

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

DREW L. ANDERSON

APPELLANT

V.

FILED

NO. 2007-CA-00879

JANET E. ANDERSON

APPELLEE

JUL 18 2008

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SUPREME COURT
COURT OF APPEALS

APPEAL FROM THE CHANCERY COURT OF WARREN COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

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IV.

RESPONSE TO APPELLEE'S MOTION TO DISMISS

Appellant adopts herein his previously filed Response to Motion to Dismiss.

On January 5, 2007, the chancellor entered "Final Judgment" awarding, among other things, that Drew pay to Janet the sum of \$1,200.00 per month as permanent, periodic alimony, as well as \$5,000.00 to her as attorney's fees. Contrary to our case law, the court gave no valid reasons for those conclusions, *Fisher v. Fisher*, 771 So 2d 364, 369 (Miss 2000). In that Judgment the court, at paragraph 1 at the bottom of page 3, specifically reserved the rights to later make findings of fact and conclusions of law.

On February 2, 2007, less than thirty (30) days after the rendition of the January 5, 2007 judgment, the appellant, Drew L. Anderson, filed his "Request for Specific Finding of Fact". On April 7, 2007, the chancellor entered the Memorandum Opinion and Final Judgment which contains Findings of Fact and Conclusions of Law from which this appeal emanates. There is no rule of court requiring that the Request for Specific Findings of Fact be filed within ten (10) days of the judgment. The Request was timely filed and the lower court so ruled in the April 27, 2007 Memorandum Opinion. That ruling was not cross-appealed by appellee and stands as a final adjudication.

Appellant asks that Appellee's Motion to Dismiss this appeal be overruled.

V.

REBUTTAL

The chancellor awarded Janet \$1,200.00 per month in periodic alimony and \$5,000.00 attorneys fees.

VI.

ALIMONY

Appellee's position that the lower court's award of \$1,200.00 per month in permanent, periodic alimony, defies logic and case law as well as principles of simple mathematics.

In *Armstrong v. Armstrong*, 618 So 2d 1278, 1280-1281 (Miss. 1993), this Court adopted several factors to be considered in both the question of whether or not to award alimony and, if so, the amount. Janet received \$125,542.34 in liquid assets, which was more than one-half of the couple's marital assets. Further she is a college educated and candidly admitted that she is quite capable of earning more than she now makes. When the oldest son chose to attend college out of state, she personally chose to move to that college town. Such a decision is neither normal nor financially practical for Mississippi parents. If it were, then Oxford, Starkville and Hattiesburg would enjoy huge growth. Factor "2" in *Armstrong* tells the court below to examine the "earning capacity" of appellee, not her choosing to ignore her capacity to earn, and to pick and choose only the few jobs that are available during school hours in order to be home with the children.

Citing *Heigle v. Heigle*, 654 So 2d 895, 898 (Miss. 1995), Janet asks the Court to "allow her to maintain her standard of living." It is common knowledge that the desire of a spouse "to be supported in a manner to which I am accustomed" is financially impossible if both parties in a divorce desire the same "custom" after the divorce. Out of necessity, it is quite common for "home makers" to enter the job market at the highest level commensurate with their education and ability. Janet made a personal decision not to do so and desires that Drew pay the price for it. Given her high award of liquid, marital assets and her education and ability, Janet should not have been

awarded permanent, periodic alimony, and to do so is an abuse of discretion by the lower court.

VII.

ATTORNEY FEES

The court below allowed attorneys fees of \$5,000.00 incurred by Janet to be paid by Drew. As set forth in Appellant's Brief (page 10) and the Opinion of the lower court (also page 10) Drew will have \$455.06 per month after taxes, child support, expenses and alimony. The parties agreed on the division of cash marital assets which totaled \$249,984.68 to which Janet contributed \$1,100.00.

Again, the court below awarded Janet marital assets of \$125,542.34 and Drew \$124,442.24. Prior decisions of this Court hold that the award of attorney's fees must be based one party's inability to pay and the other parties ability to pay. The Court below considered only the monthly income of the parties and did not consider the large amount of liquid assets (cash) awarded Janet. In *Tynes v. Tynes*, 860 So 2d 325, 331 (2203), this Court stated: "The Mississippi Supreme Court has held that when a party (in a divorce) is able to pay attorney's fees, an award of attorney's fees is not appropriate." and "The supreme court has also held that consideration of the relative worth of the parties, standing alone, is insufficient. The record must reflect the requesting spouse's inability to pay his or her own attorney's fees. (Emphasis added), citing *Bates v. Bates*, 755 So 2d 478, 482.

There was no finding by the court that Janet was unable to pay her attorney's fees, and clearly she was able to do so from her generous award of liquid marital assets. It is also clear from the transcript and the couple's separate financial statements that if either party pays the \$5,000.00 cash in attorney's fees, they must resort to their respective marital assets and to pay taxes on such withdrawal. In essence, the lower court would require Drew to pay Janet's attorney and his own attorney from Drew's assets. This is inequitable and an abuse of discretion where both parties have equal marital assets and the court has not found, as a fact, that appellee is unable to pay those fees. Obviously Janet is able to do so.

VIII.

CONCLUSION

Drew does not argue with the lower court's equitable division of marital assets which was largely agreed to by the parties even though Drew received less than fifty percent (50%) of those assets. Likewise, Drew cannot quarrel with the imposition of \$1,100.00 as child support. Janet received \$125,542.34 cash dollars as a result of that division. The fact that an invasion of those assets is subject to taxation affects both parties although the lower court considered only the effect of those taxes on Janet.

But, given the more than equal division of assets awarded to Janet and the resulting economic impact on Drew, it was clearly an abuse of discretion for the lower court, after balancing that division of marital assets, to award Janet \$1,200.00 per month in alimony as well as attorney's fees in the amount of \$5,000.00. The record shows that Janet has sizeable marital assets and a college education and the capacity of earning more than she presently chooses to make. It was her choice to move to another state and to take a job that fit her personal schedule so that she would have more time with her children. Janet clearly has sufficient assets to pay her own attorney.

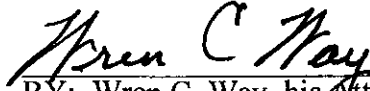
Again, this Court has been mandated by precedent to examine the total economic situation of the parties. Where a spouse receives less than one-half of the marital assets or even an equal amount, alimony should be considered in the light of that award, and a finding of that fact made in the record. That was not done in this case.

An award of attorney's fees must be based on Janet's present inability to pay and, conversely, Drew's ability to pay, and they are exactly the same. Janet has quite sufficient assets to pay her lawyer. The lower court did not find otherwise, except to say that she would have to pay taxes on any withdrawal, but so will Drew.

The lower court abused its discretion in the award of alimony and attorney's fees. Appellant respectfully requests that those awards be reversed and rendered.

Respectfully submitted,

DREW L. ANDERSON


BY: Wren C. Way, his Attorney

CERTIFICATE OF SERVICE

I, WREN C. WAY, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellant's Brief to Mr. J. Mack Varner, Esquire, at his usual mailing address of Post Office Box 1237, Vicksburg, Mississippi 39502, and to Hon. Vicki R. Barnes, at her usual mailing address of Post Office Box 351, Vicksburg, Mississippi, 39180.

THIS the 18th day of July, 2008.


WREN C. WAY