

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00993 COA

SHARON S. KING

APPELLANT

v.

MICHAEL M. KING

APPELLEE

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

TRIAL JUDGE: HON. JAMES E. NICHOLS

COURT FROM WHICH APPEALED: SHARKEY COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ROBERT S. MURPHREE

ATTORNEY FOR APPELLEE:

DAVID SESSUMS

NATURE OF THE CASE: DOMESTIC

TRIAL COURT DISPOSITION: HUSBAND GRANTED A DIVORCE ON GROUNDS OF
HABITUAL CRUEL TREATMENT AND IRRECONCILABLE DIFFERENCES

EN BANC

BRIDGES, C.J., FOR THE COURT:

Sharon King has appealed to this Court from a decree of the Chancery Court of Sharkey County granting a divorce to Michael M. King. The chancellor granted Michael the divorce on the grounds habitual cruel and inhuman treatment and on irreconcilable differences and denied Sharon's counterclaim for separate maintenance. Sharon assigns as error the following:

I. THE CHANCELLOR ERRED IN GRANTING THE APPELLEE A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT.

II. THE CHANCELLOR ERRED IN GRANTING A DIVORCE BASED ON IRRECONCILABLE DIFFERENCES.

III. THE CHANCELLOR ERRED IN DISMISSING SHARON'S COUNTERCLAIM FOR SEPARATE MAINTENANCE.

IV. THE CHANCELLOR ERRED IN NOT GRANTING THE APPELLANT ALIMONY.

V. THE CHANCELLOR ERRED IN NOT FOLLOWING THE STATUTORY GUIDELINES IN SETTING CHILD SUPPORT.

Finding that the chancellor was manifestly in error in granting the divorce, we reverse in part. Consequently, it is unnecessary to address the fourth and fifth assignments of error. Finding no reversible error in the chancellor's decision to dismiss Sharon's counterclaim for separate maintenance, we affirm in part.

FACTS

Michael and Sharon were married on June 8, 1975. The two daughters, Lacy, age 15, and Cassie, age 12, at the time of trial were born of this marriage. Michael moved out of the marital domicile on December 26, 1993 and filed his complaint for divorce on November 4, 1994. The parties owned and operated a fish farm in Sharkey County. In general, Michael managed the business while Sharon tended to the children and the home.

ANALYSIS

I THE CHANCELLOR ERRED IN GRANTING THE A DIVORCE ON THE GROUNDS OF 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). 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). 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. *Steen*, 641 So. 2d at 1169-70.

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.* 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, Michael failed to prove that grounds existed for a divorce based on habitual cruel and inhuman treatment. Michael did testify that Sharon had falsely accused him of adultery. The record reveals, however, that although she had no proof, Sharon's suspicions were not completely unreasonable.

Michael's other complaint was that Sharon was "cold" and gave him the "silent treatment." This is not behavior of the sort previously described which would amount to cruel and inhuman treatment. Michael further claims that the symptoms of stress he experiences are a result of the marital relationship. There was no medical testimony to this effect, however, and Michael has not been treated for this condition since 1987. Therefore, it seems unlikely that Michael abandoned the marriage for the purpose of preserving his health. Other evidence of Sharon's alleged mistreatment of Michael were isolated events rather than habitual conduct and seemed to be unrelated to Michael's departure from the marital domicile. Thus, the evidence in this matter does not rise to the level required to justify granting a divorce on the grounds of habitual cruel and inhuman treatment. This Court holds that Michael failed to prove cruel and inhuman treatment as those terms have been defined by Mississippi case law. His proof simply failed to show more than mere incompatibility and his wife's distaste for public displays of affection. Marital unhappiness and dissatisfaction are not sufficient to grant a divorce on the grounds of habitual cruel and inhuman treatment. We reiterate the court's statement in *Wilson v. Wilson*, 547 So. 2d 803, 805 (Miss. 1989) that "our oaths require that we take seriously the grounds we have been given" and we must insist "that parties seeking divorce on the grounds of habitual cruel and inhuman treatment prove that the conduct of the offending spouse really was cruel and inhuman, and habitually so, taking the legislative language by its common and ordinary meaning." Accordingly, we find that the chancellor erred in granting Michael a divorce on this ground.

II. THE CHANCELLOR ERRED IN GRANTING A DIVORCE BASED ON 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. 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 (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. 1991)).

In the present case, the parties failed to make the necessary agreement to properly bring an irreconcilable divorce petition of any kind. Also, from the record, it is obvious that Sharon contested the divorce. In fact, the appellee makes no attempt to defend this issue in his brief. Thus, the chancellor erred in granting Michael a divorce on this basis.

III. THE CHANCELLOR ERRED IN DISMISSING SHARON'S COUNTERCLAIM FOR SEPARATE MAINTENANCE.

An order of separate maintenance is a judicial command to the absent spouse to resume cohabitation or, in the alternative, to provide suitable maintenance of the spouse until such time as they are reconciled. *Daigle v. Daigle*, 626 So.2d 140, 145 (Miss. 1993). When the facts do not justify granting a divorce, separate maintenance can be awarded. *Kergosian v. Kergosian*, 471 So. 2d 1206, 1211 (Miss. 1985). "Separate maintenance generally will not be awarded to a spouse whose conduct was a material factor in the separation at least equal to that of the other spouse." *Id.*

Sharon freely admitted that she was equally at fault for the separation. Furthermore, she changed the locks to her home to prevent Michael from returning and stated that she did not want him to return until such time as he "gets right with the Lord." Sharon was unable to be more specific about what this qualifier entailed. This condition on her offer to have her husband return to her establishes that Sharon's willingness to have her husband resume the marital relationship was not complete. As such it will not support an award of separate maintenance, which is a judicial command to the absent spouse to resume cohabitation or, in default thereof, to provide suitable maintenance. *Marble v. Marble*, 457 So. 2d 1342, 1343 (Miss. 1984). Therefore, the chancellor did not err in refusing to grant separate maintenance to Sharon.

The record reflects that the appellee is a man of comfortable means and that he has a substantial yearly income. The children of the parties are entitled to support in accordance with their stations 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.

THE JUDGMENT OF THE CHANCERY COURT OF SHARKEY COUNTY IS REVERSED AND RENDERED AS TO THE GRANT OF DIVORCE AND IS AFFIRMED AS TO THE DENIAL OF SEPARATE MAINTENANCE. COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE APPELLANT AND APPELLEE.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.