IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00038 COA

ABU SAEED MOHAMMAD ZAHURUL HAQUE

APPELLANT

v.

SURAIYA BEGUM HAQUE

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HYDE RUST JENKINS II

COURT FROM WHICH APPEALED: CHANCERY COURT OF CLAIBORNE COUNTY

ATTORNEY FOR APPELLANT:

CARMEN G. CASTILLA

ATTORNEYS FOR APPELLEE:

CLYDE E. ELLIS; JOHN E. ELLIS

NATURE OF THE CASE: DIVORCE

TRIAL COURT DISPOSITION: DIVORCE GRANTED TO WIFE ON THE GROUND OF HABITUAL CRUEL AND INHUMAN TREATMENT; LUMP-SUM ALIMONY AWARDED; EQUITABLE DIVISION OF MARITAL ASSETS ORDERED; AND PARTIAL ATTORNEY'S FEES AWARDED

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

The Chancery Court of Claiborne County awarded Mrs. Suraiya Begum Haque a divorce from Dr. Abu Saeed Mohammed Zahurul Haque on the ground of habitual cruel and inhuman treatment. Feeling aggrieved, Dr. Haque appeals arguing: (1) the lower court erred in refusing to acknowledge the divorce of the parties pursuant to the Muslim family laws ordinance of Bangladesh; (2) the alimony award was excessive and an abuse of discretion; (3) the award to the wife of a portion of the husband's retirement annuity was an abuse of discretion; (4) the trial judge's assessment of the issues was impermissibly tainted by his view of the Appellant's religious beliefs; and (5) the court erred in its award of partial attorney's fees to the wife. Finding no error, we affirm.

STATEMENT OF THE FACTS

In the Chancery Court of Claiborne County, Mrs. Suraiya Begum Haque filed for divorce from Dr. Abu Saeed Mohammed Zahurul Haque, her husband of six years, on the ground of habitual cruel and inhuman treatment. Dr. Haque counter-claimed for divorce and also asserted that the parties were already divorced pursuant to a divorce obtained in Bangladesh.

The record reveals that the parties were married in Bangladesh in 1985. At the time of the marriage, Mrs. Haque was employed by the Ford Foundation in a supervisory capacity where she earned a salary of approximately $600 per month in addition to an annual bonus, car, fuel and a driver. Mrs. Haque left her position and accompanied her new husband to Claiborne County, Mississippi, where he has resided and has taught at Alcorn State University. Subsequent to the marriage, Mrs. Haque became a naturalized citizen of the United States. Dr. Haque had been a naturalized citizen of the United States for some years prior to the marriage in 1985. The parties resided on campus in faculty housing subsidized by Alcorn State University. Mrs. Haque earned a master's degree from 1989 until 1991 at Alcorn. Mrs. Haque earned her fees and $100 a month as a graduate assistant from January 1990 until May 1991. Dr. Haque earned wages of $44,600 in 1992. A 3,300 square foot home was built in Bangladesh during the marriage on land owned by Dr. Haque prior to the marriage.

Mrs. Haque had a daughter from a previous marriage. In 1991, Mrs. Haque made arrangements to travel to Bangladesh on a ninety-day tourist visa to attend her daughter's wedding. Mrs. Haque purchased a round trip airplane ticket with her anticipated return in January 1992. A few days before her departure for Bangladesh, Dr. Haque threw a surprise birthday/graduation party for Mrs. Haque.

During December 1991, Dr. Haque traveled to Bangladesh. Mrs. Haque was not aware of Dr. Haque's trip. While in Bangladesh, Dr. Haque sought and received a Bangladesh divorce by performing "talak," a Muslim religious ceremony provided for under the laws of Bangladesh. Dr. Haque then returned to his home in Claiborne County and resumed his teaching duties at Alcorn. Upon his return home and unknown to Mrs. Haque, Dr. Haque canceled Mrs. Haque's health insurance under his health insurance plan from the State of Mississippi.

Mrs. Haque, while still in Bangladesh, was notified that Dr. Haque had obtained a divorce by performing "talak." Mrs. Haque returned to Claiborne County in January 1992 where she, through the intervention of family friends, attempted to reconcile with her husband. Dr. Haque did not want a reconciliation and contended that the parties were divorced. Mrs. Haque had little or no money upon her return, and Dr. Haque did not provide her with any means of support. Mrs. Haque resorted to help from friends and family for her support. Mrs. Haque also sought medical assistance as she lost weight and became ill.

In November 1993, Mrs. Haque obtained a divorce in the Chancery Court of Claiborne County on the ground of habitual cruel and inhuman treatment. The chancellor found that the Bangladesh divorce should not be recognized as a valid divorce and was void as to Mrs. Haque. The chancellor found that Mrs. Haque contributed to the well-being of the marriage, and that she was entitled to an equitable division of the marital assets. The chancellor ordered Dr. Haque to reimburse Mrs. Haque for her medical bills in the amount of $600. Dr. Haque was ordered to pay Mrs. Haque $2,000 for her interest in the personalty located in the family home, with several named items to be given to Mrs. Haque. Mrs. Haque was awarded back alimony in the amount of $900; $1,500 toward her attorney's fees; and lump-sum alimony of $14,700. The chancellor entered a Qualified Domestic Relation Order providing Mrs. Haque with $17,800 from a tax shelter annuity/retirement fund. Dr. Haque was awarded the family car and retained all remaining funds in the annuity ($2,731); $13,100 held in certificates of deposit; his deferred compensation plan containing $21,500; an IRA containing $12, 430.09; and his Public Employees Retirement Plan containing $50,653.03. The chancellor made no provision for the home being built in Bangladesh, recognizing that the property was located outside his jurisdiction, and that Dr. Haque's other family members may have claims on the property under the law in Bangladesh. The chancellor did consider the Bangladesh home in his decision in that it was built during the marriage.

STANDARD OF REVIEW

"Our scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994) (citing *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994)).

ARGUMENT AND DISCUSSION OF THE LAW

> I. THE LOWER COURT ERRED IN REFUSING TO ACKNOWLEDGE THE DIVORCE OF THE PARTIES PURSUANT TO THE MUSLIM FAMILY LAWS ORDINANCE OF BANGLADESH.

Dr. Haque argues that he does not contest the grant of the divorce itself, yet asserts that the chancellor erred in not recognizing the Bangladesh divorce, and for failing to recognize the terms of the Bangladesh divorce.

We are squarely presented for the first time with whether recognition is to be given by the State of Mississippi to an ex parte divorce judgment of a foreign country where personal jurisdiction of the non-divorcing party was acquired by her physical presence in the foreign land, and not by her submission or presence before the foreign court, while considering that neither the domicile nor residence of either party is within that foreign jurisdiction.

The Mississippi Supreme Court has recognized that the "[e]nforcement of foreign nation judgments in our courts is governed by the principle of comity. The principle of comity is similar to full faith and credit except that it is not governed by Federal statutes and that its application rests in the *discretion of the trial judge.*" *Laskosky v. Laskosky*, 504 So. 2d 726, 729 (Miss. 1987) (emphasis added) (citations omitted).

The Mississippi Supreme Court faced a similar question of whether full faith and credit should be given to an Arkansas divorce and child custody decree. *Winters v. Winters*, 236 Miss. 624, 111 So. 2d 418, 418-19 (Miss. 1959). In *Winters*, a divorced husband sought to obtain custody of his daughter from his divorced wife. *Winters*, 111 So. 2d at 418. The chancellor awarded custody to the wife. *Id.* The husband, who had obtained an Arkansas divorce and was awarded custody by the Arkansas court, argued res judicata as to custody while the wife argued that the Arkansas decree was invalid and should not be given any consideration by the Mississippi courts. *Id*. at 419. The lower Mississippi court found that the husband had failed to meet the requisite residency requirements in Arkansas which were conditions precedent to secure jurisdiction of the Arkansas court. *Id*. In affirming the Mississippi chancellor's refusal to recognize the Arkansas divorce and custody decree, the Mississippi Supreme Court noted that Winters went to Arkansas *for the sole purpose of obtaining a divorce* and that "[t]he granting of a divorce, under such circumstances, is *contrary to the public policy of this state*; and the courts of this state will determine for themselves as to the jurisdiction of a court in another state to render such [a] decree." *Id.* at 420 (emphasis added) (citations omitted). Similarly, the present set of circumstances violates the public policy of this State. Mrs. Haque went to Bangladesh for a limited period of time to attend her daughter's wedding. Her tourist visa expired after ninety days, and she had purchased a round trip ticket to return home to Claiborne County, Mississippi. Her subsequent return home confirms that she did not intend to remain in Bangladesh. For the courts of Mississippi to allow Dr. Haque to travel to Bangladesh for the sole purpose of obtaining a divorce without his wife's prior knowledge would clearly violate the public policy of Mississippi. We are not presented with a situation where two parties voluntarily seek and obtain a foreign divorce. To the contrary, only one party was even aware that a divorce action was sought prior to the granting of the divorce.

Finally, in *Weiss v. Weiss*, 579 So. 2d 539, 541 (Miss. 1991), the Mississippi Supreme Court recognized that the litigation of divorce and alimony are divisible or separable as to both divorce decrees of Mississippi and those of foreign courts. Essentially, it is permissible to maintain an alimony action in a Mississippi court when the divorce decree was obtained in a foreign jurisdiction. *Id.* Thus, regardless of the validity of the Bangladesh divorce, the jurisdiction of the chancellor to determine alimony and equitable distribution of marital assets for Mrs. Haque is not precluded simply because the divorce was obtained outside of Mississippi.

In light of the foregoing discussion, we cannot say that the chancellor abused his discretion in not recognizing the Bangladesh divorce. The circumstances surrounding the granting of that divorce reinforce our determination that the chancellor's decision was correct. We find this issue to be without merit.

II. THE ALIMONY AWARD WAS EXCESSIVE AND AN ABUSE OF DISCRETION.

Dr. Haque argues that the chancellor erred in making a lump-sum alimony award and also argues that the amount is excessive and punitive.

"Our scope of review of an alimony award is well-settled. Alimony awards are within the discretion of the chancellor, and his discretion will not be reversed on appeal unless the chancellor was manifestly in error in his finding of fact and abused his discretion." *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145-46 (Miss. 1995) (quoting *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993)

(citation omitted)). "This Court will not disturb a chancellor's ruling if the findings of fact are supported by credible evidence in the record." *Ethridge*, 648 So. 2d at 1146 (citations omitted). Lump-sum alimony is allowable in either a single lump sum or fixed periodic payments. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1281 (Miss. 1993). We are instructed that "[i]n the final analysis, all awards should be considered together to determine that they are equitable and fair." *Hubbard v. Hubbard*, 656 So. 2d 124, 130 (Miss. 1995).

The Mississippi Supreme Court has set forth four factors which are to be considered in awarding lump-sum alimony:

> 1) substantial contribution to accumulation of wealth by quitting job to become housewife or assisting in husband's business; 2) long marriage; 3) separate income or separate estate meager in comparison to that of payor spouse; and 4) financial security without lump-sum alimony.

Creekmore v. Creekmore, 651 So. 2d 513, 517 (Miss. 1995); *Crowe v. Crowe*, 641 So. 2d 1100, 1103 (Miss. 1994) (citations omitted); *Bland v. Bland*, 629 So. 2d 582, 587 (Miss. 1993) (citation omitted). "Most important is a comparison of the estates." *Creekmore*, 651 So. 2d at 517. In *Heigle v. Heigle*, the court stated that "[i]n the case of property settlement and lump sum alimony, the court's decision must hinge on the value of the marital estate, or the spouses' separate estates." *Heigle v. Heigle*, 654 So. 2d 895, 898 (Miss. 1995) (citing *Ferguson v. Ferguson*, 639 So. 2d 921, 928-29 (Miss. 1994); *Cheatum v. Cheatum*, 537 So. 2d 435, 438 (Miss. 1988)).

In reviewing the factors, Mrs. Haque quit her job in Bangladesh to come to the United States with her new husband, and trial testimony indicated her job was quite a position for anyone-- especially a woman--to hold in that country; the marriage lasted six years; Mrs. Haque has no separate estate and has had to rely on others for her support since returning from Bangladesh; and Mrs. Haque would have no financial security without this award in that she had no money upon which to rely at the time of the divorce or on a long-term basis.

Dr. Haque gives substantial weight to the first factor in arguing that Mrs. Haque is not entitled to lump-sum alimony because she did not contribute to the accumulation of his wealth. Instead, he argues that it was his work that resulted in the accumulation of wealth. The chancellor found that Mrs. Haque contributed to the well-being of the marriage. Mrs. Haque did contribute to the maintenance of the household during the marriage. Mrs. Haque testified that her small salary (of $100 per month which she earned as a graduate assistant) went to support her personal expenses. Thus, with Mrs. Haque paying such expenses, Dr. Haque was free to use his income elsewhere.

The disparity of the estates of the parties confirms that the chancellor correctly determined that Mrs. Haque was entitled to lump-sum alimony. In balancing the equities, we do not find the award to be an abuse of discretion. This issue is without merit.

III. THE AWARD TO THE WIFE OF A PORTION OF THE HUSBAND'S RETIREMENT ANNUITY WAS AN ABUSE OF DISCRETION

Dr. Haque argues that the chancellor erred in awarding Mrs. Haque $17,800 to be taken from his tax shelter annuity/retirement funds. He argues that because she was not entitled to any part of his state pension plan, that the chancellor violated "the spirit of the law precluding such division, and accomplished the same end, by awarding her almost all of the tax shelter annuity."

The Mississippi Supreme Court has long recognized that chancellors have the authority to order an equitable division of the property accumulated through the joint efforts of both husband and wife in a divorce action. *Ferguson v. Ferguson*, 639 So. 2d 921, 934 (Miss. 1994). To complete an equitable division of such property, the chancery court has the authority to divest title to real estate. *Id*. (citing *Draper v. Draper*, 627 So. 2d 302, 305 (Miss 1993)). Additionally, the matter is within the chancellor's discretion, considering all the equities and other relevant facts. *Id.* (citing *Bowe v. Bowe*, 557 So. 2d 793, 794 (Miss. 1990)). The chancery court "has the authority to order an equitable division of jointly accumulated property and in doing so to look behind the formal state of title." *Ferguson*, 639 So. 2d at 935 (quoting *Johnson v. Johnson*, 550 So. 2d 416, 420 (Miss. 1989)). However, we are reminded "that non-marital property is not subject to equitable division." *Ethridge v. Ethridge*, 648 So. 2d 1143, 1145 (Miss. 1995). The Mississippi Supreme Court has stated:

> We define marital property for the purpose of divorce as being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor. We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic or otherwise are of equal value.

Hemsley v. Hemsley, 639 So. 2d 909, 915 (Miss. 1994). "A spouse who has made a material contribution toward the acquisition of property which is titled in the name of the other may claim an equitable interest in such jointly accumulated property incident to a divorce proceeding." *Ferguson*, 639 So. 2d at 935 (quoting *Jones v. Jones*, 532 So. 2d 574, 580 (Miss. 1988) (citations omitted)). It is well settled that pension and 401K monies are marital assets subject to marital division. *Magee v. Magee*, 661 So. 2d 1117, 1124 (Miss. 1995) (citing *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss. 1994)).

The tax shelter annuity contained $20,531.56 of which $17,800 was awarded to Mrs. Haque. In addition to the annuity, Dr. Haque had $50,653.03 in the Public Employees Retirement System and $12,430.09 in an IRA. The chancellor awarded one-third to Mrs. Haque and designated that the funds were to come from the annuity. This annuity was opened by Dr. Haque during the second year of the marriage growing from an initial deposit of $100 to $20,531 at the time of trial. The reality that this chancellor was faced with is that this couple's primary assets were in retirement savings (the only real property owned was the land in Bangladesh). The chancellor violated neither the law nor the spirit of the law as Dr. Haque argues. Taking into account that fairness is the prevailing guideline in marital division, this Court cannot say that the chancellor erred in granting Mrs. Haque $17,800 of

equitable interest in retirement savings, particularly when the annuity grew during the time of the couple's marriage. *Ferguson*, 639 So. 2d at 929. There was no abuse of discretion in the chancellor's findings here. Thus, this issue is without merit.

IV. THE TRIAL JUDGE'S ASSESSMENT OF THE ISSUES WAS IMPERMISSIBLY TAINTED BY HIS VIEW OF THE APPELLANT'S RELIGIOUS BELIEFS.

Dr. Haque points to statements made by both the Plaintiff's attorney and the chancellor which he claims were mocking Dr. Haque's religious beliefs. Most, if not all, of these statements were made while discussing Dr. Haque's association or connections to the State of Mississippi and as a United States citizen--all considered by the chancellor in determining whether the Bangladesh divorce should be recognized by the Chancery Court of Claiborne County.

We agree with the Appellant that it is the chancellor's duty to maintain proper decorum. While the nature of the comments is not endorsed by this Court, we recognize that when considered in context, the comments appear to have emerged from a rather unusual case in which Dr. Haque's ties to this State and country were an issue properly before the chancellor. To further complicate the matter, the chancellor was faced with evaluating a divorce from a country in which religion and government are intertwined. Dr. Haque has failed to establish that any alleged bias on behalf of the chancellor resulted in the denial of a fair trial. As to this as a basis for reversal, we have reviewed the record and conclude that the chancellor did not commit manifest error.

V. THE COURT ERRED IN ITS AWARD OF PARTIAL ATTORNEY'S FEES TO THE WIFE.

The chancellor awarded Mrs. Haque $1,500 toward partial payment of her attorney's fees. Dr. Haque argues that this award was error by the chancellor because Mrs. Haque failed to properly establish that the expenses were reasonable and necessary, and that she failed to establish that she was unable to pay.

Attorney's fees are a matter entrusted to the sound discretion of the chancellor. *Brooks v. Brooks*, 652 So. 2d 1113, 1120 (Miss. 1995) (citation omitted); *Armstrong v. Armstrong*, 618 So. 2d 1278, 1282 (Miss. 1993); *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982). The fee should be based upon: (1) the relative financial abilities of each party; (2) the skill and standing of the attorney; (3) the nature of the case; (4) the novelty and difficulty of the issues; (5) the degree of responsibility in managing the case; (6) the labor and time required; (7) the usual and customary charges in the community; and (8) the preclusion of other employment by the attorney due to acceptance of the case. *McKee*, 418 So. 2d at 767. The fee must be fair and just, and the legal work must be determined to be reasonably required and necessary. *Id*. Sufficient evidence must exist to accurately assess a proper fee. *Id.*

Mrs. Haque introduced into evidence a detailed accounting of her attorney's fees including time, services, and expenses. The total amount of time accounted for prior to trial was 47.60 hours.

Additionally, Mr. McFatter, a practicing Claiborne County attorney, testified that the amount of work was reasonable and consistent with the work required in this case particularly considering the issues of international law. Mr. McFatter testified that he was present in the courtroom during a previous

hearing in the present case, and that he recognized the complicated legal questions involving international law. Mr. McFatter stated that the expenses were proper expenses for which attorneys are ordinarily reimbursed. Mr. McFatter also testified that he thought the rate of $120.00 for Mrs. Haque's attorney was "a little higher" than attorneys in Port Gibson normally charge, which would range $75.00-$85.00 while recognizing that the local rates did "tend to run a little under the larger city of Vicksburg." Mr. McFatter testified that knowing Mrs. Haque's attorney, the amount of time that he had practiced law, his reputation, his service on the bench, that he did not consider the fee unreasonable.

Mrs. Haque showed insufficient resources from which to pay her attorney's fees, as her only resources were from a recent part-time job with Central Carrie College earning $600 a month. Mrs. Haque testified that she was living on borrowed money through the generosity of friends and family. The evidence submitted at trial reflects in excess of $5,800 in attorney's fees and expenses. We

do not find that the chancellor abused his discretion in awarding Mrs. Haque partial attorney's fees in the amount of $1,500. Thus, this issue is without merit.

THE JUDGMENT OF THE CHANCERY COURT OF CLAIBORNE COUNTY IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., THOMAS, P.J., BARBER, DIAZ, KING, AND McMILLIN, JJ., CONCUR. BRIDGES, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN AND SOUTHWICK, JJ.

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BRIDGES, P.J., CONCURRING IN PART AND DISSENTING IN PART:

The matter involving attorney's fees in divorce suits has haunted this Court on several occasions since our commencement. The majority in the case at bar has opined that Mrs. Haque is entitled to the attorney's fees awarded by the chancellor. Believing the majority has failed to follow the law, I must respectfully dissent.

This Court was created by the legislature as an "error finding" court to adhere to the laws already established and dictated by the supreme court of this State. I wholly agree with my colleagues on all matters as set forth in their opinion, including their standard of review, except as to their discussion and resolution of Issue V involving the award of attorney's fees. In the case sub judice, Dr. Haque argues that the chancellor erred in awarding attorney's fees to Mrs. Haque because she failed to establish her inability to pay the fees, and because the chancellor failed to find that the fees were reasonable and necessary. I agree with his argument.

Our supreme court has held that a party seeking attorney's fees must clearly demonstrate the inability to pay the fees, and in the absence thereof, the chancellor may not award such fees. *Rogers v. Rogers*, 662 So. 2d 1111, 1116 (Miss. 1995)*; Martin v. Martin*, 566 So. 2d 704, 707 (Miss. 1990). If the record fails to reflect the inability to pay, or if the party seeking the fees does not testify that she is unable to pay the fees, then the chancellor *must* find that the party was unable to pay her attorney's fees, a factor necessary in making such an award. *Johnson v. Johnson,* 650 So. 2d 1281, 1288 (Miss. 1994)*; McKee v. McKee,* 418 So. 2d 764, 767 (Miss. 1982).

Mrs. Haque's attorney on direct examination asked her the following questions:

> Q. Now, Mrs. Haque, since I've had Mr. McFatter on the stand, did you have monies to pay your attorney's fees?

A. Yes.

Q. Where did you have the money?

> A. I told you that I borrowed money from so many people and I'm paying you but I know I have to pay back them immediately, you know, or maybe within a short time.

> Q. Is that figured into the $11,000.00 of monies that you needed for living expenses plus keeping the attorney's fees current?

> A. No, just no. I borrowed money living, I borrowed $11,000.00 from my brothers and relatives but I just paying you from, you know, my source. I have some other sources so I'm paying you from there.

Never did Mrs. Haque testify that she was unable to pay her attorney or that she wanted the judge to award her attorney's fees. In fact, her attorney in an apparent last attempt to get Mrs. Haque to say such, and at the very end of her direct testimony, asked her the following question:

> Q. Is there anything else that you can think that you want to mention to the judge that you have a need for? Do you want the Judge to require him to carry, continue your medical insurance coverage?

> A. I just want to just have this money, this what I have spent for medical expenses and I want to get back that money so that I can pay back to my brother.

Mrs. Haque says nothing about attorney's fees here, except that she wants to pay back her brother who apparently lent her $11,000.00 for living expenses and attorney's fees. Furthermore, when the judge rendered his bench opinion and made monetary awards to Mrs. Haque, he made no findings that Mrs. Haque was unable to pay her attorney, that she was entitled to $1,500.00 as an attorney's fee, and that the fee was reasonable.

With some degree of speculation on my part, the majority may have justified the award of attorney's fee by distinguishing *Martin, Johnson,* and *Rogers* from the case at bar by assuming in those cases that the complaining party had funds or some separate estate from which to pay attorney's fees. However, such a distinction was made in neither the case at bar, nor in *Martin, Johnson,* or *Rogers* which would give this Court any guide to stray from the law therein. A proper finding by the chancellor in the case sub judice may have eliminated this question in the mind of this writer. However, even if the majority rested upon such a premise, I think such would have been contrary to the supreme court's findings in *Brooks v. Brooks*, in which the court stated:

> We have 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.

Brooks v. Brooks, 652 So. 2d 1113, 1120 (Miss. 1995) (emphasis added) citing *Benson v. Benson,* 608 So. 2d 709, 712 (Miss. 1992).

It is regrettable in some cases to reverse the chancellor where the party requesting attorney's fees may truly be in need thereof. That may be the situation in the case at bar, but I think for this Court to

affirm the lower court on this issue would be to defy the law we are required to follow and circumvent the duty this Court is mandated by law to fulfill. Accordingly, I would reverse the chancellor and render on the issue of attorney's fees and affirm him as to all other issues.

COLEMAN AND SOUTHWICK, JJ., JOIN THIS SEPARATE WRITTEN OPINION.