

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-CA-01295 COA**

**DEMPSEY SMITH**

**APPELLANT**

**v.**

**BOBBIE SMITH**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	10/30/95
TRIAL JUDGE:	HON. DONALD B. PATTERSON
COURT FROM WHICH APPEALED:	LINCOLN COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	PATSY ANN BUSH
ATTORNEY FOR APPELLEE:	RALPH L. PEEPLES
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	COMPLAINT FOR SEPARATE MAINTENANCE AND CUSTODY OF CHILDREN, CHILD SUPPORT, ETC. GRANTED TO APPELLEE. APPELLANT'S COUNTERCLAIM FOR DIVORCE DENIED.
DISPOSITION:	REVERSED IN PART; AFFIRMED IN PART - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

Dempsey Smith appeals the decision of the Lincoln County, Mississippi, Chancery Court in which he was ordered to pay separate maintenance to his wife, Bobbie Smith, and the attorney's fees she incurred in the action. Because we find that the chancery court erred in making the award of separate maintenance, we reverse in part and affirm in part.

**I. THE FACTS**

On November 21, 1971, Mr. and Mrs. Smith were married. The marriage ended in divorce in May, 1989, but the two parties reconciled and remarried on December 9, 1994. Four children were born into the marriage. At the time of the proceedings which are the subject of this appeal, two of the children were living with Mrs. Smith: Demetra, eighteen years old, and Delicia, seventeen years old. The other two children were emancipated and living with neither parent.

Mrs. Smith initiated divorce proceedings against Mr. Smith when she filed her complaint of divorce on the ground of habitual cruel and inhuman treatment and on the ground of irreconcilable differences. In her complaint, Mrs. Smith alleged that she was entitled to custody of the two minor children, attorney's fees, periodic and lump sum alimony, child support, exclusive use of the home, or other suitable living quarters, temporary alimony, payment of hospitalization for her and the minor children, and other relief. Mr. Smith answered the complaint, denying the majority of Mrs. Smith's allegations, and he filed a counter-claim for divorce on the ground of habitual cruel and inhuman treatment and, alternatively, irreconcilable differences. Mr. Smith asserted that he was entitled to exclusive use of the home and all furnishings and household goods therein, payment from Mrs. Smith of one-half of all medical bills for the minor children, and other relief. The chancellor heard the parties on the issue of temporary relief, awarded temporary custody of the minor children to Mrs. Smith, and ordered Mr. Smith to provide his wife with \$487 per month in temporary child support, \$450 per month in temporary alimony, and to provide hospitalization insurance for Mrs. Smith and the minor children, pending a final hearing on the merits. The trial court also ruled that Mr. Smith was entitled to reasonable visitation with the minor children. However, the court denied Mrs. Smith's request for exclusive use of the marital home on a temporary basis, and held the issue of attorney's fees for resolution after a final hearing on the merits.

Thereafter, Mrs. Smith was granted leave to amend her complaint. In the amended complaint, she alleged that she abandoned her claim for divorce and, instead, was entitled to separate maintenance "of and from the Defendant due to the habitual cruel and inhuman treatment inflicted upon her." Additionally, she alleged that she should be granted custody of the minor children, child support, exclusive use of the home or other suitable living quarters, medical insurance and other relief.

During the hearing of this action on its merits, the chancellor heard testimony concerning Mr. Smith's alleged abusive and cruel treatment of Mrs. Smith following their remarriage on December 9, 1994. She testified that on December 31, 1994, Mr. Smith threatened and assaulted her. She stated that while Mr. Smith was arguing with one of their daughters, Mrs. Smith attempted to intervene. He grabbed her by the hair and demanded that she leave the house. Mrs. Smith and her daughters thereafter got into her motor vehicle and left. They returned to the house only after Mr. Smith had left for work.

Mrs. Smith also testified that on January 27, 1995, the parties got into another argument, and Mr. Smith again demanded that Mrs. Smith leave the house. He threatened to beat her and throw her out, if she did not leave. As a result, Mrs. Smith called the local sheriff's department and deputies came to their home to quell the disturbance.

The event which ultimately led to the final separation of the parties occurred on or about April 15, 1995. According to the testimony, Mr. Smith was upset because Mrs. Smith had not prepared dinner. With a pistol in hand, he forced Mrs. Smith out of their home and instructed her not to return. During

the confrontation, Tim Smith, the son of the parties, got between his mother and father, begged his mother to leave, and encouraged his father to end his threatening actions. Mr. Smith testified that it was only on this last occasion that he truly meant for his wife to leave their home.

In support of his complaint for divorce, Mr. Smith testified that he often worked at night and slept during the day. Thus, he expected his wife to clean his house, prepare daily meals, wash his clothes and to take care of him since she was not working outside the home. He testified that Mrs. Smith did not do this. He stated, and Mrs. Smith agreed, that they could not get along. Basically, he was frustrated because he was the bread winner of the family and money was tight. He felt that since he had a wife and two teenage daughters at home that were almost grown, the least he could expect would be a clean house, clean clothes to wear, and good food to eat. It is noteworthy that he made no attempt to control his wife's monthly disability payments in the sum of \$392 per month, although he did maintain tight control of the money he brought home. It should be further noted that after the parties remarried on December 9, 1994, Mrs. Smith continued to receive child support payments in the amount of \$578 per month through the Department of Human Services which Mr. Smith was required to pay pursuant to a previous order of the court following the divorce of the parties in 1989. These \$578 monthly payments went directly to Mrs. Smith after their second marriage until some point around the time of the separation of the parties on April 15, 1995.

Mrs. Smith stated several times that she could not live with Mr. Smith and that she was afraid to live with him. He testified that they could not live together because Mrs. Smith would not care for him in the manner which he expects and that Mrs. Smith was constantly arguing with him and nagging him about money. Mr. Smith stated that he had finally concluded that Mrs. Smith was correct when she said that they could no longer live together.

Following the hearing on the matter, the chancellor found that Mr. Smith had not carried his burden in proving that he was entitled to a divorce on the ground of habitual cruel and inhuman treatment. Therefore, the chancellor dismissed his counter-claim for divorce. The court awarded Mrs. Smith separate maintenance in the amount of \$300 per a month and also awarded her custody of the two minor children. Mr. Smith was ordered to pay \$174 per month in child support for Demetra Smith and \$328 a month in child support for Delicia Smith. Mr. Smith was also required to provide health insurance for Mrs. Smith and the minor children. Finally, Mr. Smith was ordered to pay his wife's attorney's fees in the amount of \$750. It is from this judgment that Mr. Smith appeals.

## **II. THE ISSUES**

On appeal, Mr. Smith assigns the following errors:

**1. WHETHER THE CHANCELLOR ERRED WHEN HE GRANTED APPELLEE'S PRAYER FOR SEPARATE MAINTENANCE AND ATTORNEY'S FEES AFTER SHE HAD TESTIFIED THAT SHE WOULD NEVER RETURN TO THE MARITAL DOMICILE TO RESUME COHABITATION WITH APPELLANT.**

**2. THE CHANCELLOR ERRED WHEN HE FAILED TO FIND THAT APPELLEE HAD MATERIALLY CONTRIBUTED TO THE BREAKDOWN OF HER MARRIAGE TO THE APPELLANT AND SUBSEQUENTLY AWARDED HER SEPARATE MAINTENANCE**

## AND ATTORNEY'S FEES.

For the reasons set forth below, we reverse the judgment of the lower court as to the award of separate maintenance and affirm the award of attorney's fees. It is noteworthy that Mr. Smith files no appeal in regard to the chancellor's award of child custody, child support, and health insurance to Mrs. Smith, and that Mrs. Smith files no appeal from the trial court's failure to award to her the exclusive use of the homestead property. During her testimony, she stated that she did not want use of the marital home because she was scared to live there.

### III. ANALYSIS

We will consider both assignments of error together. This Court employs a limited standard of review on actions appealed from chancery court. Where there is substantial evidence in the record to support the chancellor's decision on issues of fact, we will not reverse. *Reddell v. Reddell*, 696 So. 2d 287, 288 (Miss. 1997). Moreover, this Court will not interfere with the findings of the chancellor unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard. *Reddell*, 696 So. 2d at 288.

In regard to separate maintenance, the Mississippi Supreme Court has stated that "separate maintenance and the amount to be awarded are for the most part, matters within the discretion of the chancellor. Further, these decisions will not be reversed unless they are against the overwhelming weight of the evidence." *Honts v. Honts*, 690 So. 2d 1151, 1152 (Miss. 1997) (citing *Tanner v. Tanner*, 481 So. 2d 1063, 1064 (Miss. 1985)). While the chancellor is "shown great deference" in matters involving separate maintenance, "such deference and discretion granted the chancellor is not wholly unrestrained." *Tanner*, 481 So. 2d at 1064.

Separate maintenance in Mississippi is not authorized by statute but has been recognized as an equitable form of relief available to a dependent spouse which is based upon the marriage relationship. *Daigle v. Daigle*, 626 So. 2d 140, 144 (Miss. 1993). In Mississippi, "[i]t is well settled that '[a] decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other.'" *Id.* (citation omitted). Separate maintenance to a dependent spouse is based upon separation without fault on the dependant spouse's part, and a willful abandonment by the supporting spouse accompanied with the refusal to support the dependent spouse. *Thompson v. Thompson*, 527 So. 2d 617, 621 (Miss. 1988) (citations omitted). It is likewise fundamental that ("[u]nless the wife is willing to live with her husband, she is not entitled to separate maintenance." *Marble v. Marble*, 457 So. 2d 1342, 1343 (Miss. 1984) (citing *Smith v. Smith*, 293 So. 2d 466 (Miss. 1974)). Separate maintenance assumes that there will be a continuation of the marriage. *King v. King*, 246 Miss. 798, 802, 152 So. 2d 889, 891 (1963).

In this case, Mrs. Smith made it clear that she would not again live with Mr. Smith and indicated her intent not to continue in the marriage in her testimony as follows:

Q. Is there any way you can live with Dempsey Smith?

A. No, no.

Q. Has he tried to get you to come back since you separated from him April fifteenth?

A. No. We talked on the phone and he come by the house to see the kids, but both of us agreed that we can't live in the same house.

...

Q. Can you live with him?

A. No.

...

A. I cannot live in the same house with Dempsey.

Q. So at this point you're not willing at all to work on this marriage?

A. I'm scared to live in the same house with Dempsey. I believe if I live in the house with Dempsey anywhere, he'd kill me, that's what I believe. I am scared to live with him.

Mr. Smith's testimony likewise did not indicate an intent of the parties to resume the marriage. He merely stated that if it was Mrs. Smith's intentions not to move back home, he would honor her wishes because, in his opinion, she would not likely change her habits of not taking care of him if she did move back into his home.

In *Rodgers v. Rodgers*, 349 So. 2d 540, 541 (Miss. 1977), the court ruled that since both parties had testified that they could no longer live together as husband and wife and that since the separation was caused by the fault of both parties, the decree awarding separate maintenance to the wife was reversible error. While it is apparent that the actions of Mrs. Smith did not contribute substantially to the separation of the couple, it is quite clear that neither party intends to reside together as husband and wife. For this reason, we hold that the chancery court improperly applied the law to the facts and thereby abused its discretion in granting separate maintenance to Mrs. Smith. While it may seem harsh to deprive Mrs. Smith of support where it can be said that Mr. Smith's conduct caused her to be "constructively abandoned," it is simply not the law in Mississippi to award separate maintenance where the couple does not intend to resume the marriage relationship or at a minimum, resolve to work on their marital differences while temporarily residing apart. Some jurisdictions have equated separate maintenance with alimony and have held that separate maintenance is justified when the supporting spouse's action include cruelty, ill treatment, violence, or abuse. *See* 41 C.J.S. *Husband and Wife* § 238 (1991); 41 Am. Jur. 2d *Husband and Wife*, § 390-395 (1968). To date, the Mississippi Supreme Court has not embraced such a concept. The function of an intermediate appellate court in a case such as this is not to state what the law on separate maintenance should be, but simply to follow precedent previously established by our supreme court. Accordingly, we reverse and render the award of separate maintenance.

As to attorney's fees, the trial court simply found that Mrs. Smith was without the ability to pay her attorney a reasonable fee, and therefore, required Mr. Smith to pay the attorney's fees which Mrs. Smith incurred in bringing the separate maintenance action. It is well settled in Mississippi "that if a party is financially able to pay an attorney, an award of attorney's fees is not appropriate." *Benson v.*

***Benson*, 608 So. 2d 709, 711 (Miss. 1992).** Moreover, the Mississippi Supreme Court in *Benson* noted that "if the record is insufficient to demonstrate the wife's inability to pay the attorney's fees, then an award of the fees is an abuse of discretion." ***Benson*, 608 So. 2d at 711**(citation omitted). However, whether to award attorney's fees in cases such as this is "largely entrusted to the sound discretion of the trial court,"***McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982)**, and will not be disturbed on appeal unless the chancellor is manifestly wrong. ***Daigle v. Daigle*, 626 So. 2d 140, 147 (Miss. 1993)**. The criteria to use in awarding attorney's fees are: (1) the relative financial ability of the parties; (2) the skill and standing of the attorney employed; (3) the nature of the case and novelty and difficulty of the questions at issue; (4) the time and labor required; and (5) the customary charge in the community and preclusion of other employment by the attorney due to the acceptance of the case. ***McKee*, 418 So. 2d at 767.**

At the hearing in this matter, a statement of service and applicable fees of Mrs. Smith's attorney was submitted into evidence without objections. Further, Mrs. Smith testified that she was without the ability to pay her attorney's bills. She is disabled and unable to work, and she has relied for her livelihood upon social security payments and the temporary alimony she receives from Mr. Smith. While the trial court noted its frustration with the inaccuracy of the financial statements submitted by both parties, the court nevertheless found that Mrs. Smith was without the ability to pay her attorney's fee. Furthermore, no evidence was introduced to contradict or challenge the reasonableness of the attorney's fees. It is noteworthy that in addition to being successful on her claim for custody of the minor children, for child support, and for hospitalization insurance coverage, Mrs. Smith successfully defended the counter-claim of divorce filed by Mr. Smith.

Though we have ruled here that Mrs. Smith is not entitled to separate maintenance and that the chancellor was in error in awarding such, we are not willing to say that the court abused its discretion in awarding attorney's fees. Thus, we affirm the chancellor's award of attorney's fees to Mrs. Smith.

**THE JUDGMENT OF THE CHANCERY COURT OF LINCOLN COUNTY AS TO SEPARATE MAINTENANCE IS REVERSED AND RENDERED, AND THE AWARD OF ATTORNEY'S FEES IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TO BE DIVIDED BETWEEN THE PARTIES.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., HINKEBEIN, AND SOUTHWICK, JJ., CONCUR.**

**SOUTHWICK, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN AND THOMAS, P.JJ., AND HERRING, J.**

**PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, DIAZ, AND KING, JJ.**

SOUTHWICK, J., concurring

I am in full agreement with the majority. I write separately because of the implications of the dissent. The dissent applies reasoning that supports temporary alimony pending divorce, but Mrs. Smith explicitly does not want a divorce. On the other hand, the cases cited by the dissent do not support the proposition that a spouse can receive separate maintenance when he or she is unwilling to return to the marriage. That we are ignoring controlling case law or perpetuating inequitable rules are notions that should be dispelled. I will attempt that task.

The traditional view of separate maintenance is this:

The plaintiff in a separate maintenance action is not asking for a dissolution of the marriage, but just to the contrary, is asking that the marriage be recognized and is seeking a court order of support that actually encourages the continuation of the marriage and its support elements. . . . Thus actions for separate maintenance and divorce are philosophically different . . .

**N. SHELTON HAND, MISSISSIPPI DIVORCE, ALIMONY AND CHILD CUSTODY 19 (4th ed. 1996) § 2-3.** The law does not abandon a spouse who reasonably through no fault of her own does not live with the other spouse. The choice initially taken by Mrs. Smith was exactly the one that would have provided her the support that the dissent seeks to provide her, namely, the alimony to which she would have been entitled upon divorce. Having abandoned the option of divorce, but also having declared that she will not live with her husband no matter what changes in his behavior may occur, Mrs. Smith has chosen a path that is "philosophically different" from divorce and from separate maintenance as well. Separate maintenance provides support for the wronged spouse who wishes to return to the marriage, and provides that support during the time that the wrongdoer spouse explicitly or by undesirable conduct and words inhibits that return. The dissent says otherwise, that it is or at least should be an all-encompassing right of support no matter the interest of either spouse in living with the other. A review of the cases cited in the dissent is therefore useful.

All the following cases indicate that the wronged spouse has to be open to return to the marriage: ***Garland v. Garland*, 50 Miss. 694, 715 (1874)** (support must be provided if wife wishes to return to husband, but he refuses to permit it); ***Hilton v. Hilton*, 88 Miss. 529, 531-532 (1906)**(wife imposed unfair conditions on returning to the husband, and therefore not entitled to separate maintenance); ***Serio v. Serio*, 94 So. 2d 799, 802 (Miss. 1957)** (husband forced wife from home; wife remained apart because husband never agreed to abandon his "undesirable" "traits and characteristics"); ***Cox v. Cox*, 183 So. 2d 921, 924 (Miss. 1966)** (spouse not entitled to separate maintenance if she "wrongfully refuses" to return to marriage, i.e., she must be willing to return, but her husband's conduct prevents it); ***Marble v. Marble*, 457 So. 2d 1342, 1343 (Miss. 1984)** (Mrs. Marble's willingness to return to marriage was conditional and therefore did not support separate maintenance); ***Kergosien v. Kergosien*, 471 So. 2d 1206, 1211 (Miss. 1985)** ("Mrs. Kergosien [testified] that she could live with Mr. Kergosien, wanted to live with Mr. Kergosien. . ."); ***King v. King*, 481 So. 2d 1063, 1065 (Miss. 1985)** (separate maintenance is "a command to the husband to resume cohabitation with his wife or else provide for her until reconciliation"; case focuses on amount of support); ***Lynch v. Lynch*, 616 So. 2d 294, 296 (Miss. 1993)** (same "command to resume cohabitation" language as *King*); ***Daigle v. Daigle*, 626 So. 2d 140, 145 (Miss. 1993)** ("judicial command" language).

The following cases cited by the dissent refuse to permit separate maintenance because the requesting

spouse shared largely in the blame for the separation: *Hilton v. Hilton*, 88 Miss. 529, 531, 41 So. 262 (Miss. 1906); *King v. King*, 152 So. 2d 889, 891 (Miss. 1963); *Cox v. Cox*, 279 So. 2d 612, 615 (Miss. 1973); *Rodgers v. Rodgers*, 349 So. 2d 540, 541 (Miss. 1977); *Marble v. Marble*, 457 So. 2d 1342, 1343 (Miss. 1984); *Robinson v. Robinson*, 554 So. 2d 300, 304 (Miss. 1989)

The only other cases cited by the dissent are on related propositions: *Smith v. Smith*, 293 So. 2d 466, 468 (Miss. 1974) (this was a divorce, not separate maintenance; court stated that spouse is not entitled to support unless she is willing to live with other spouse "provided separation is through no fault of his own."); *Gallaspy v. Gallaspy*, 459 So. 2d 283, 286 (Miss. 1984) (this case discusses support obligation for divorce, not separate maintenance).

This summary of the dissent's cases leads to several conclusions. None support the proposition that separate maintenance is available to a spouse that refuses to resume cohabitation if the other spouse's behavior that causes the separation were to end. Secondly, the dissent is correct that the permissible degree of fault by the spouse who wishes support may be greater today than in the past, but that is not the question we face. Several of the most recent cases have reiterated the fundamental problem Mrs. Smith faces: "separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide separate maintenance of her until such time as they may be reconciled to each other." *Daigle*, 626 So. 2d at 145. That judicial command to the husband is fairly pointless if the wife who is receiving support herself refuses to return to the marriage.

Thus, as important as what the dissent's cases state is what they do not state.

Separate maintenance paid while spouses have an opportunity to reconcile is philosophically different than temporary alimony pending a divorce. The dissent wants to grant something in the former proceeding, when the would-be recipient states that she will never reconcile. Mrs. Smith readily could receive the equivalent in the latter proceeding, but a divorce is exactly what Mrs. Smith first sought and then abandoned. The majority, relying on existing case authority, fully protects Mrs. Smith: she may seek alimony and a divorce, or seek separate maintenance and reconciliation. Instead she wants separate maintenance while rejecting both divorce and reconciliation. Whether the reasons Mrs. Smith has for wanting to continue the marriage are laudatory or not, refusing to seek a divorce is not something I wish to discourage. Yet neither should the courts be asked to contrive independent support obligations for living arrangements that do not qualify either as temporary pending divorce or tentative pending reconciliation.

The options to satisfy Mrs. Smith's support needs are available, but she has not taken them. I believe the dissent unnecessarily strives to form new ones while condemning the existing ones. Traditional and equitable rules have not provided support entitlements for a wife who wants never to see her husband again, but wants to remain married. Whether a new category of marriage should be created is a public policy question that deserves a public answer through the legislature.

**THOMAS AND MCMILLIN, P.JJ., AND HERRING, J., JOIN THIS SEPARATE OPINION.**

PAYNE, J., DISSENTING:

This is a case where the record clearly shows that the wife is entitled to a divorce on the ground of



habitual cruel and inhuman treatment should she desire it. The question in regard to separate maintenance seems to arise because of her statement that she could not live with her husband again. This is not a surprising nor unreasonable determination given the fact that he had ordered her out of his presence at gunpoint. The question whose answer will determine the outcome of this case is:

Will a husband's unrepented acts of continuous cruel and inhuman treatment of a wife defeat her action for separate maintenance when that treatment justified her leaving?

In a court of law, the answer would be "No" much less in a court of equity!

Therefore, I must respectfully dissent from the majority's opinion because I believe Mississippi's case law requires that we affirm the chancellor's decision. I will not repeat the well known and undisputed standard of review; however, a review of the history of separate maintenance might be helpful.

***Garland v. Garland*, 50 Miss. 694, 714-16 (1874)** recognized that in separate maintenance the separation must not be materially caused by the fault of the wife.

***Serio v. Serio*, 231 Miss. 147, 94 So. 2d 799 (Miss. 1957)** held that the wife could receive separate maintenance where separation was caused by the husband's mistreatment, even though he later wrote his wife that he was looking for a place the whole family could live. He did not guarantee that he would invite them should he find the place, nor did he state that he would abandon his undesirable traits and treatment of his wife.

In ***King v. King*, 152 So. 2d 889 (Miss. 1963)**, the wife was not entitled to separate maintenance because her misconduct *materially contributed* to her separation from her husband. The court found that her fault was equal to or greater than that of the husband and that he was *not* habitually cruel and inhuman in his treatment of his wife. The court quoted from ***Hilton v. Hilton*, 44 So. 2d 262 (Miss. 1906)** that the wife who leaves a husband need not be blameless, but if "the fault of the wife is equal to or greater than that of the husband, or that his fault was not sufficient to justify her leaving the domicile" she is not entitled to separate maintenance. ***King*, 152 So. 2d at 891**. The evidence in the case *sub judice* does not support a finding of fault equal or greater than that of her husband, so the chancellor cannot be manifestly wrong in his determination in regard to comparative fault.

***Rodgers v. Rodgers*, 349 So.2d 540 (Miss. 1977)** was a case where the chancellor denied the wife's bill for divorce but awarded her separate maintenance. The supreme court reversed because it found her conduct to be a *material* factor in the separation equal to if not greater than that of the husband. The wife admitted stabbing her husband several times and having a male companion against her husband's wishes, though no adultery was involved. The husband was guilty of striking her and cursing her. "Both testified that they could no longer live together as husband and wife." ***Id.* at 541**. The action was dismissed without prejudice so that either party could "begin anew."

***Marble v. Marble*, 457 So. 2d 1342 (Miss. 1984)** began to muddy the waters because the wife was "partly responsible for the marital difficulties. Therefore, in our opinion, she is not entitled to separate maintenance." ***Id.* at 1343**. The court then said that since she would not take her husband back unless he got counseling showed her unwillingness to have him resume the marriage relationship, therefore negating separate maintenance. The court cites to ***Smith v. Smith*, 293 So. 2d 466 (Miss. 1974)** as authority, but *Smith* granted the wife a divorce and said: "[h]e contends that unless she is willing to

live with him, she is not entitled to support; that is, of course the law, *provided* the separation is through *no fault of his own*." **Smith, 293 So. 2d at 467.**

**Smith quoted Cox v. Cox, 183 So. 2d 921, 924 (Miss. 1966):** "Cox is not required to pay her alimony, separate maintenance, or to support her so long as she *wrongfully* refuses to return to her conjugal duties." (emphasis added). None of these cases has relevance in an instance where the wife is ordered out at gunpoint as in the case *sub judice*, because Mr. Smith's actions provided the major fault and wrong in this separation. The chancellor could readily see that from the testimony in the trial.

Later that year, the court in **Gallaspy v. Gallaspy, 459 So. 2d 283 (Miss. 1984)**, reversed a divorce decree on the basis that the husband's actions did not constitute habitual cruel and inhuman treatment, but then said:

The record reflects that [husband] is a man of considerable wealth and that he has substantial yearly income. [Wife] and the children of the parties are *entitled to support* in accordance with their station in life and in accordance with the means of the parties. The lower court has adequate power and authority to adjudicate the rights of the parties, and the decision here does not prejudice any of them in the enforcement of those rights.

**Id. at 286** (emphasis added). In other words, even though there are not sufficient grounds for divorce, separate maintenance is available.

**Kergosien v. Kergosien, 471 So.2d 1206 (Miss. 1985)** held that the wife was entitled to separate maintenance even though she was not blameless. She would not balance the bank statements, was often overdrawn, failed to pay the utility bills on time, left the husband home alone with six children on occasion, etc. She was not guilty of habitual cruel and inhuman treatment and the supreme court reversed the divorce decree and rendered judgment for separate maintenance. The court said, "Separate maintenance may be awarded when the facts do not justify the granting of a divorce. **Cox v. Cox, 279 So. 2d 612 (Miss. 1073)**. Therefore, this is a case where the granting of separate maintenance would have been appropriate." **Id. at 1211**. In the case *sub judice*, since there *was* habitual cruel and inhuman treatment on the part of the supporter which would have warranted alimony, how much more would the court be authorized to order separate maintenance to the offended though not blameless wife?

Later that year, **Tanner v. Tanner, 481 So. 2d 1063 (Miss. 1985)**, upheld separate maintenance to the wife but reversed as to amount as it would not leave the husband with a reasonable standard of living.

The case of **Robinson v. Robinson, 554 So. 2d 300 (Miss. 1989)** was a case where separate maintenance at the trial level was granted in an amended decree which found that although the husband admitted having an affair, his health and job problems had not affected the separation. Still, the wife's dependence on her father's money was an injury to her husband's psychological makeup. Therefore, the chancellor found the husband was justified in leaving home as resumption of the marriage was impossible. Incredibly the court said:

A careful reading of the record clearly demonstrates that the lower court correctly found that

Nancy's conduct [not refusing her father's gifts] materially contributed to the separation because of the psychological makeup of her husband; thus, the wife here was not without fault. . . . Finding the husband's leaving the marriage was justified, the Court is of the opinion that no separate maintenance can be awarded to the wife.

***Id.* at 304.** The case was reversed, although child support was upheld, and remanded for determination of the amount without separate maintenance included. Justice Robertson's dissent asked a question that is pertinent here: "[I]f [wife] is not guilty of fault such that [husband] is entitled to a divorce, how is it that she is guilty of fault such that she should be denied separate maintenance?" He further states that the husband's pride was wounded. "How this becomes [the wife's] fault precluding separate maintenance escapes me." ***Id.* at 307.**

I, equally puzzled, wonder how the husband's habitual cruel and inhuman treatment in the case *sub judice* and the wife's refusal to live with a man guilty of such treatment "becomes wife's fault precluding separate maintenance."

If *Robinson* were the Mississippi Supreme Court's last words, I would no longer have the stomach to dissent here, but two 1993 cases lend some balance again to the law of separate maintenance in Mississippi. They are ***Lynch v. Lynch*, 616 So. 2d 294 (Miss. 1995)** and ***Daigle v. Daigle*, 626 So. 2d 140 (Miss. 1993)**. *Lynch* reversed a decree (1) denying the husband a divorce and (2) awarding separate maintenance. That case would seem to enhance the majority opinion in the case *sub judice*, but an examination of the evidence shows the distinction. In *Lynch* the court found that although husband moved out of the marital domicile the cause of the separation was the wife's behavior toward her husband--nagging about beer, falsely accusing him of infidelity and insisting that he read religious books and watch Christian TV. Since she was at fault and he was not, he was entitled to a divorce from his wife on the ground of constructive desertion and she was entitled to no separate maintenance.

These facts differ greatly than the case *sub judice* where the husband often cursed his wife, threatened to kill her, and backed up his threat by brandishing a gun as he ordered her to leave. Her failure to wait on him hand and foot could not equate to his mistreatment of her.

*Lynch* quoted from ***Thompson v. Thompson*, 527 So. 2d 617, 621 (Miss. 1989)**:

Recalling the nature and function of separate maintenance, we have noted that:

[i]n former times, when divorce was socially less acceptable, it was used with more frequency to preserve the marriage relationship and enforce the husband's legal duties to support his wife. However, under today's mores, the divorce is more commonly sought when the marriage has deteriorated. *Nevertheless, the purpose of separate maintenance when it is sought has not changed.*

(emphasis added).

*Daigle v. Daigle* is a case in many ways similar to the case *sub judice*. The husband claimed that his wife's refusal to allow him to come home to live with her barred her from an award for separate maintenance. However, the court noted that he waited three years until just before the trial to attempt

to return. The court found that the wife was justified in viewing his offer with reasonable suspicion. "The chancellor did not believe the offer by Husband to be sincere. There is nothing in the record to show that his belief was incorrect." *Daigle*, 626 So. 2d at 145.

In the case *sub judice*, the chancellor believed that the husband could not or would not change from his habitually cruel and inhuman treatment and "there is nothing in the record to show that his belief was incorrect." I would hold, as the chancellor apparently did, that whatever fault that the wife's behavior bore was nothing to be compared with that of the husband. Therefore, her separation was not materially caused by her actions but rather by the gross mistreatment by her husband.

I would affirm the chancellor's decision and commend the chancellor for avoiding a miscarriage of justice.

**COLEMAN, DIAZ, AND KING, JJ., JOIN THIS SEPARATE WRITTEN OPINION.**