

IN THE COURT OF APPEALS 10/31/95
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-01233 COA

CHARLA MEANS OLSON

APPELLANT

v.

CLIFFORD OLSON

APPELLEE

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

TRIAL JUDGE: HON. MELVIN MCCLURE, JR.

COURT FROM WHICH APPEALED: PANOLA COUNTY CHANCERY COURT, SECOND
JUDICIAL DISTRICT

ATTORNEY FOR APPELLANT:

ROBERT H. BROOME

ATTORNEY FOR APPELLEE:

JOE VANDYKE

NATURE OF THE CASE: DOMESTIC RELATIONS - CUSTODY

TRIAL COURT DISPOSITION: GRANT OF DIVORCE ON GROUNDS OF HABITUAL CRUEL
AND INHUMAN TREATMENT

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

PAYNE, J., FOR THE COURT:

This is a divorce action brought by Clifford Olson (Clifford) against Charla Means Olson (Charla) on the grounds of habitual cruel and inhuman treatment or, in the alternative, irreconcilable differences. The chancellor granted him a divorce on the grounds of habitual cruel and inhuman treatment. He did not grant the divorce based on irreconcilable differences since neither party met the statutory guidelines. Finding that the chancellor was manifestly in error in granting the divorce, we reverse.

STATEMENT OF THE FACTS

Clifford and Charla Olson were married on August 1, 1992. They separated on December 9, 1993, after sixteen months of marriage and no children. Clifford filed his complaint for divorce on January 7, 1994, on the grounds of habitual cruel and inhuman treatment or, in the alternative, irreconcilable differences. The Panola Chancery Court held a trial on September 9, 1994, where the chancellor granted Clifford a divorce on grounds of habitual cruel and inhuman treatment. Charla put on no defense at trial, yet now appeals the decree based on a lack of evidence to support the divorce. She assigns as error essentially the following:

I. DID THE CHANCERY COURT ERR IN GRANTING CLIFFORD OLSON A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT?

Since we find that Clifford failed to meet his burden of proof, we reverse and remand this case for proceedings consistent with this opinion.

ARGUMENT AND DISCUSSION OF THE LAW

Clifford argues that the grounds of divorce were proven by a preponderance of the evidence. He contends that, since corroboration was not necessary and the evidence at trial was uncontroverted, the chancellor was not in error in granting him the divorce. Finally, he argues that the chancellor, who is in the best position to hear the evidence and witnesses, should not be reversed absent manifest error. On the other hand, Charla contends that Clifford failed to meet his burden of proving the grounds of habitual cruel and inhuman treatment by a preponderance of the evidence. Therefore, she argues that the chancellor's decision was manifestly wrong since it was unsupported by the evidence.

IRRECONCILABLE DIFFERENCES

The public policy of this State is to encourage marriage and discourage divorce. Divorce is purely a statutory remedy, and we are bound by the language of the statute. The grounds for divorce have been set forth for over a century. Miss. Code Ann. § 93-5-1 (1972). In 1976, the Mississippi Legislature enacted an additional remedy in the case of irreconcilable differences. 1976 Miss. Laws 451. Certain conditions precedent made that remedy available to the parties. Miss. Code Ann. § 93-5-2 (1972 & Supp. 1976). These conditions were:

- (1) a joint bill of the husband and wife or a bill of complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process;
- (2) an affirmative court finding that:
 - (a) the parties have made adequate and sufficient provision by written agreement for the custody and maintenance of children of that marriage, and
 - (b) for the settlement of any property rights between the parties;
- (3) that the bill had been on file for sixty (60) days before being heard;
- (4) that a joint bill may be taken as confessed and a final decree entered thereon, pro confesso, without proof or testimony;
- (5) that no contest or denial exists; and
- (6) that this ground may be asserted as a sole ground for divorce or as an alternative ground with any other cause for divorce within section 93-5-1.

Id.

Because it can be difficult to get feuding parties to a marriage to agree to anything, in 1990 the legislature amended the irreconcilable differences statute to allow the parties to stipulate, in writing, the areas of a property settlement on which they cannot agree and on which they would like the court to make a final order. 1990 Miss. Laws 584 (codified as Miss. Code Ann. § 93-5-2 (Supp. 1990)).

In the present case, the parties failed to make the necessary agreement to properly bring an irreconcilable divorce petition of any kind. Clifford chose to bring this action forward on the grounds of habitual cruel and inhuman treatment. The question today is: Were the grounds of the chosen statutory relief proven? We are bound by caselaw which establishes the type of evidence necessary to meet a plaintiff's burden of proof. This is a peculiar case in that Charla put on no testimony, yet now appeals the divorce decree for lack of evidence. Seldom does one hear of losing an uncontested divorce case, but an examination of both the trial transcript and the court file indicates that this divorce was far from uncontested. We believe Clifford failed in his burden of proof on the grounds of habitual cruel and inhuman treatment. Although the Mississippi Legislature has twice amended the irreconcilable differences statute in the last nine years, making it progressively easier to be granted a divorce in those cases, we also believe the parties here failed to meet that statutory requirement as well.

HABITUAL CRUEL AND INHUMAN TREATMENT

The Mississippi Supreme Court has stated that, on appellate review, a chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings. *Brooks v. Brooks*, 652 So. 2d 1113, 1124 (Miss. 1995) (citations omitted). The appellate scope of review is limited since this court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994) (citation omitted). This court is required to respect a chancellor's findings of fact

that are supported by credible evidence, particularly in the areas of divorce and child support. *Id.* at 1169-70 (citations omitted).

The standard applicable to a divorce on the grounds of habitual cruel and inhuman treatment is as follows:

In years gone by, this Court consistently held that habitual cruel and inhuman treatment could be established only by a continuing course of conduct on the part of the offending spouse which was so unkind, unfeeling or brutal as to endanger, or put one in reasonable apprehension of danger to life, limb or health, and further, that such course of conduct must be habitual, that is, done so often, or continued so long that it may reasonably be said a permanent condition.

Id. at 1170 (quoting *Smith v. Smith*, 614 So. 2d 394, 396 (Miss. 1993) (citing *Wilson v. Wilson*, 547 So. 2d 803, 805 (Miss. 1989)); see also *Ferguson v. Ferguson*, 639 So. 2d 921, 931 (Miss. 1994); *Chamblee v. Chamblee*, 637 So. 2d 850, 859 (Miss. 1994); *Smith v. Smith*, 614 So. 2d 394, 396-97 (Miss. 1993). "While habitual cruel and inhuman treatment may be established by a preponderance of the credible evidence, as opposed to clear and convincing evidence, the charge 'means something more than unkindness or rudeness or mere incompatibility or want of affection.'" *Steen*, 641 So. 2d at 1170 (quoting *Wires v. Wires*, 297 So. 2d 900, 902 (Miss. 1974)). Systematic and continuous behavior beyond simple incompatibility on the part of the offending spouse must be shown. *Id.* (citing *Parker v. Parker*, 519 So. 2d 1232, 1234 (Miss. 1988)). The court has stated that "[w]e have counseled against the awarding of a divorce on the grounds of habitual cruel and inhuman treatment where the lawsuit is based merely 'on petty indignities, frivolous quarrels, general incompatibility and the petulant temper of one or both parties.'" *Steen*, 641 So. 2d at 1170 (quoting *Howard v. Howard*, 138 So. 2d 292, 293 (Miss. 1962)). The risk of life, limb, or health must be real rather than imaginary and must be clearly established by proof. *Id.* (citation omitted). The court has "consistently insisted that parties seeking divorce on [these] grounds . . . prove that the conduct of the offending spouse really was cruel and inhuman . . ." *Faries v. Faries*, 607 So. 2d 1204, 1208 (Miss. 1992) (quoting *Wilson*, 547 So. 2d at 805). Finally, the court has held:

Evidence sufficient to establish habitual, cruel and inhuman treatment should prove conduct that:

either endanger[s] life, limb or health, or create[s] a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief or, in the alternative, be so unnatural and infamous as to make the marriage revolting to the offending spouse and render it impossible for that spouse to discharge the duties of the marriage, thus destroying the basis for its continuance.

Gardner v. Gardner, 618 So. 2d 108, 113-14 (Miss. 1993) (alterations in original) (quoting *Rawson v. Buta*, 609 So. 2d 426, 431 (Miss. 1992)). The party alleging habitual cruel and inhuman treatment must generally corroborate the testimony. *Id.* A divorce may be granted on uncorroborated testimony of the plaintiff if the nature of the situation or isolation of the parties results in no corroborating proof being reasonably possible. *Id.*; see also *Peterson v. Peterson*, 648 So. 2d 54, 57 (Miss. 1994) (even where a divorce on the grounds of habitual cruel and inhuman treatment is uncontested, there must be corroboration of the plaintiff's testimony); Unif. Ch. Ct. R. 8.03 (in all uncontested divorce cases, the plaintiff's testimony must be substantially corroborated).

In the present case, Clifford failed to prove that grounds existed for a divorce based on habitual cruel and inhuman treatment. Clifford did testify that Charla hit him and threw dishes and other objects, but there exists no testimony that Clifford was ever in reasonable apprehension of danger to his life, limb, or health. He testified as follows:

A. I would start cleaning up stuff. I would start picking up and preoccupy my mind with something else. Then she would usually come up and just push and shove me, and ask me to hit her back. Tell me that I wanted to hit her, and she would ask me to hit her back, things like that.

Q. Did she ever leave any marks on your person?

A. No visible, none that I can remember. Those type things I didn't want to even look for, didn't want to think about after those incidences happened.

Q. Did she ever do any of this in anyone else's presence?

A. No.

Q. You just stated that soon as she would throw things, you would try to clean then [sic] up, is that correct?

A. Correct.

Clifford claimed that he was afraid Charla would do bodily harm to herself, not to him. Clifford's testimony also showed that he was able to control Charla both verbally, when she threatened suicide, as well as physically:

A. She just got upset [sic]. She -- I don't know how to explain it, but I did take my twenty two pistol revolver away from her, well my father's twenty two pistol that I had at the time, away from her. She said she was going to kill herself with it.

Q. Were there any other incidences where you had to physically remove a gun from her hand?

A. Yes, sir. One night she got the pistol, ran down -- we had a little pond on our place, she ran down to the pond and sat down on the pond with the pistol.

It was a loaded gun.

Q. What type pistol?

A. It was a ruger twenty two revolver pistol. At this point I was a wreck, I mean I was sick of the suicide attempts, I was sick of everything, so I took another pistol that I had, a forty five caliber pistol, completely unloaded it, I pulled the clip out, and I went down to the pond and I said lets just kill ourself [sic] together if you want to kill yourself, and she agreed to it, that we would kill ourself [sic], and so I took the loaded twenty two pistol away from her and said look, mine is not loaded, this is crazy we need to quit this talk of suicide. It is crazy. We talked through that.

...

Q. Mr. Olson, you have testified as to the behavior on the part of your wife where she would throw things and become violent toward you, did you ever strike your wife?

A. Never. Never struck her.

Q. Was there ever a time that you restrained your wife?

A. Yes, sir. There was a couple of occasions where I restrained her.

Q. Would you tell us about those, please sir?

A. The two that I remember, one was --

...

A. Yes, sir. We were, I'm not sure exactly what lead up to it, we were, she started pushing and shoving and wanting me to hit her back. She slammed her fist into the bathroom door and started, just slinging at me. I grabbed her, held her, threw her on the bed, holding her, she and I both went to the bed together, and I held her there until she calmed down enough to where I could release her and we could try to talk without the throwing of licks, or me holding her.

The testimony revealed that Clifford had no real fear of being harmed by Charla. Although he stated that he became nervous and worried over her behavior and their marriage, he failed to show any resultant reasonable apprehension of danger to his health or safety. The conduct complained of can hardly be said to have been so unkind, unfeeling, or brutal as to cause him reasonable apprehension of danger to his life, limb, or health. Neither can Charla's conduct have been termed permanent since it was not done so often or so long, or even systematic or continuous, that it became habitual. Moreover, proof of Charla's suicide attempts failed to show cruel treatment of *Clifford*. He failed to indicate how these incidents affected his life, limb, or health, except to state that he was worried and upset about his marriage. Testimony existed that Charla's conduct around Clifford's family was normal, yet somewhat reserved. His major complaint was that Charla did not want to have Sunday

dinners at his grandmother's house. Finally, it cannot be said, based on his testimony, that Clifford considered Charla's conduct so unnatural and infamous as to make the marriage revolting. The conduct here certainly does not rise to the level necessary to justify granting a divorce on the grounds of habitual cruel and inhuman treatment.

Moreover, Clifford was required to corroborate his testimony unless the nature of the situation or isolation of the parties was such that no corroborating proof was possible. Here, Clifford failed to call Charla's parents, with whom he testified he conferred regarding the guns in the house and her suicide attempts. Clifford testified that there were no eyewitnesses to the throwing of dishes or to the broken items in their home, although later he stated that he was certain the trailer owner, Marilyn Barbaro, had seen the items. Nevertheless, he also failed to call her to corroborate any of his testimony. At trial, Clifford did call his brother and mother to attempt to support what he had stated. However, that testimony was weak, at best. Clifford's brother said Clifford became upset and cried when discussing his marriage with him. His mother, likewise, said when he talked to her about his marriage he would become upset. These two witnesses only verified Clifford's testimony that he was upset about Charla's conduct and their marriage. More importantly, however, is the fact that strong, positive corroboration would not have helped Clifford in his claims. He simply failed to prove the necessary grounds for divorce by a preponderance of the evidence. Corroboration was absolutely unnecessary in this case. Clifford failed to prove cruel and inhuman treatment as those terms have been defined by Mississippi caselaw. His proof simply showed mere incompatibility and his wife's propensity to display her temper and unpredictable behavior behind closed doors. Neither Charla's conduct or Clifford's marital unhappiness and dissatisfaction fulfill the requirements of a divorce on the grounds of habitual cruel and inhuman treatment.

Divorce is a statutory remedy. This court is not at liberty to amend the statute to allow divorce where unhappiness is the ground. The conditions for granting a divorce on grounds of habitual cruel and inhuman treatment and on irreconcilable differences are explicit. The record contains nothing to prove that the conditions for either of the two grounds were met. Although in days past, the grounds of habitual cruel and inhuman treatment may have seemed to be a "catchall" for "anything goes," the Mississippi Supreme Court in 1989 reiterated that any such change was for the Legislature to make, not the judiciary. *Wilson v. Wilson*, 547 So. 2d 803, 805 (Miss. 1989). Therefore, we are not at liberty to fashion a relief for the appellant Clifford herein. This court may not amend the statute by judicial fiat.

We hold that the chancellor was manifestly in error when he granted Clifford a divorce on the grounds of habitual cruel and inhuman treatment. No evidence exists to prove Clifford suffered habitual cruel and inhuman treatment that endangered his life, limbs, or health. Accordingly, the chancellor's decree is reversed and rendered for proceedings consistent with this opinion.

THE JUDGMENT OF THE PANOLA COUNTY CHANCERY COURT, SECOND JUDICIAL DISTRICT IS REVERSED AND RENDERED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.

