

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-00672-COA

KIMBERLYE ESTES BROWN

APPELLANT

v.

HICKMAN SCOTT BROWN

APPELLEE

DATE OF JUDGMENT: 10/24/2011
TRIAL JUDGE: HON. DOROTHY WINSTON COLOM
COURT FROM WHICH APPEALED: CHICKASAW COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT: REX F. SANDERSON
ATTORNEYS FOR APPELLEE: JAMES E. BROWN JR.
MATTHEW DANIEL WILSON
NATURE OF THE CASE: CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION: DENIED BOTH APPELLANT'S AND APPELLEE'S PETITIONS FOR DIVORCE; DENIED APPELLANT'S REQUEST FOR SEPARATE MAINTENANCE; APPELLANT GRANTED CUSTODY
DISPOSITION: AFFIRMED: 12/03/2013
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

LEE, C.J., FOR THE COURT:

FACTS AND PROCEDURAL HISTORY

- ¶1. Kimberlye Estes Brown (Kim) and Hickman Scott Brown (Scott) were married on December 6, 2002. They have one child together, and Kim has two children from a previous marriage. Scott left the marital home in Okolona, Mississippi, on December 30, 2009.
- ¶2. On January 6, 2010, Kim filed a petition for child custody and separate maintenance.

The parties entered an agreed temporary order addressing marital property and child custody, support, and visitation. Subsequently, Scott filed his answer and counter-petition for child custody and separate maintenance. On April 23, 2010, Scott filed his complaint for divorce on the ground of habitual cruel and inhuman treatment or, in the alternative, irreconcilable differences. The chancellor consolidated the separate maintenance action and the divorce action. On February 2, 2011, Kim filed her counterclaim for divorce on the grounds of desertion and habitual cruel and inhuman treatment.

¶3. After numerous hearings on discovery issues, as well as motions for contempt and motions for modification, the case was heard in the Chickasaw County Chancery Court on May 24, 2011, and July 7, 2011. The chancellor found that both parties failed to show by a preponderance of the evidence any credible evidence to meet their burdens of proof and failed to present any corroborating evidence for their respective habitual-cruel-and-inhuman-treatment claims. As for the desertion claim, the chancellor found that although Kim testified that she repeatedly asked Scott to resume the marriage, her actions proved differently. Therefore, the chancellor denied and dismissed both petitions for divorce. After addressing each *Albright*¹ factor and considering the totality of the circumstances, the chancellor awarded custody of the couple's child to Kim and granted Scott visitation. The chancellor did not award Kim separate maintenance.

¶4. On October 29, 2011, Scott filed a motion to alter or amend the judgment to reflect the previous visitation schedule the parties had agreed to. Kim filed a motion for a new trial on November 3, 2011. Those motions, along with each party's motions for contempt, were

¹*Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983).

heard on January 19, 2012. The chancellor denied the motion for a new trial and motions for contempt.

¶5. Kim appeals, arguing the chancellor erred in (1) denying her a divorce, (2) denying separate maintenance, (3) failing to order a division of the marital assets and debts, and (4) denying her motion for contempt. Kim does not appeal any issue regarding child custody.

STANDARD OF REVIEW

¶6. “This Court will not disturb the findings of a chancellor when supported by substantial credible evidence unless the chancellor abused his or her discretion, was manifestly wrong [or] clearly erroneous, or [applied] an erroneous legal standard . . .” *Dupre v. Dupre*, 71 So. 3d 1226, 1228 (¶11) (Miss. Ct. App. 2011). However, “[l]egal questions are reviewed de novo.” *Id.*

DISCUSSION

I. DIVORCE

¶7. Kim claims that the chancellor erred in refusing to grant her petition for divorce on the grounds of desertion and habitual cruel and inhuman treatment.

A. *Desertion*

¶8. Mississippi Code Annotated section 93-5-1 (Supp. 2013) permits a divorce for “[w]ilful, continued[,] and obstinate desertion for the space of one year.” The party seeking the divorce must establish the ground for divorce, but must not have “provok[ed] the defendant into the acts which constitute the alleged ground[] for divorce.” *Ammons v. Ammons*, 144 Miss. 314, 318, 109 So. 795, 795 (1926). The defendant may defend against a claim of desertion by “set[ting] up any misconduct of [the] plaintiff which justified the

separation[.]” *Id.*

¶9. Scott left the marital home on December 30, 2009. Kim filed her counterclaim for divorce on February 2, 2011. Scott never attempted to reconcile, and he never returned to the marriage. In denying the divorce on the ground of desertion, the chancellor found that although Kim had “testified she repeatedly asked [Scott] to resume the marriage, her actions during the pendency of her [c]omplaint for [s]eparate [m]aintenance and the divorce paint[] a different picture.”

¶10. On January 4, 2010, Kim applied for and was granted a protective order after an incident at Scott’s mother’s home in Louin, Mississippi. The protective order prohibited Scott from contacting Kim in person or by phone unless he was telephoning their son or exchanging him for visitation. The protective order expired on January 14, 2010, and was not renewed. This was not the only incident between Kim and Scott that warranted law-enforcement intervention. In May 2010, according to Kim, Scott arrived at her house and blocked in her car. Scott contends that he was there to exchange their son for visitation, albeit in a different place and time than previously agreed on. Kim called the police. After they arrived, Scott was instructed to leave or he would be arrested for trespassing.

¶11. While both parties argue at great lengths about these incidents, both occurred past the statutory period of one year. If the desertion occurred, the year period would have ceased on December 30, 2010.

¶12. In the final judgment and opinion, the chancellor addressed the substantial credible evidence presented to defend against the claim of desertion. Scott testified that Kim had put him out of the bedroom in November 2009. He stated that while Kim was working in

Oxford, Mississippi, she often stayed at her father's condominium overnight instead of returning home. And when Kim switched to a job in Columbus, Mississippi, she often left home early in the morning and returned late at night. In Kim's absence, Scott raised the children and took care of the household duties. Scott testified that taking on these responsibilities caused him great stress, and when he told Kim about it, she screamed at him.

¶13. Scott also stated that his marital problems led to depression, for which he sought medical attention. Scott's mother and brother also testified that he had been depressed and had seen a doctor for treatment. On one occasion, Scott stated that he wanted to take his son to his mother's house in Louin for Christmas. According to Scott, when he informed Kim of this, she told him that if he took the child, he would be single when he returned.

¶14. Kim testified to the contrary, stating that there were no problems in the marriage until Scott left on December 30, 2009.

¶15. The chancellor clearly found Scott to be more credible than Kim. The Mississippi Supreme Court has stated numerous times, "A chancellor sits as a fact-finder and[,] in resolving factual disputes, is the sole judge of the credibility of witnesses." *Murphy v. Murphy*, 631 So. 2d 812, 815 (Miss. 1994). Contrary to the dissent's approach, this Court "cannot, and will not, reweigh the evidence or reconsider the credibility of the witnesses. The chancellor is in 'a better position [than] this Court to judge the veracity of witnesses and credibility of evidence.'" *Hammers v. Hammers*, 890 So. 2d 944, 951 (¶19) (Miss. Ct. App. 2004) (quoting *Lee v. Lee*, 798 So. 2d 1284, 1291 (¶29) (Miss. 2001)). While this Court may have considered the evidence differently than the chancellor, nevertheless, we will not reweigh the evidence. Based on our review of the record, the chancellor's decision was

supported by substantial credible evidence. This issue is without merit.

B. Habitual Cruel and Inhuman Treatment

¶16. Kim fails to cite any legal authority in support of her argument that the chancellor erred in denying her claim of divorce on the ground of habitual cruel and inhuman treatment. “It is well established that appellate courts in Mississippi will not review any issues on appeal if the party fails to cite relevant authority in support of his or her arguments.” *Lambert v. Lambert*, 872 So. 2d 679, 683 (¶14) (Miss. Ct. App. 2003). This issue is without merit.

II. SEPARATE MAINTENANCE

¶17. Kim contends that the chancellor erred by failing to award separate maintenance. In the final judgment and opinion, the chancellor found that when Kim filed her counterclaim for divorce, she abandoned her claim for separate maintenance. After a hearing on the parties’ respective post-trial motions, the chancellor entered an order altering that finding. The chancellor clarified the record and found that Kim was not entitled to separate maintenance and that she materially contributed to the separation of the parties.

¶18. A chancellor may grant separate maintenance to a wife if the “separation [occurred] without fault on the wife’s part” and the husband “willful[ly] abandon[ed]” her and refused to support her. *Bridges v. Bridges*, 330 So. 2d 260, 262 (Miss. 1976). As discussed above, from a thorough review of the record, substantial credible evidence was presented that Kim contributed to the separation. This issue is without merit.

III. DIVISION OF MARITAL ESTATE

¶19. Kim contends that the chancellor erred in refusing to divide the marital estate. A chancellor has the authority to divide the marital estate after a divorce has been granted.

Ferguson v. Ferguson, 639 So. 2d 921, 927 (Miss. 1994). In cases where only separate maintenance has been granted, however, a chancellor does not have the power to award either party a portion of the marital estate. In *Daigle v. Daigle*, 626 So. 2d 140, 146 (Miss. 1993), the supreme court stated that separate maintenance “is not a dissolution of a marriage and dividing of marital assets” And the court found that the chancellor erred by dividing the marital assets. *Id.*

¶20. Furthermore, in *Thompson v. Thompson*, 527 So. 2d 617, 622-23 (Miss. 1988), the court stated:

The legal duty of the husband to support his wife does not require that he convey any property to her. During cohabitation the wife has the legal right to live in the husband’s home, but he is under no legal duty to convey it to her. And after separation her legal rights are no greater than before. . . . [T]he court should not, under the guise of enforcing that contractual duty, deprive him of his lands or other specific property, where not necessary for the enforcement of that duty.

(Citations omitted).

¶21. By asking the chancellor to divide the marital assets in the absence of a divorce decree, Kim is asking for her legal rights to be greater than they were before the separation. The chancellor did not have the authority to divide the marital assets, because the claims for divorce had been denied. This issue is without merit.

IV. CONTEMPT

¶22. Kim argues that the chancellor erred in denying her motion for contempt, because Scott failed to pay her in accordance with the temporary agreed orders. The chancellor found that when the final judgment was entered denying the divorce, Scott’s financial obligations under the temporary orders stopped.

¶23. “[T]he supreme court has held that: ‘contempt matters are committed to the substantial discretion of the trial court which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than are we.’ ” *Keys v. Keys*, 930 So. 2d 438, 443 (¶18) (Miss. Ct. App. 2005) (quoting *Morreale v. Morreale*, 646 So. 2d 1264, 1267 (Miss. 1994)).

¶24. The chancellor was well within her discretion to deny Kim’s motion for contempt. This issue is without merit.

¶25. THE JUDGMENT OF THE CHICKASAW COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, MAXWELL, FAIR AND JAMES, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

CARLTON, J., DISSENTING:

¶26. I respectfully dissent from the majority’s opinion. The record reflects that the evidence satisfied the requirements of Kim’s requested relief for a divorce based upon the fault ground of Scott’s desertion of the marriage. A spouse’s wilful, continued, and obstinate desertion for the space of one year is a ground for divorce. Miss. Code Ann. § 93-5-1 (Rev. 2013). Simply stated, “[t]he essence of desertion is one spouse’s abandonment of the marriage without the other’s consent.” Debbie Bell, *Bell on Mississippi Family Law* § 4.02 (2005).

¶27. To prove desertion, Kim had to show: (1) that Scott was absent for one year; (2) that Scott intended to abandon the marriage; and (3) that Kim did not consent to the separation. *Id.* As discussed herein, the record shows that each of these requirements was met.

Moreover, the record fails to show evidence that Scott, the deserting spouse, offered any good-faith reconciliation. A deserted spouse's unreasonable refusal of a good-faith offer may provide the spouse offering the reconciliation with grounds for divorce based on desertion. *Id.*² In this case, however, Scott made no offer of reconciliation, in good faith or otherwise. The evidence in the record satisfies the elements required to support Kim's petition for divorce on the ground of desertion by evidence of Scott's wilful, continued, and obstinate desertion of the marriage for the space of one year.

¶28. The majority affirms the chancellor's finding that Kim's conduct justified Scott's desertion of the marriage. However, precedent reflects that the evidence the chancellor found to be causation of Scott's departure from the marriage is insufficient to serve as a reasonable cause or legal justification for Scott's desertion of the marriage. While the chancellor found fault with Kim, the chancellor failed to find that Kim's conduct rose to the level of an independent contributory or proximate cause of the separation or an independent ground for divorce. Therefore, the record fails to show that Scott possessed a reasonable cause for leaving the marriage. *See Bell*, at § 4.02 (addressing situations where the conduct of one spouse is so extreme that the conduct drives away the other spouse).

¶29. Mississippi law holds that the deserted spouse need not be blameless. *See Rodgers v. Rodgers*, 349 So. 2d 540, 541 (Miss. 1977) (discussing the fault of both spouses in determining whether to uphold wife's petition for separate maintenance). To be considered

² *See also Thrasher v. Thrasher*, 229 Miss. 536, 539, 91 So. 2d 543, 544 (1956) (finding that husband filed for divorce based upon desertion, that wife made no good-faith offer of reconciliation, and that, good faith or otherwise, husband did not reject an offer of reconciliation).

fault, “the spouse’s ‘misconduct must not only be of a serious nature but must also be an independent contributory or proximate cause of the separation.’” *See Saucier v. Saucier*, 357 So. 2d 1378, 1379 (La. Ct. App. 1978) (citing *Kendrick v. Kendrick*, 106 So. 2d 707, 709 (La. 1958)). The denial of sexual intercourse must be both unjustified and persistent to constitute marital fault rising to the level of an independent contributory or proximate cause. Stated otherwise, to provide grounds for divorce, the refusal to have sexual relations must be inexcusable and long-continued. *Handshoe v. Handshoe*, 560 So. 2d 182, 184 n.5 (Miss. 1990) (citing *Culver v. Culver*, 383 So. 2d 817, 818 (Miss. 1980)).

¶30. As stated, the facts and the chancellor’s findings fail to support that Scott possessed any reasonable cause to abandon the marriage. Rather, the record reflects the following: (1) that Scott claimed a cessation in sexual relations at times during the marriage because of Kim’s work demands, work hours, and fatigue from work and for approximately thirty days from November 2009 until he left in December 2009; (2) that he wanted to spend Christmas of 2009 with his mother rather than his wife; (3) that when he married Kim, she worked and had two children from a prior marriage; (4) that Scott and Kim had another child during the marriage; (5) that Kim continued to work throughout the marriage, and her work often required her to commute or stay overnight; (6) that Scott became stressed managing the duties of housework and helping with the kids; (7) that Scott possessed problems with sexual intimacy due to medical conditions or medications; and (8) that Scott deceived Kim by failing to disclose his intent to leave the marriage until after he left with their young son. For Kim’s conduct to rise to the level to justify Scott’s departure from the marriage, Kim’s conduct, as discussed, would need to rise to the level of an independent ground for divorce

or an independent proximate cause of the separation.

¶31. Regarding Scott's complaints as to sexual relations, cessation of sexual relations must be unjustified and persistent. Cessation due to work, work demands, or health is not unjustified. Evidence in the record fails to support Scott's claim of cessation of sexual relations for any significant period. The record also contains evidence disputing Scott's claim that Kim forced him to leave the marital bedroom. He claims to have been removed from the bedroom for approximately thirty days, from the end of November 2009 until he left on December 30, 2009. However, Kim's thirteen-year-old daughter, Ann Marie, testified that she had no memory of Scott being removed from the marital bedroom and that her mom and Scott, whom she called Daddy, always slept together, except when the kids were sick. Kim also refuted any denial of sexual relations and claimed that she and Scott slept together the night before Scott left.

¶32. What is clear in the record is that Scott concealed not only his intent to leave but also his actual departure with the couple's child. The record shows that after sleeping with Kim, the very next morning on December 30, 2009, Scott concealed from Kim his intent to leave. He asked her to leave her car at the house when she went to work so that he could change the oil. She claims that they kissed, and she went to work. Shortly thereafter, Scott's mother and brother arrived, and they took Scott's clothes, gun safe, an all-terrain vehicle, other personal property, and Scott and Kim's son, Rex, and left for Loin, Mississippi. At 5 p.m. that day, Scott called Kim at her workplace and told her that he had left her and had taken Rex. On January 2, 2010, Kim went to Scott's mother's house to retrieve Rex, who had been taken without her knowledge, and after an altercation, Scott allowed Kim to leave with Rex. The

record indicates that Scott called his attorney, who advised him to allow Kim to have custody of Rex and to not fight the protective order because Kim had been injured in the altercation with Scott. Kim received a protective order from justice court on January 4, 2010. The chancery court entered a temporary order on January 14, 2010.

¶33. At the trial on the divorce, however, the chancellor found Scott's mother more credible than Kim regarding the altercation. The chancellor made this finding even though Kim received injuries, including a broken bone, in the altercation and even though Scott raised no objection or contest to the justice court's protective order or the chancellor's temporary order placing custody with Kim. The issues raised in Kim's petition for a protective order had already been adjudicated and an order issued by another court.³ A victim of domestic violence may procure an order of protection even if the victim seeks to pursue the goal of reconciliation. *Cole v. Cole*, 556 N.Y.S.2d 217, 301 (N.Y. Fam. Ct. 1990); 24 Am. Jur. 2d *Divorce and Separation* § 266 (2008). The chancellor erred in reasoning that Kim's action to obtain the protective order from justice court effectively prohibited Scott from returning, and therefore, desertion could not be found. The protective order did not prevent Scott from seeking marital counseling, making an offer of reconciliation to Kim, or stating any reasonable concerns.

¶34. The law requires neither that the deserted spouse give an immediate response nor that

³ See *Riley v. Wiggins*, 908 So. 2d 893, 899 (¶15) (Miss. Ct. App. 2005) (discussing the final nature of a consent decree, which "has the force of res judicata"); see also 24 Am. Jur. 2d *Divorce and Separation* § 266 (2008) (party requesting protective order bears burden of proof of showing actual or imminent domestic violence; protection order is warranted where potential for future abuse exists based upon past behavior).

the offer to reconcile be made face to face.⁴ In *Thrasher v. Thrasher*, 229 Miss. 536, 539, 91 So. 2d 543, 544 (1956), the court found that where a wife sent her reconciliation offer through a local sheriff, her husband's request for time to discuss the offer with his lawyer was not an unqualified refusal. The offer to reconcile must be unqualified and in good faith; the innocent spouse must be given sufficient time to consider a reply to the offer; and the deserter must respond to any reasonable concerns. See *Bell*, at § 4.02. Kim's efforts in obtaining a protective order and then a temporary order constituted reasonable steps toward achieving a peaceful resolution of the situation created by Scott, whose deceitful departure from the marital residence included absconding with the couple's son and injury to Kim when she attempted to retrieve their child. The purpose of domestic-abuse civil statutes is remedial and protective rather than criminal. 28 C.J.S. *Domestic Abuse and Violence* § 3 (2008). Domestic-abuse statutes act to prevent individual acts of abuse or recurrence of abuse by removing the perpetrator from the household for a period of time, providing the victim with a buffer zone of safety. *Id.*; see also Miss. Code Ann. § 97-3-7 (Supp. 2013). The purpose of domestic-violence statutes is to preserve the safety of the family unit. 28 C.J.S. *Domestic Abuse and Violence* § 3 (2008). The chancellor erred in applying the law to these facts in finding that the protective order prevented reconciliation, since the law fails to support such a conclusion. Furthermore, the conclusion punished Kim for taking responsible and reasonable steps to prevent further violence against her person and to achieve a peaceful, not deceitful, resolution.

¶35. Kim's petition for divorce similarly fails to provide any evidence of marital fault. The

⁴ See generally *Bell*, at § 4.02 (discussing offers to reconcile).

duty to reconcile does not extend beyond the one-year period. Bell, at § 4.02. Once the statutory period has run, the innocent spouse may obtain a divorce even though the deserter offers to reconcile. *Id.*; see also *Lynch v. Lynch*, 217 Miss. 69, 85, 63 So. 2d 657, 663 (1953) (“[W]hen the desertion has ripened into a ground for divorce, the day of repentance is ended[.]”). The evidence in the record shows that Scott never offered to reconcile, in good faith or otherwise. Therefore, Kim did not reject any offer by Scott to reconcile, and as stated, the one-year period expired.⁵

¶36. Additionally, Scott complains and asserts as fault: (1) the stress he feels from managing a household; (2) the parental responsibility of managing children; and (3) Kim’s work, work hours, commute to work, and fatigue from working. Precedent reflects, however, that absence from the marriage for legitimate reasons fails to constitute desertion. For example, a husband’s lengthy absence from Mississippi to find work in Florida was not desertion because he intended to return to his family. *Walton v. Walton*, 76 Miss. 662, 662, 25 So. 166, 168 (1899).⁶ In the present case, Kim’s commute to work and her short absences caused by travel to and from work fail to constitute marital fault, much less just cause for Scott to desert the marriage.⁷ The stress that Scott claims resulted from managing a

⁵ At oral argument, counsel for Scott argued that Kim should agree to an irreconcilable-differences divorce, but in Mississippi Kim cannot be forced into such an agreement. See Miss. Code Ann. § 93-5-2 (Supp. 2013).

⁶ *But cf. Wilson v. Wilson*, 198 Miss. 334, 341-42, 22 So. 2d 161, 163 (1945) (discussing that, when a wife abandons her husband without legal justification, she is not entitled to alimony).

⁷ *But cf. Griffin v. Griffin*, 207 Miss. 500, 504, 42 So. 2d 720, 722 (1949) (reflecting precedent that a spouse is justified in leaving a husband whose complete refusal to work left the family without adequate food and shelter and dependent on friends).

household of three children and marriage to a working mom fails to evidence marital fault by Kim. Even though Scott may have felt stress from working, managing his parental and household responsibilities, and raising a family, the existence of these marital and parental responsibilities fails to constitute a basis of marital fault by Kim. Moreover, this stress could be resolved or managed by Scott without deserting the marriage by assigning chores or obtaining household help for this dual-working-parent household.

¶37. Abandonment is “the voluntary separation of one spouse from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other spouse.” 27 Am. Jur. 2d *Proof of Facts* 737 § 2 (1981). A wilful and malicious desertion is presumed when one spouse voluntarily separates from and abandons the other spouse without adequate legal reason. See *Commonwealth ex rel. Udis v. Udis*, 101 A.2d 144, 145 (Pa. Super. Ct. 1953); 27 Am. Jur. 2d *Proof of Facts* 737 § 2 (1981). Moreover, the law fails to require that the abandoned spouse, Kim in this case, be blameless. See 27 Am. Jur. 2d *Proof of Facts* 737 § 3 (1981); see also *Jeffrey v. Jeffrey*, 569 N.Y.S.2d 107, 108 (N.Y. App. Div. 1991).

¶38. A determination of whether Kim’s conduct rose to the necessary level should be based upon factual findings showing that Kim’s fault factually supported an independent ground for divorce or an independent contributory or proximate cause of the separation. See *Goodwyn v. Goodwyn*, 278 S.E.2d 813, 814 (Va. 1981) (holding that temporary cessation of sexual relations for less than two months prior to wife’s hospitalization, where wife worked and financially contributed to the family, was insufficient to show wilful desertion).

¶39. The evidence in the record satisfied the requirements for Kim to prove the ground of

desertion, and no evidence shows that Kim rejected any offer of reconciliation, in good faith or otherwise. The evidence in the record showing fault by Kim during the marriage fails to rise to a level to provide Scott with a reasonable cause or legal justification to desert the marriage. Accordingly, I dissent from the majority's opinion and would remand this case to the chancellor to grant Kim's petition for divorce on the ground of desertion by Scott.