5, 2007. (CP 25) The Chancellor awarded joint legal custody of the minor children to both parties and awarded Janet primary physical custody of the minor children with Drew having reasonable visitation rights. Drew was ordered to pay Janet $1,100.00 per month for child support of which $550.00 of said child support would be paid directly to Andrew who was a college student at Nebraska, and the remaining $550.00 per month would be paid directly to Janet on behalf of Adam.

Aggrieved by the Chancellor's ruling, Drew filed a Request For Specific Findings of Fact on February 2, 2007, more than ten days after the judgment was entered in violation of MRCP 52(b). Drew also filed a Motion for Reconsideration on February 2, 2007, clearly more than ten days from the day the Final Judgement was entered. Therefore, both the Motion For Reconsideration and the Request for Specific Findings of Facts were not timely made and therefore the Court should deny said requests. This Court does not have jurisdiction since the Notice of Appeals was not filed more than thirty (30) days after January 5, 2007, specifically, on February 2, 2007, the Court on its own motion entered an order requiring both parties to submit a brief to the Court, said deadline to be March 9, 2007, which was entered more than ten days after the Final Judgment in violation of MRCP 52 (b).

Drew's Motion for Reconsideration asked the Court to reconsider the periodic alimony order of $1,200.00 per month. The Motion for Reconsideration also asked the Court the reconsider payment of the $5,000.00 in attorneys fees. Drew's Request for

Specific Findings of Facts requested specific findings of facts with regards to the award of child support as reasonable since Drew made an adjusted gross income in excess of $50,000.00. Drew also requested for specific findings of facts as to the Court's award of periodic alimony of $1,200.00 per month. Finally, Drew asked the Court to make specific findings of facts with regards to attorneys fees to Janet.

The Chancellor awarded Janet fifty percent (50%) of Drew's TSP savings plan of $230,101.68 and half of Drew's FERS annual account of $18,783.00. Janet was also awarded her own retirement account of approximately $1,100.00. Janet and Drew were awarded their respective vehicles. Additionally, Janet was awarded Andrew's vehicle for the use and benefit of Andrew. The Chancellor ordered Drew to pay Janet $1,200.00 per month as permanent periodic alimony beginning February 1, 2007. Finally, Drew was ordered to pay Janet $5,000.00 in attorneys fees.

On April 27, 2007, the Chancellor entered a Memorandum Opinion and Final Judgment. (CP 71-103) The Chancellor found that based on Janet's response to Drew's Motion to Reconsider, that Drew's motion to reconsider was filed more than ten (10) days after the final judgment was entered. (CP 78) Therefore, the Chancellor denied Drew's motion to reconsider. (CP 9) The Chancellor went on to state and made specific findings by the Court based on MRCP 52 and noted that Drew did not specifically ask the Court to amend its ruling but merely to make findings of fact in support of the Chancellor's final judgment. (CP 9)

The Chancellor found that based on Ms. Anderson's 8.05 statement that her monthly adjusted gross income was $1,320.36. (CP 81) The Chancellor found that based on Mr. Anderson's financial statement he has an annual income of $91,988.00 with a monthly gross income of $7,665.66. (CP 81, 12) The Chancellor made a specific finding on the record weighing the factors of alimony and properly concluded that an award of periodic alimony in the amount of $1,100.00 was proper. (CP 90-101) The Chancellor found that Janet's earning capacity has been diminished by "the foregoing of a career to take care of the household." (CP 101) The Chancellor noted Janet would have no medical insurance after the divorce. The record is replete with any evidence showing or suggesting in any way that Janet voluntarily chose a position offering less money. (CP 101) The Chancellor found that there was a significant disparity in earning capacity which is a significant major factor in determination of periodic alimony. Therefore, the Chancellor found that Drew shall pay Janet $1,100.00 per month a permanent/period alimony.

The Chancellor noted Janet requested an award of $7,160.96 in attorneys fees which said attorneys fees reflected the amount prior to the parties submitting briefs to the Chancellor. The Chancellor found "there is a substantial difference between the parties adjusted gross incomes. Ms. Anderson's expenses exceeded her income." (CP 102) The Chancellor noted that the award of any of the thrift savings accounts or other retirement would make Janet suffer a tax penalty and furthermore that she had no other retirement. Therefore the Chancellor awarded $5,000.00 in attorneys fees. (CP 33)

FACTS

Janet and Drew Anderson married on October 6, 1984. Janet was twenty three years old and Drew twenty two years old at the time of the marriage. In January 2006, after nearly twenty two years of marriage, Drew asked Janet for a divorce. (TR 6)

The couple married while they were both attending Wichita State University in Wichita, Kansas. Both had been born and raised in the El Dorado, Kansas area. At the time of the marriage, Janet was pursuing a degree in business and Drew was taking electrical engineer courses. Janet took a full time job as a payroll clerk for the First National Bank in Wichita and attended night classes. Drew attended classes during the day and worked part time in the afternoon. Janet's job provided insurance coverage and other benefits. The couple both graduated in 1986. Drew had a degree in electrical engineering and Janet received a Bachelors in Business Administration. (TR 14-16)

After graduation, Drew accepted a position in New Mexico with the US Army as a civilian. Janet quit her job and relocated with him to Las Cruces, New Mexico. Janet was pregnant at this time. After some complications with the pregnancy, Janet gave birth to their first son Andrew. (TR 16-17)

After a year in New Mexico, Drew began looking for a new job in the Midwest. Janet helped Drew research what government facilities were in the area that the couple wanted to relocate. Drew received a job offer in Omaha, Nebraska which Drew accepted. Drew worked at the US Army Corp of Engineers as an electrical engineer in Omaha from

April of 1988 until August of 1998. (TR 18-19)

Janet gave birth to the couple's second son, Adam, on July 27, 1989. She gave birth a month after the couple had moved into their first home in Neola, Iowa. The couple borrowed the down payment from Janet's grandmother and paid her back little by little every two weeks until the grandmother was repaid. (TR 19)

Janet stayed home with the two sons until the boys were in elementary school. Drew's job required several business trips a year and Janet was needed to be available to care for them. During the time of their infancy until elementary school, Janet provided all the care for the children, ran the household, cooked, cleaned, paid bills, did laundry and car care. (TR 20)

Janet began working in August of 1995, on a part time basis as a technology coordinator at the boy's school district. Working at the school district part time provided that when the boys were out of school Janet was not working. Furthermore, Janet was able to take care of the boys on a regular basis as well as if any emergency occurred. Janet drove the boys to school and also kept up with all the household work. Janet also had other extra curricular activities such as optimist club and the chamber of commerce. (TR. 20)

By 1998, Drew's job became more stressful and he wanted to relocate. Even though Janet felt comfortable and settled in Iowa and enjoyed her job and life, she agreed to transfer with Drew. Drew ultimately relocated to Germany which was a tremendous move for the family. The children were enrolled in school on the base. Since this was a major cultural change particularly for the young boys, the family decided that Janet should stay at home with the boys to ease the transition for the boys. However, Janet did try later on to find a job but with only one vehicle and Drew working away from the residence limited the ability of Janet to work. Therefore Janet stayed home and raised the boys and took care of the families needs. The couple only remained in Germany for thirteen months. (TR 21-23)

In September of 1999, the Anderson family moved to Vicksburg, Mississippi. (TR 24) They temporarily lived in hotels for the first few months and finally moved into their martial home at 150 Amber Leaf Drive. (TR 25) After one year in Vicksburg, when the boys obtained the age of thirteen and ten, Janet took a job as seasonal help at Bath and Body Works in Vicksburg. Janet had previously tried to work at Rainbow Casino but had to work evenings which caused problems with the family. The family ultimately asked her not to take the job as it was to difficult to care for the boys, particularly when Drew traveled. As such, it was very important to the family that Janet be available at home to be with the boys. (TR 33-34)

Janet's job with Bath and Body Works went from temporary seasonal hire to becoming part time manager in 2002. The boys were now sixteen and thirteen as of July 2002. Drew and the boys voiced frustration over Janet taking the job which required her to work some evening hours and on weekends.(TR 34)

A year and a half later, Janet attempted to find employment that did not require weekend or evening work. Janet was offered the job at Jamison Inn as general manager with pay of $29,000.00 annual salary. She worked mostly day time hours but occasionally had to cover shift work when employees did not show up over the weekend or in the evenings. Ultimately the Jamison Inn incurred ownership issues and Janet left Jamison Inn. After leaving the Jamison Inn, Janet was able to take care of medical issues and do some work on the house as well as spend time with Andrew before he left for college. (TR 35)

Janet then took a sales job at the convention center. She made approximately six or seven hundred dollars for the months of June and July but it was determined not to be a successful endeavor. She then took a job at Vision Clinic working 8:30 to 5:30 Monday through Friday which allowed her to be free on the weekends with her family. At Vision Clinic she netted approximately $300.00 a week or $1,200.00 a month take home pay. (TR 37-38)

During the marriage, Janet met Drew for lunch almost everyday while living in Vicksburg. The couple often dinned out in the evenings at such places as Sun Koon, Beachwood, Jaques, and Rusty's. The couple also traveled to Jackson to eat at nice restaurants. (TR 46) The couple each owned their own car and each purchased a new car within every three to five years.

The couple took a cruise in 2002 and again in 2004 in the Western Caribbean. The first cruise in 2002, Drew and Janet went alone with the cost of approximately $4,000.00. The second cruise in 2004, Janet and Drew took both sons which cost approximately $5,500. The family also traveled to London, Amsterdam and France as a family during their time in

Germany. Drew and the oldest son Andrew took a ski trip to the Swiss Alps with the boy scouts. Janet has traveled several times to South Carolina to visit friends. Drew and Adam took two scuba trips in 2006 with the boy scouts. The boys always attended a scout camp during the summer. In fact, the family was very active in the boy scouts and both sons have obtained eagle scout ranking. (TR 47-48) Janet worked very hard in the scout organization as did Drew.

During the marriage, Janet was able to relocate with Drew to pursue his career as she was not tied down to a career. In fact, until the children were no longer elementary students, Janet stayed home with the boys. During the entire marriage, Janet was in charge of maintenance of the cars, the household, taking the sons to medical appointments, pet care, grocery shopping, purchase of clothing for the entire family, and paid the bills. Janet also gathered all information for taxes and took them to an accountant or did them herself. Janet did all the computer work on Andrew's student loans and applications for college. Janet also did most of the work on the interior part of the housing including painting and wallpaper of the home. Drew did yard work, vacuuming, and assisted with the laundry. (TR 54-55)

In January of 2006, after nearly 22 years of marriage, Drew asked Janet for a divorce. (TR 39) Since Janet had no ties to Mississippi other than her husband, and her eldest Adam was now attending college in Nebraska, and the youngest child wished to pursue a degree at Missouri Southern State University in Joplin, Janet decided to move to Joplin, Missouri.

The move allowed Janet to establish residency for Adam during his senior year of high school so that he could then enter Missouri Southern State University as an instate resident, thereby saving on tuition. Living in Joplin, Missouri also makes the travel for Andrew closer to Janet as well as puts both boys closer to their maternal grandparents near El Dorado, Kansas and their paternal grandfather in White Water, Kansas. (TR 39-41) In Joplin, Missouri, Janet applied for more than 60 jobs before finding a position. (TR 44) She required an 8-5 job in order to be available for their youngest son's extra curricular activities. (TR 74) She is currently working for the Mortgage House Company. She makes $10.75 an hour and receives no benefits. Needless to say, the housing market has taken a down turn since the trial of this matter.

Janet rents a three bedroom house in Joplin, Missouri for $775.00 per month. (TR 26) The house provides room for Andrew when he comes home from college. Janet testified to living expenses of over $3,157.00 per month. Her income statement after standard deductions of state and income taxes and social security nets her a total net monthly income of $1,320.36. Janet has essentially gone from a combined household income of over $120,000.00 to making just $22,360.00 annually before taxes.(TR 160) Her current job does not pay the added expenses of health insurance or life insurance. Needless to say, she has no money to put in a retirement account. (TR. 46)

Drew produced a wage statement stating that he netted approximately $2,989.05 per month. This is after he makes a salary before deductions of $7,617.02 per month. However, it is clear that after the divorce proceeding began, Drew began withholding more federal income tax than was necessary for taxes, meaning he would be entitled to a significant refund at the end of the year. John Paris, a CPA with May and Company testified that based on the standard federal income taxes deduction, that the adjusted gross monthly income for Drew was actually significantly higher and was $4,627.97. Additionally, throughout the years of working for the government, Drew was able to obtain retirement plans of a total of over $261,184.68. Janet had an IRA of approximately $1,100.00, which she was able to obtain while she worked for the school district in Iowa. (TR. 43)

The couple sold their home for $179,400.00. (TR 26) Drew withdrew $2,500.00 from a HELOC account at Trustmark. When the house was paid off, the HELOC was also paid essentially meaning that Drew pocketed $2,500.00 of which Janet was required to pay half. (TR 52-53)After paying all the bills, the proceeds of the house netted Janet less than $500.00.

Since the time of the separation, Drew has been able to purchase a boat. (TR 162) Drew continues to maintain his job with the US government as a civil engineer making more than $90,000.00 per year and receiving health insurance benefits and retirement benefits. Drew essentially has job security wherein Janet has foregone her career path for the benefit of the family household including raising two wonderful sons.

SUMMARY OF ARGUMENT

The Chancellor properly awarded Janet alimony. Janet took care of the house and raised the couple's two children and gave up her career. At the time of the divorce there was a significant difference in income. Additionally, Drew had a significant retirement which would increase with time as he remained employed with the government. While Janet was awarded half of Drew's retirement, her chances of increasing that retirement are slim based on her employment and position. Therefore, the Court, after the weighing the appropriate factors, properly held that Drew should pay permanent alimony to Janet.

The Chancellor properly awarded Janet $5,000.00 in attorneys fees. Janet had submitted an attorney fee bill for over $7,000.00 but the Chancellor awarded $5,000.00. The only asset awarded Janet was half of the retirement accounts of Drew. If Janet where to use the income from the retirement accounts she would suffer a tax penalty. Janet had no other assets. Furthermore, Janet's expenses exceeded her income she brought in monthly. Therefore, the Chancellor properly awarded attorneys fees.

LAW

I. THE CHANCELLOR PROPERLY AWARDED JANET PERMEANT/PERIODIC ALIMONY

Alimony originates from an obligation of one spouse to provide support for the other spouse. Weiss v Weiss, 579 So.2d 539, 541-42 (Miss. 1991).An award of periodic alimony flows from the objection of a husband to support his wife in the manner to which she has been accustomed. Franklin v Franklin, 864 So.2d 970, 979 (Miss. Ct. App. 2003); Johnson v Pogue, 716 So.2d 1123, 1131(Miss. Ct. App. 1998).

In Franklin, the Court of Appeals affirmed a Chancellor's award of periodic alimony where the parties both were in their mid forties; the husband worked and the wife had a child at home, the couple had been married for twenty years, and the wife suffered a substantial loss in her standard of living. Franklin, 864 So.2d at 979-980.

Periodic alimony comes from the duty of the husband to support his wife in the manner to which she has been accustomed to the extent of his ability to pay. East v East, 493 So.2d 927 (Miss. 1986).

"The wife is entitled to support corresponding to her rank and condition in life, and the estate of her husband." Weeks v Weeks, 832 So.2d 583, 587 (Miss. Ct. App. 2002). Thus a wife such as Janet is entitled to continue living in the same standard of living as she has grown accustomed to during the course of her twenty-two year marriage.

In considering an award of alimony, the Chancellor needs to consider twelve factors listed in Armstrong v Armstrong, 618 So.2d 128 (Miss. 1993):

1. **The income and expenses of the parties**;

This factor clearly favors awarding alimony in favor of Janet. As the facts reveal, Janet took care of the household and raised their two sons while Drew was the breadwinner. At the time of the divorce, Drew was making nearly $100,000.00 per year while Janet was making $22,000.00 before taxes. Janet has a adjusted gross income of $1,320.36 and still has one son living with her. She has expenses totaling $3,157.00. Drew, on the other hand, brings in approximately $7,700.00 per month. Drew tried to withhold an additional amount of federal income taxes of more than the taxable amount which would provided for an income in a tax refund at the end of the year. However, after testimony from a CPA, it was clear that after the standard deductions, Drew has an adjusted gross income of $4,627.97. Drew will continue to earn money with the US Government with the same job and his earning potential will increase and he will continue to have health insurance and retirement benefits. Janet has no benefits.

This factor clearly favors awarding alimony in favor of Janet. As the facts reveal, Janet took care of the household and raised their two sons while Drew was the breadwinner. At the time of the divorce, Drew was making nearly $100,000.00 per year while Janet was making $22,000.00 before taxes. Janet has a adjusted gross income of $1,320.36 and still has one son living with her. She has expenses totaling $3,157.00. Drew, on the other hand, brings in approximately $7,700.00 per month. Drew tried to withhold an additional amount of federal income taxes of more than the taxable amount which would provided for an income in a tax refund at the end of the year. However, after testimony from a CPA, it was clear that after the standard deductions, Drew has an adjusted gross income of $4,627.97. (See 97 $5,354.66) Drew will continue to earn money with the US Government with the same job and his earning potential will increase and he will continue to have health insurance and retirement benefits. Janet has no benefits.

2. The health and earning capacities of the parties;

Janet, at the age of forty five, has to begin her career anew at the bottom. During the marriage she gave up her career to raise the family and run the household. She now starts a job at $22,000.00 and at best will have 20 to 25 years to work. She currently does not have any benefits including health and retirement. All of the college students out of college will receive the better jobs than her because they are younger and she doesn't have significant work experience, and attended college twenty-two years ago.

Drew, on the other hand, has worked throughout the entire marriage for over twenty-two years. He has a great career as a civil engineer working for the government. He will continue under the governmental system to receive incremental raises and will soon be making in excess of $100,000.00 a year. He continues and will continue to have health benefits and retirement. Drew is working on a career with twenty years experience in the same job market in which he will continue to only grow.

Clearly this factor sides with awarding Janet alimony.

3. The needs of each party;

The family clearly had a high standard of living. Both parties were able to buy a new car every 3-5 years. They lived in a $180,000.00 house on Amber Leaf Drive and went out to dinner often and went on nice vacations.

Janet is now lucky to be able to have a three bedroom house where she can raise the one child still in highschool and still have a room for her college student to return on vacations. She simply cannot pay all of the bills and expenses on her measly salary.

Drew on the other hand, is still raking in a considerable income. In fact during the separation he was able to buy a boat. Drew does not have any of the children living with him and does not have any great expenses or any physical limitations that would require any significant income expense. As such, this factor weighs heavily on Janet receiving alimony.

4. The obligations and assets of each party;

Janet really does not have any significant assets from the marriage. The only real asset was the retirement. The retirement can not be touched for over twenty years. All the marital debt has been paid based on the sale of the house but now there are no other assets Janet has.

Drew, on the other hand, has a significant asset in his career as a civil engineer for the US government. He has a salary of almost $100,000.00 which will only increase as the years continue in his successful career. Janet has the obligation of raising her two sons and putting them through college. The award of child support will not support tuition and living expenses for a child in college.

5. The length of the marriage;

The couple has been married for twenty-two years. Clearly a marriage of over twenty-two years supports an award of alimony. Janet forewent her career over those twenty-two years so that she could support a household for her husband Drew and their two young sons. Clearly this factor supports an award of alimony.

6. The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care;

Janet has physical custody of the two children. She must provide a house with enough room for the children. Clearly, the oldest is in college but he will need a place to return for holidays and Summer vacations. The youngest is still in highschool and requires to be taken care of as highschool children so need. As such, Janet is not even able to take a high paying job because she must remain available and assessable for her youngest son Adam. The award of child support will not alone pay for tuition, living expenses, and a place to come home to on the holidays. This factor clearly favors an award of alimony to Janet.

7. The age of the parties;

Janet is forty-five years of age, and Drew is forty-four years of age. However, Drew will be able to work for another twenty-five years building a long career. Janet begins at the bottom of a career with only twenty-five years to build. Janet will be competing in the job market with the twenty-five year olds recently graduated from college. Clearly this factor favors an award of alimony.

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

The family had a high standard of living on an income exceeding $120,000.00. The couple lived in a $180,000.00 house. Each bought a new car every 3-5 years. They went on nice vacations. They went out to eat. Clearly Janet can not live a lifestyle even remotely similar as to when she was married on a $22,000.00 year income. This factor clearly favors awarding alimony to Janet.

9. The tax consequences of the spousal support order;

The tax consequences favor alimony. Drew may deduct from his income taxes what he pays Janet in alimony. Therefore, alimony provides more income to both Drew and Janet.

10. Fault or misconduct;

Neither party were at fault as the couple proceeded on irreconcilable differences. However, Drew did ask for the divorce.

11. Wasteful dissipation of assets by either party;

Neither wastefully disposed of the assets. Drew did buy a boat during the separation.

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

Drew has over twenty years under his belt in a successful civil engineering career with the government with benefits such as health and retirement. Drew can look forward to another twenty-five years in the same career with an escalation of income for time worked with the government. Janet must start a career from the ground while still tending to the needs of her youngest son. She received her college degree over twenty years ago and must now compete with the "twenty somethings" that are recently educated. Janet makes $22,000.00 while Drew makes $95,000.00. Clearly, an award of periodic alimony is supported by the facts of this case.

"A wife is generally entitled to periodic alimony when her income is inadequate to allow her to maintain her standard of living and when her husband is able to pay. Heigle v Heigle, 654 So.2d 895, 898 (Miss. 1995)." Kilpatrick v Kilpatrick, 732 So.2d 876, 882 (Miss. 1999). Two important considerations in the award of periodic alimony are the earning capacity of the payor of alimony and the payor's necessary living expenses. Dunaway v Dunaway, 749, So.2d 1112, 1118 (Miss. Ct. App. 1999).

Drew has the ability to pay $1,200.00 per month in alimony. While Janet has a gross income of $1,819.78, Drew has an gross income of $7,665.66. Part of Drew's adjusted gross income of $4,627.97 includes $298.87 for mandatory insurance. Janet does not have insurance even after her adjusted gross income of $1,320.36 per month. After an award of $1,200.00 in alimony, Drew still has a higher income with less expenses than Janet. Plus, Drew's income will continue to steadily rise and Drew has job security. Janet does not have job security or the guarantee of a raise in income. Clearly the award for periodic permanent alimony was proper and is supported by the record.

Drew in his brief to this Court argues that granting Janet fifty percent of Drew's thrift savings plan and fifty percent of his federal employees retirement and one hundred percent of her savings plan of $1,100.00 creates a deficiency in Drews marital estate which negates an award for alimony. This is completely preposterous if you look at the income brought in monthly. Janet has a gross income of approximately $1,800.00 per month. Drew on the other hand, has a gross income of $7,665.60. Furthermore, Drew should continue with the good life with US Government while Janet is starting from scratch in a mortgage business which has presumably gone bust with the bust housing market bust over the last twelve months. Based on the factors as provided in determining whether permanent periodic alimony is appropriate, clearly the Chancellor did not manifestly error in awarding Janet permanent periodic alimony in the amount of $1,200.00 per month. Drew's adjusted gross income is $5,354.66 (TR 97) while Janet's adjusted gross income is merely $1,320.34 (TR 88).

Drew also argues against alimony with contending the Chancellor did not consider award of child support. However, Drew's argument is misplaced because half of the child support was paid directly to the eldest son who was in college and was not paid to Janet whatsoever. Furthermore, the youngest child was about to start college so presumably none of the child support for the youngest child would be paid to Janet either. Therefore, since Janet received little or none of the child support and that the money is or will go to the children directly, then alimony is necessary to equalize the desperate incomes between the parties in that Drew has an adjusted income of nearly $6,000.00 while Janet only has an adjusted income of approximately $1,300.00.

II. THE CHANCELLOR PROPERLY AWARDED JANET ATTORNEYS FEES

Janet submitted an attorney fee invoice totaling $7,163.96. (Note this was prior to writing the brief to the Chancellor at the trial level!!) The Chancellor awarded Janet attorney's fees of $5,000.00. Drew argues the Chancellor should not have awarded attorneys fees because the Chancellor awarded Janet half of Drew's TSP retirement accounts and therefore could pay her attorneys fees out of the retirement.

Janet has no retirement other than what the Chancellor awarded other than her IRA of $1,100.00. If Janet liquidated her share of the retirement as awarded, Janet would suffer a 20% penalty. Additionally, Janet would pay federal income tax on the liquidated retirement less twenty percent. Janet can not afford to liquidate the retirement. The awarded retirement is all Janet has for the future.

Janet is forty-five years old with no career. She currently makes $22,000.00 per year. She still has one son at home. Her adjusted gross monthly income is $1,320.36 per month. Her monthly expenses are $3,157.00 per month. She has no savings or retirement except what the Chancellor awarded which has to be for retirement. Clearly Janet does not have the ability to pay her attorney's fees.

An award of attorneys fees is proper where the party awarded the attorney's fees is financially unable to pay them. Crowe v. Crow, 641 So.2d 1100, 1106 (Miss. 1994). In Crowe, the Mississippi Supreme Court upheld an award of attorneys fees where the wife's expenses exceeded her income. Crowe, 641 So.2d at 1106. In the case *sub judice*, Janet's expenses clearly exceed her income. The Chancellor properly awarded Janet $5,000.00 in attorneys fees.

CONCLUSION

The Chancellor's awards are reasonable and appropriate. This Court should affirm the Chancellor's decision and additionally, award Janet attorney fees and expenses associated with defending this appeal.

Respectfully submitted,

JANET E. ANDERSON

By: ______________________

LEE D. THAMES, JR. (MS[redacted]
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CERTIFICATE OF SERVICE

I, LEE D. THAMES, Jr., Attorney for Appellee, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, hand-delivered, or via facsimile, a true and correct copy of the above and foregoing document to the following counsel of record:

Wren C. Way
Attorney at Law
913 Crawford St.
Vicksburg, MS 39180

Chancellor Barnes
P.O. Box 351
Vicksburg, MS 39181-0531

This the 19th day of May, 2008.

L.D.T. Jr.

LEE D. THAMES, JR.