IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WANDA JOHNSON	**APPELLANT/CROSS APPELLEE**
VS.	**APPEAL NO. 2008-CA-00230**
IRA JOHNSON, JR.	**APPELLEE/CROSS APPELLANT**

APPEAL FROM THE CHANCERY COURT OF WASHINGTON COUNTY

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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WANDA JOHNSON	**APPELLANT/CROSS APPELLEE**
VS.	**APPEAL NO. 2001-CA-00381**
IRA JOHNSON, JR.	**APPELLEE/CROSS APPELLANT**

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.

Trial Court Chancellor:

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ARGUMENT

1.

THE LOWER COURT ABUSED ITS DISCRETION AND ERRED IN GRANTING AN IRRECONCILABLE DIFFERENCES DIVORCE AND PROCEEDING TO A TRIAL ON THE MERITS WITHOUT REVIEWING THE COURT FILE OR FOLLOWING THE SPECIFIC STATUTORY PROCEDURE AND ABUSED ITS DISCRETION AS TO DENY THE APPELLANT A FAIR TRIAL.

DISCUSSION

Section 93-5-2, Mississippi Code of 1972, as amended, reads as follows:

(1) Divorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process.

(2) If the parties provide by *written agreement* for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties *and the court finds that such provisions are adequate and sufficient*, the agreement may be incorporated in the judgment, and such judgment may be modified as other judgments for divorce.

(3) If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. *Such consent must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment*. Such consent may not be withdrawn by a party without leave of the court after the court has commenced any proceeding, including the hearing of any motion or other matter pertaining thereto. The failure or refusal of either party to agree as to adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between the parties, or any portion of such issues, or the failure or refusal of any party to consent to permit the court to decide such issues, shall not be used as evidence, or in any manner, against such party. *No divorce shall be granted* pursuant to this subsection *until all matters* involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings *have been* either adjudicated by the court or agreed upon by the parties and *found to be adequate and sufficient by the court* and included in the judgment of divorce. Appeals from any orders and judgments rendered pursuant to this subsection

may be had as in other cases in chancery court only insofar as such orders and judgments relate to issues that the parties consented to have decided by the court.

(4) Complaints for divorce on the ground of irreconcilable differences must have been on file for sixty (60) days before being heard. Except as otherwise provided in subsection (3) of this section, a joint complaint of husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process, for divorce solely on the ground of irreconcilable differences, shall be taken as proved and a final judgment entered thereon, as in other cases and without proof or testimony in termtime or vacation, the provisions of Section 93-5-17 to the contrary notwithstanding.

(5) Except as otherwise provided in subsection (3) of this section, *no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial*; provided, however, that *a divorce may be granted* on the ground of irreconcilable differences where there has been a contest or denial, *if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.*

(6) Irreconcilable differences may be asserted as a sole ground for divorce or as an alternate ground for divorce with any other cause for divorce set out in Section 93-5-1.

-emphasis added

It is readily apparent that the statutory requirements were not met in this case. There was no written agreement for an irreconcilable divorce and there was no finding in the bench opinion or in the judgment that the parties had reached or made an adequate and sufficient settlement.

A reading of the record reveals that there had been discussion between the attorneys about efforts to reach an agreement. Wanda, during cross examination, acknowledged that they had agreed to proceed "no fault" but adamantly stated that there never was a full agreement. (T-25, RE-7) The details of an email between counsel that Ira's attorney referred to and read at trial but did not enter as evidence also supports the argument that no agreement was ever reached. (T-26, 27, RE-8,9) At different times during the trial it seemed that the parties wavered in the specifics of what they had discussed and would be willing to agree to during the proceedings. (T-33, RE-9) It became so confused that at times it seemed that the Chancellor was presiding over a settlement conference. In

fact the Chancellor abused her discretion by involving herself in the settlement discussions and apparently became irritated at the exchange to the point that she stated: "All right, well let's move along. We're going to move along and we're going to try to get through with this by lunch I hope." (T-40-46, RE-12-18)

At trial the only argument made in support of awarding Ira attorneys fees from Wanda was that she had refused to reach some resolution–a resolution that was not established anywhere in the record–and that Mr. Boyd's extra work entitled him to more fees. (T-36-38, RE-10,11) There is no evidence in the record that the charges of Ira's trial attorney were reasonable or necessary.

Assuming *arguendo* that a written agreement may not have been required by law or may have been waived by the verbal acknowledgments on the record that the parties had in fact during the course of the hearing agreed to an irreconcilable difference divorce, the written aspect of the agreement and the finding of "adequate and sufficient" remain requirements of any property settlement between the parties whether it is partial or complete. No such written agreement was entered into and no such finding was ever made by the lower Court. Additionally, there was no written consent entered into by the parties, and the statute is quite specific in its requirements. In view of the lack of the statutorily required agreement and findings, according to the specific language of the statute, no divorce should have been granted.

This judgment should be reversed and remanded.

2.

THE LOWER COURT ABUSED ITS DISCRETION AND ERRED WHEN CONSIDERING THE TESTIMONY OF AMBER JOHNSON IN CHAMBERS THUS DENYING WANDA THE RIGHT OF CONFRONTATION AND IN AWARDING CUSTODY OF THE MINOR CHILD TO THE APPELLEE.

DISCUSSION

Amber Johnson was 17 at the time of trial, soon to be 18. From all indications she is a smart girl who was planning to go to Delta State. It is undisputed that from the time of the separation in 2004 through sometime just prior to trial Wanda Johnson had been the primary custodian of her with little help from Ira. (T-50-59, RE-19,20) It wasn't until Ira purchased Amber an automobile without consultation with Wanda that Amber became difficult, and Wanda attributes that difficulty to Ira's influence over her with the automobile. (Two automobiles actually as the first one was a total loss in an accident, and Ira immediately replaced it with another.) (T-48, 49)

At trial the Chancellor over the objection of Wanda brought this child into chambers and examined her without the parties or counsel present. (T-4-17) The record is silent of any agreement to this procedure, however the Chancellor placed into the record Wanda's objection to Ambers in chamber testimony (T-17, RE-6). Amber described one instance when she and her mother got into what she described as a physical altercation. When Wanda attempted to provide her version of what had happened, the Chancellor would not let her testify. (T-20, 21)

The principal interest of the court in child custody suits is to make a custodial arrangement which will be in the best interest of the child. This Court has listed a number of factors the Court should consider in Albright v. Albright, 437 So. 2d 1003 (Miss. 1983) and its progeny.

1. Age, health and sex of the child.

This is the first factor listed and is an important one. However, we cannot know how this factor was considered by the Chancellor since no findings were made of record.

2. Continuity of care prior to the separation.

The record clearly reveals that Wanda would prevail on this issue until Ira interceded with his gift of two automobiles. However, we cannot know how this factor was considered by the Chancellor since no findings were made of record.

3. Parenting skills and willingness and capacity to provide primary childcare.

We cannot know how this factor was considered by the Chancellor since no findings were made of record.

4. Employment of the parent and responsibilities of that employment.

We cannot know how this factor was considered by the Chancellor since no findings were made of record.

5. Physical and mental health of the parents.

We cannot know how this factor was considered by the Chancellor since no findings were made of record.

6. Emotional ties of the parent and the child.

We cannot know how this factor was considered by the Chancellor since no findings were made of record.

7. Moral fitness of the parents.

We cannot know how this factor was considered by the Chancellor since no findings were made of record.

8. The home, school, and community record of the child.

We cannot know how this factor was considered by the Chancellor since no findings were made of record.

9. The preference of the child at the age sufficient by law to express a preference.

Amber stated her desire to live with her father, but the Chancellor did not provide any cross examination and did not allow this testimony in open court over Wanda's objection. The Chancellor also refused to allow Wanda to provide her version of what had happened on that one occasion when Amber said an argument became physical. This evidence was not established to any degree of reliability. Nontheless, we cannot know how this factor was considered by the Chancellor since no findings were made of record.

10. Stability of home and employment of each parent.

Wanda resides in the marital home. Ira resides in a home that is titled in his absentee Aunt's name. The evidence in the record is limited on this issue. We cannot know how this factor was considered by the Chancellor since no findings were made of record.

11. Other factors relevant to the parent-child relationship.

Again, we cannot know how this factor was considered by the Chancellor since no findings were made of record.

It appears that the Chancellor relied heavily on the child's testimony in chambers, testimony that alone should cause the appellate Court great concern. The record is clear that this testimony was taken over the objection of Wanda. Cross examination should have been allowed. Rather, it appears that the Chancellor took Amber's testimony as fact and refused to consider anything to the contrary.

Where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error. *Jerome v. Stroud,* 689 So.2d at 757 (citing *Smith v. Smith,* 614 So.2d 394, 397 (Miss.1993)), SEE ALSO: *Hollon v. Hollon,* 784 So.2d 943 (2001).

3.

THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN ITS DIVISION OF MARITAL ASSETS WITHOUT CONSIDERING SUFFICIENT EVIDENCE, CONSIDERATION OF FERGUSON, OR CONSIDERATION OF REQUIRED FINANCIAL DECLARATIONS.

DISCUSSION

> Rule 8.05 of the Mississippi Uniform Chancery Court Rules provides as follows: Unless excused by Order of the Court for good cause shown, *each party in every domestic case involving economic issues and/or property division shall provide* the opposite party or counsel, if known, the following disclosures:
>
> (A) A *detailed written statement of actual income and expenses and assets and liabilities,* such statement to be on the forms attached hereto as Exhibit "A" and "B".
>
> (B) Copies of the preceding year's Fedral and State Income Tax returns, in full form as filed, or copies of W-2s if the return has not yet been filed.
>
> (C) A general statement of the providing party describing employment history and earnings from the inception of the marriage or from the date of divorce, whichever is applicable. *The party providing the required written statement shall immediately file a Certificate of Compliance* with the Chancery Clerk for filing in the court file. The Certificate of Compliance shall be in the form of the attached Exhibit "C". The

> foregoing disclosures shall be made by the plaintiff not later than the time that the defendant's Answer is due, and by the defendant at the time that the defendant's Answer is due, but not later than 45 days from the date of the filing of the commencing pleading. The Court may extend or shorten the required time for disclosure upon written motion of one of the parties and upon good cause shown.
>
> When offered in a trial or a conference, the party offering the disclosure statement shall provide a copy of the disclosure statement to the Court, the witness and opposing counsel.
>
> This rule shall not preclude any litigant from exercising the right of discovery, but duplicate effort shall be avoided.
>
> *The failure to observe this rule, without just cause, shall constitute contempt of Court* for which the Court shall impose appropriate sanctions and penalties.
>
> *-emphasis added*

It is readily apparent from the record that no such financial disclosures were made between the parties, nor were they made during trial as evidence to aid and assist the Chancellor in making her decision. Other than testimony of the parties that during the marriage they had purchased things through their joint account, that Ira had paid child support during the separation, and that both parties had expended funds for the benefit of Amber, the only financial evidence received by the Chancellor was the verbal testimony of each party of their salary. (T-71, 96) While it is acknowledged that both parties mentioned that they had filed bankruptcy either before these proceedings or during them, the details of those bankruptcies were not revealed, and there remains an absolute dearth of evidence of the financial status of the parties at the time of trial.

Without an 8.05 financial declaration and without any meaningful evidence of the parties respective financial abilities, the ruling of the lower Court is on its face an abuse of discretion because it is based wholly on speculation and conjecture. Except for the evidence of salaries of the parties the record is essentially silent of the parties's respective financial status–monthly expenses, debts, amounts withheld from salary, pension plans, retirement plans, savings, investments, assets,

etc. Wanda works at the Washington County Head Start and brings home $961.00 two times per month. Ira works at Producer's Rice and Caldwell Banker and earns $63-66,000 per year exclusive of his real estate sales. (T-71, 96) Even if this limited evidence of financial ability were to be considered sufficient, it is clear that the income of Ira is several times that of Wanda, resulting in an inequitable award in favor of Ira.

In dealing with the division of the marital property, this Court has routinely considered the Chancellor's findings regarding the factors for equitable distribution found in *Ferguson v. Ferguson,* 639 So.2d 921, 928 (Miss.1994). SEE: *Owen v. Owen,* 928 So.2d 156 (Miss.2006) (citing *Reddell v. Reddell,* 696 So.2d 287 (Miss.1997)). This Court has held in the past that a chancellor's division of marital assets will be set aside if not "supported by substantial credible evidence." SEE: Carrow v. Carrow, 642 So.2d 901 (Miss.1994). Further this Court has stated that it "will not hesitate to reverse if the chancellor's decision is manifestly wrong, or that the court applied an erroneous legal standard." (*Owen* at 160.)

In *Ferguson,* the Mississippi Supreme Court listed a non-exclusive list of seven factors that chancery courts should use when determining an equitable division of marital property:

> (1) contribution to the accumulation of marital wealth,
> (2) disposition of marital assets,
> (3) market and emotional value of the marital assets,
> (4) value of non-marital assets,
> (5) tax and other economic consequences of the division of the property,
> (6) minimization of future friction between the parties, and
> (7) the needs of the parties and their income and earning capacity.
>
> -*Ferguson,* 639 So.2d at 928.

This Court has made it clear since *Ferguson* that trial courts are to look at both a party's economic contributions to the marriage and the party's domestic contributions and if they fail to do so, their rulings are subject to being set aside. See: *Berryman v. Berryman,* 907 So.2d 944

(Miss.2005); *Hensarling v. Hensarling,* 824 So.2d 583 (Miss.2002); *Selman v. Selman,* 722 So.2d 547 (Miss.1998); *Henderson v. Henderson,* 757 So.2d 285 (Miss.2000) (quoting *Bullock v. Bullock,* 699 So.2d 1205 (Miss.1997)); and *Watson v. Watson,* 724 So.2d 350 (Miss.1998) (citing *Ferguson,* 639 So.2d at 928).

Because of the abuse of discretion in not following the Ferguson guidelines, all aspects of the judgment relating to the division of property–including but not limited to the order for the sale of the marital domicile–should be reversed and remanded.

4.

THE LOWER COURT ABUSED ITS DISCRETION AND ERRED GRANTING ATTORNEYS FEES TO THE APPELLEE.

DISCUSSION

The Chancellor granted attorney's fees to Ira from Wanda in the amount of $3,600.00. (T-128) Both parties in this case are gainfully employed, though as stated earlier, Ira earns multiple times more than Wanda. At no time was it established that the fee sought was reasonable or necessary, and the record is clear that Ira, earning a yearly salary of $63,000 to $66,000 not including his real estate income, could afford to pay his own attorney. (T-96) The record is painfully silent of any other assets of Ira or any retirement or pension he held. The law regarding attorney's fees in divorce cases is very clear.

In the case of *Dunn v. Dunn*, 609 So.2d 1277 (1992), this Court set out the general rule regarding attorney's fees in divorce cases. This Court said:

> The award of attorney fees in divorce cases is left to the discretion of the chancellor, ***assuming he follows the appropriate standards***. *Adams v. Adams,* 591 So.2d 431, 435 (Miss.1991), *citing Cheatham v. Cheatham,* 537 So.2d 435, 440 (Miss.1988). The fee ***should be fair*** and should only compensate for services actually rendered ***after it has been determined that the legal work charged for was reasonably required and necessary***. *Adams,* 591 So.2d at 435, quoting *McKee v. McKee,* 418

So.2d 764, 767 (Miss.1982). Unless the chancellor is manifestly wrong, his decision regarding attorney fees will not be disturbed on appeal. *Trunzler v. Trunzler,* 431 So.2d 1115, 1116 (Miss.1983).

–Dunn at 1287
-emphasis added

Generally, unless the party requesting attorney fees can establish the inability to pay, such fees should not be awarded. *Jones v. Starr,* 586 So.2d 788 (Miss. 1991); Martin v. Martin,566 So.2d 704 (Miss.1990). No such inability to pay was established by Ira.

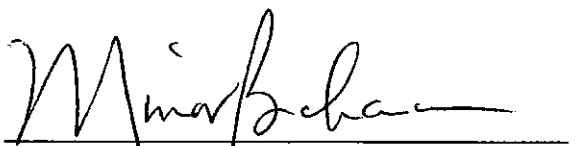
The award of attorney's fees should be reversed and remanded.

CONCLUSION

For the reasons as set forth herein, the divorce and all rulings relating to the custody of the minor child, division of marital property, and attorney's fees should be reversed and remanded.

Respectfully submitted,

WANDA JOHNSON

BY: 

MINOR F. BUCHANAN, ESQ.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this date hand delivered or mailed postage prepaid a true and correct copy of the above and foregoing brief to trial Chancellor and all counsel at their last known address, to wit:

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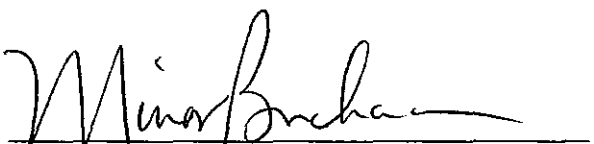
So certified, this the 10th day of December, 2008.



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