

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DREW L. ANDERSON

FILED

APPELLANT

V.

FEB 14 2008

NO. 2007-CA-00879

JANET E. ANDERSON

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

APPELLEE

APPEAL FROM THE CHANCERY COURT OF WARREN COUNTY, MISSISSIPPI

APPELLANT'S BRIEF

**WREN C. WAY, MSBN [REDACTED]
WAY, FIELD & BODRON
P. O. BOX 1113
1001 LOCUST STREET
VICKSBURG, MS 39180
(601) 634-8968
FAX: (601) 638-5223
E-MAIL: wayfieldbodron@cablelynx.com**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO.

JANET E. ANDERSON

APPELLANT

V.

DREW L. ANDERSON

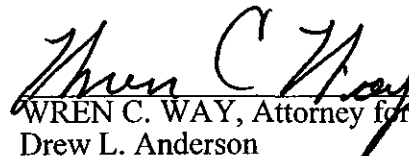
APPELLEE

I.

CERTIFICATE OF INTERESTED PERSONS

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

1. Drew L. Anderson,
Appellant
2. Janet E. Anderson,
Appellee
3. Wren C. Way, Esquire
Attorney for the Appellant
P.O. Box 1113
Vicksburg, MS 39181-1113
4. J. Mack Varner, Esq., attorney for Appellee
P.O. Box 1237
Vicksburg, MS 39181
5. Honorable Vicki R. Barnes, Chancellor
Post Office Box 351
Vicksburg, Mississippi, 39180



WREN C. WAY, Attorney for Appellant
Drew L. Anderson

II.

TABLE OF CONTENTS

I.	Certificate of Interested Persons	I
II.	Table of Contents	ii
III.	Table of Authorities	iii
IV.	Statement of the Issues	1
V.	Statement of the Case	2
VI.	Summary of the Argument	3
VII.	Argument	4-17
VIII.	Conclusion	18
	Certificate of Service	19

III.

TABLE OF AUTHORITIES

	<u>PAGE NO.</u>
Lauro v. Lauro , 847 So 2d 843 (Miss.2003)	9, 11, 13
Hemsley v. Hemsley , 639 So.2d 909, 912 (Miss. 1992)	10
Johnson v. Johnson , 650 So 2d. 1281, 1287 (Miss 1994)	11
Mace v. Mace , 818 So.2d 1130 (Miss 1992)	11
LaRue v. LaRue , 172 W. Va. 158, 304 S.E. 2d 312 at 334 (1983)	11
Duncan v. Duncan , 815 So. 2d 480, 485	12
Harrell v. Harrell , 231 So. 2d 793, 797 (Miss 1970)	12
Heigle v. Heigle , 771 So. 2d 341 (Miss 2000)	13

IV.

STATEMENT OF THE ISSUES

- 1. THE LOWER COURT ERRED IN GRANTING APPELLEE PERMANENT, PERIODIC ALIMONY.**
- 2. THE LOWER COURT ERRED IN THE GRANTING OF ATTORNEY'S FEES TO APPELLEE.**

V.

STATEMENT OF THE CASE

This divorce action was heard by the Chancery Court of Warren County, Mississippi. The parties agreed to an irreconcilable difference divorce, but disagreed upon a division of the marital assets, the question of whether alimony was due wife and an award of attorney's fees.

The lower court awarded appellee \$125,542.34 as her share of the marital assets and awarded appellant \$124,442.34 thereof. The court then set child support from appellant at \$1,100.00 per month, ordered appellant to pay alimony in the amount of \$1,200.00 per month and awarded appellee \$5,000.00 in attorney's fees.

VI.

SUMMARY OF THE ARGUMENT

After the lower court equitably divided the marital assets of the parties, the chancellor awarded appellee-wife the sum of \$1,200.00 as permanent, periodic alimony, \$1,100.00 in child support and \$5,000.00 as attorney's fees. Appellant argues that, when balanced with the monetary award to appellee in the division of marital assets and the award of child support, it was an abuse of discretion for the lower court to award any sum as alimony or attorney's fees.

IN THE COURT OF APPEALS FO THE STATE OF MISSISSIPPI

NO.

JANET E. ANDERSON

APPELLANT

V.

DREW L. ANDERSON

APPELLEE

VII.

FACTS

HISTORY OF THE MARRIAGE

Drew and Janet Anderson were married on October 6, 1984 and separated January 6, 2006. Two children were born of the marriage, both of whom are living with their mother, Janet, in Joplin, Missouri, which was the choice of Janet. One of the children was in college and the other attended high school. Janet filed for a divorce from Drew on June 9, 2006, citing cruel and inhuman treatment or, in the alternative, for irreconcilable differences.

The fault grounds were withdrawn by Janet and the action went forward on the grounds of irreconcilable differences.

On April 27, 2007, the lower court entered its Memorandum Opinion and Final Judgement, awarding Janet one-half of Drew's Thrift Savings Plan of \$230,101.68 (\$115,050.84), and one-half of his Federal Employees Retirement Account of \$18,783.00 (\$9,391.50) and one-hundred percent (100%) of her savings account (\$1,100.00). Janet was awarded \$1,200.00 as permanent periodic alimony. Without any specific finding of fact attesting to need or lack of ability to pay, Janet was also awarded \$5,000.00 in attorney's fees. Drew was also ordered to pay the sum of \$1,100.00 as child support for the two minor children of the parties.

VIII.

ARGUMENT

In *Lauro v. Lauro*, 847 So 2d 843 (Miss 2003), this Court addressed all points of this Appeal:

I. Whether the chancellor abused his discretion by not equitably distributing the marital assets and liabilities.

II. Whether the trial courts award of alimony in conjunction with its award of child support was against the over whelming weight of the evidence and so excessive that it constitutes an abuse of discretion.

III. Whether the chancellor committed manifest error in awarding (Janet) attorney's fees.

With regard to Issue I, Drew and Janet agreed upon a division of furniture and automobiles. Other than these items, the parties had remaining only monetary, marital assets consisting of Drew's Thrift Savings Plan, his Federal Employees Retirement, and Janet's savings account. The value of these assets total \$249,984.68. Janet's only monetary contribution to this total was \$1,100.00 in savings. The lower court awarded Janet fifty percent (50%) of Drew's Thrift Savings Plan (\$115,050.84), fifty percent (50%) of Drew's Federal Employees Retirement (\$9,391.50) and 100% of her savings plan (\$1,100.00) Though small, this finding creates a deficiency in Drew's equal sharing of the marital assets.

With regard to Issue II, Janet was awarded a total of \$125,542.34 in monetary, marital assets while Drew would receive \$124,442.34. In her Findings and Conclusions (T.93,94) the chancellor found:

“(3) The needs of each party. After deducting Mr. Anderson's monthly expense of \$2,599.60 and \$1,100.00 in child support he has \$1,655.00 (per month) remaining.”

Mrs. Anderson has a monthly income of \$1,320.36 and \$550.00 in child support, giving her an income of \$1,870.36. Her monthly expenses are \$3,157.00. She has a shortage of \$1,286.64.

This factor weighs in favor of awarding alimony.”

“(4) The obligations and assets of each party.

Mrs. Anderson will also receive her retirement account of \$1,100.00. The parties have

agreed that their personal property is equally divided.

Mr. Anderson and Mrs. Anderson will each receive fifty percent (50%) of Mr. Anderson's Thrift Savings Plan of \$230,101.68 and fifty percent of (50%) of Mr. Anderson's PERS annual account of \$18,783.00.

This factor weighs in favor of awarding alimony." (T 93, 94)

These two factors favoring an award of alimony are among the seventeen named in *Hemsley v. Hemsley*, 639 So. 2d 909, 912 (Miss. 1992). The lower court then added. "The Court finds that the award of periodic alimony would not prevent Mr. Anderson from living a normal life with a reasonable standard of living.

The Court finds that Mr. Anderson shall pay Mrs. Anderson \$1,200.00 per month as permanent periodic alimony" (T.101)

The Court below awarded permanent, periodic alimony to Mrs. Anderson in the monthly amount of \$1,200.00. As stated above the chancellor found, as a matter of fact, that Drew's adjusted gross income was \$5,354.66. (T.97), and that Janet's adjusted gross income was \$1,320.34 (T.88). The lower court found, as a fact, that after deducting Drew's monthly budget expenses, taxes, and \$1,100.00 in child support he had a disposable monthly income of \$1,655.06. Janet's disposable income was \$1,320.36 plus \$550.00 in child support, giving her an income per month, of \$1,870.36. "Her monthly expenses are \$3,157.00. She has a shortage of \$1,286.64" (T.93).

The court then assessed Drew with an additional \$1,200.00 in permanent periodic alimony.

Thus, the "bottom line" monthly disposable income of the parties is:

Drew - \$1,655.06 - \$1,200.00 alimony = \$455.06 per month

Janet - \$1,870.36 + 1,200.00 alimony = \$3,070.36 per month

Such a finding is patently unfair and inequitable toward Drew, especially in light of the award to Janet more than 50% of the total monetary assets, which is a net to her of \$125,542.34. Nowhere in the lower court's opinion as to alimony is this cash award to Mrs. Anderson considered in the calculation of Mrs. Anderson's "needs".

It is respectfully submitted that the lower court abused its discretion in the award of alimony. The *Lauro* Court considered an award of alimony and child support after the court had made an equitable distribution of marital assets. Citing *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss 1994), the Court held

“If there are sufficient marital assets which, when equitably divided and considered with each spouses non-marital assets, will adequately provide for both parties, no more need to be done.”

In the Andersons’ case there were no non-marital assets possessed by either party.

The Court further held that “alimony is considered only after the marital property has been divided and the chancellor determines one spouse has suffered a deficit.” (*Lauro* at p. 848).

In *Mace v. Mace*, 818 So. 2d 1130 (Miss. 1992), cited by *Lauro* at p. 849, this Court reversed the lower court’s findings as to property division and alimony:

“The chancery court’s valuation of the (medical) practice is reversed, and this case remanded for an adequate valuation of the practice. Also, the award of alimony is vacated, and the chancellor instructed to revisit the issue as alimony and equitable distribution should be considered together. *Ferguson*, 639 So. 2d at 929 (stating that though alimony and equitable distribution are different concepts, they should be considered together, as when one expands, the other must recede.)” (at P. 849)

It is further respectfully submitted that the lower court failed to likewise consider the award of child support vis a vis equitable distribution and alimony. The *Lauro* Court held, “Like alimony, child support must be considered collectively with all property division.” (at p. 848, emphasis added)

“All property division, lump sum or periodic alimony payments, and mutual obligations for child support should be considered together. Alimony and equitable distribution are distinct concepts, but together they command the entire field of financial settlement of divorce. Therefore, where one expands, the other must recede.” *Lauro* at p. 849, citing *LaRue v. LaRue*, 172 W. Va. 158, 304 S.E. 2d 312 at 334 (1983)

It is respectfully submitted that the lower court abused it’s discretion in “expanding” Janet’s award to include permanent alimony without addressing her large share of equitable distribution in

fulfilling her needs, as well as failing to consider that award when compared to the granting of child support.

ATTORNEY'S FEES

With regard to Issue III, the granting of attorney's fees in the amount of \$5,000.00 to Janet, the record is totally void of any finding by the lower court that she could not pay her attorney from her own funds. The court simply stated that that the parties income was substantially different and that Mrs. Anderson's expenses exceeded her income. (T.102) the Chancellor then went on to state:

"The awards Mrs. Anderson received; her retirement account of \$1,100.00, fifty percent (50%) of Mr. Anderson's Thrift Savings Plan and fifty percent (50%) of Mr. Anderson's annuity of \$18,783.00 if liquidated would be reduced by penalties and taxes."

"The Court finds that Mrs. Anderson is entitled to attorney's fees. The Court finds that Mr. Anderson shall pay to Mrs. Anderson \$5,000.00 in attorney's fees." (T 102, 103)

It is respectfully submitted that these "findings" are neither logical nor reasonable. If Mrs. Anderson draws down \$5,000.00 of the \$125,542.34 awarded to her, she will pay taxes thereon. If Mr. Anderson draws \$5,000.00 from his accounts for Janet's attorney fee, he, too, will have to pay the tax. In *Duncan v. Duncan*, 815 So. 2d 480, 485, this Court faced this issue directly:

"The Chancellor awarded Mrs. Duncan \$5,000.00 in attorney's fees without any finding that she was unable to defray her costs of representation from her own assets. This is one of the fundamental prerequisites of an award fo attorneys fees in a divorce action. *Harrell v. Harrell*, 231 So. 2d 793, 797 (Miss 1970). The evidence demonstrates Mrs. Duncan's access to fairly substantial sums of cash in the form of savings and checking balances and there is no proof indicating that these funds are otherwise committed so as to impose a substantial hardship on her were she required to pay her own cost of representation from assets available to her immediately upon the conclusion of this proceeding."

"In that light, we conclude that the award of attorney's fees was an abuse of discretion and

we reverse that award.” See also *Heigle v. Heigle*, 771 So. 2d 341 (Miss 2000), holding that it was an abuse of discretion for a trial court to award attorney’s fees without a factual finding that one party is unable to pay the fees in question

In *Lauro*, this Court likewise addressed the issue of awarding attorney’s fees where the lower court failed to balance the award of equitable distribution to the wife, together with awards for child support and alimony:

“Because we have reversed this case so that the chancellor may revisit the equitable distribution of the marital assets, it will be necessary for the chancellor to reconsider the award of attorney’s fees to Helen. Equitable distribution is the first step in all divorce matters; therefore, in addition to the awards of alimony and child support, this case is remanded so that the Chancellor may revisit the award of attorney’s fees, if necessary, after he has properly divided the marital property and awarded child support and alimony.” (at p. 850)

CONCLUSION

Appellant has no argument with the lower court’s equitable division of marital assets even through Drew received less than fifty percent (50%) of those assets. 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 is applicable to both parties although the lower court considered only the effect of those taxes on Janet.

Likewise, appellant cannot quarrel with the imposition of \$1,100.00 as child support. The lower court correctly calculated Drew’s adjusted gross income and “did the math” to arrive at that conclusion.

But, given the distribution award to Janet, and the resulting economic impact to Drew, it was clearly an abuse of discretion of the lower court 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 a college education and capable of earning more than her meager salary. It was her choice to move to another state to escape out-of-state college tuition and to take a job so that she would have more time with her teenage sons.

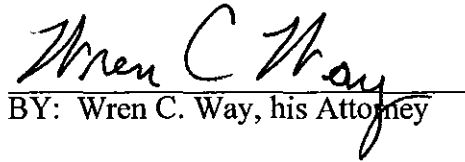
This Court has been mandated by precedent to examine the total economic situation of the parties. Where a spouse receives less than one-half of the marital assets, alimony should be considered in the light of the parties' financial situation and a finding of that fact made in the record. That was not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

Likewise, an award of attorney's fees must be based on one party's inability to pay and, conversely, the other party's ability to pay. Again, the record reflects that Janet has quite sufficient assets to pay her counsel. The lower court did not find otherwise, except to say that she would have to pay taxes on any withdrawal.

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 14th day of February, 2008.


WREN C. WAY