

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 97-CA-00031 COA**

GEORGE H. RHODES, JR.

APPELLANT

v.

NANCY FLOWERS

APPELLEE

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

DATE OF JUDGMENT:	11/12/96
TRIAL JUDGE:	HON. VICKI R. BARNES
COURT FROM WHICH APPEALED:	WARREN COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	SAMUEL D. HABEEB J. MACK VARNER
ATTORNEY FOR APPELLEE:	LANDMAN TELLER, JR.
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	APPELLANT'S PETITION TO MODIFY DECREE DENIED. ATTY. FEES AWARDED TO APPELLEE
DISPOSITION:	AFFIRMED - 02/10/98
MOTION FOR REHEARING FILED:	2/25/98
CERTIORARI FILED:	04/23/1998
MANDATE ISSUED:	

BEFORE BRIDGES, C.J., COLEMAN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

George Rhodes assigns error to the chancellor's refusal to terminate his obligation to pay alimony to his former wife, Nancy Flowers. Finding Rhodes's argument without merit, we affirm the chancellor's ruling.

FACTS

On September 8, 1994, Nancy Flowers was granted a divorce from her husband, George Rhodes, on the grounds of adultery. The chancellor awarded Nancy the marital home as well as \$1,250 per

month in periodic alimony to be paid until Nancy remarried, died, or until the alimony was terminated according to law. The court also ordered George to pay Nancy \$2,500 for attorney's fees. However, in the summer of 1994, before the final judgment of divorce was entered, Nancy began having a sexual relationship with Allen Teeter. In August of 1995, Allen moved into Nancy's house and began renting a bedroom from her at the rate of \$500 per month. George filed a motion to modify the judgment for divorce citing a material change in circumstances, which he concluded should terminate his obligation to pay alimony. He argued that Nancy's present living situation and financial needs justified a modification of the former judgment. Nancy counterclaimed, asking the court to increase her alimony based on George's increased financial income. The chancellor ruled that the circumstances did not warrant a modification for either party. It is from this order that George Rhodes appeals.

DISCUSSION

The supreme court has repeatedly held that in order to justify the modification of a divorce decree, the petitioner must show a material change in circumstances arising after the original decree was entered. *See, e.g., Anderson v. Anderson, 692 So. 2d 65, 70 (Miss. 1997); Morris v. Morris, 541 So. 2d 1040, 1042-43 (Miss. 1989)*. The record reflects that Nancy and Allen had begun vacationing and having sexual relations together in the summer of 1994, which was prior to the entry of the divorce decree. George should have anticipated that the relationship might continue; thus, George's allegations of a material change in circumstances must fail.

This Court is also unpersuaded by George's assertion that Nancy and Allen are cohabiting and that therefore his obligation to provide alimony to Nancy should terminate. The fact that a divorced payee spouse is engaging in sexual relations is an insufficient basis for modifying or terminating alimony. *Ellis v. Ellis, 651 So. 2d 1068, 1071 (Miss. 1995)*. Instead, the court must make additional financial inquiries before determining that alimony should be terminated. *Id.* While cohabitation raises a presumption of changed circumstances, it does not, in itself, support a reduction of alimony. *Hammonds v. Hammonds, 641 So. 2d 1211, 1216 (Miss. 1994)* (citing *DePoorter v. DePoorter, 509 So. 2d 1141, 1144 (Fla. Dist. Ct. App. 1987)*). Rather, upon sufficient evidence by the recipient ex-spouse that her financial needs have not changed as a result of her relationship, the burden shifts to the paying ex-spouse to rebut the recipient's claim. *Id.* Where the paying ex-spouse fails to satisfy his burden, the court must uphold his obligation to continue providing alimony. Furthermore, this Court will not "disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Anderson, 692 So. 2d at 70*. In the present case, although Nancy allows Allen to live in her home, she requires that he pay rent for his living quarters, she maintains a separate bank account from Allen, and she does not give to nor receive additional financial assistance from Allen. Since there is substantial evidence in the record to support the chancellor's finding that no material change in circumstances exists to warrant a modification in alimony, we affirm.

Finally, George argues that the chancellor's award of attorney's fees was unjust in light of Nancy's ability to pay her own fees. Although an award of attorney's fees to a party financially capable of paying is certainly inappropriate, we entrust the chancellor with the authority to make such decisions concerning a party's financial ability to pay. *Sarver v. Sarver, 687 So. 2d 749, 755 (Miss. 1997)*. A careful review of the record reveals no abuse of discretion in the chancellor's award of attorney's fees;

therefore, we affirm the decision of the chancery court.

**THE JUDGMENT OF THE WARREN COUNTY CHANCERY COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, HINKEBEIN,
KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**