

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TIMOTHY LEE TACKETT

APPELLANT

VS.

CASE NO. 2006-CA-01157

KIM OLIVER TACKETT

APPELLEE

APPEAL FROM THE CHANCERY COURT OF MONROE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, KIM OLIVER TACKETT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justice of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Timothy Lee Tackett, Appellant;
2. Kim Oliver Tackett, Appellee;
3. Duncan Lee Lott, attorney for Appellant;
4. The Lott Law Firm, P.A., attorneys for Appellant;
5. Candace Cooper Blalock, attorney for Appellee;
6. Jonas & Blalock, PLLC, attorneys for Appellee; and
7. Honorable Talmadge D. Littlejohn, Chancellor, 1st Judicial District, New Albany, MS (trial judge).

Respectfully submitted,

KIM OLIVER TACKETT, Appellee

By:


CANDACE COOPER BLALOCK (Miss. Bar No.100245)

TABLE OF AUTHORITIES

<u>Brawdy v. Howell</u> , 841 So.2d 1175, 1179 (Miss. App. 2003)	4
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STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Appellee concurs with Appellant's Nature of the Case, Course of Proceedings and Disposition Below.

B. STATEMENT OF FACTS

Appellee concurs with the first paragraph of Appellant's Statement of Fact, but would show there are some discrepancies in the remaining paragraphs, all of which are easily established by reviewing the transcript.

Kim and Tim dated for over twenty (20) years and later married on September 6, 2003. No children were born unto this union. Kim and Tim both testified there were money issues. Kim testified that she was unable to work a forty (40) hour week. Kim did obtain a job driving a school bus for the Amory City Schools and her income is just a few hundred dollars less than what she was making working full time as a meter reader for the city. Kim testified that she did use some of the money from her retirement account to help her sister and pay bills. Kim and her mother both testified that her family were the ones to help her financially when Tim left her without any means of support. There was no testimony about Kim excessively spending money.

Kim and Tim both testified there were issues in the marriage involving sex. Kim testified that Tim asked her to change medications to help with that issue, but the medication change did not solve the problem. Kim testified that Tim had to take a pill in order to perform sexually. Both parties testified that Tim wouldn't come home at night, but when he did, he either slept on the love seat or in the other bed. Furthermore, the only incident testified to where Tim tried to have sexual relations with Kim to no avail was when she was walking through the kitchen and he

was sitting on the love seat and asked her “Well, do you want to have sex?”

Tina Hodges, who testified at the request of Tim, testified as to arguments Kim told her about and issues they had with sex, but there was no time frame given. Furthermore, most of the testimony, according to Tina, was about incidents prior to the parties’ marriage.

Tim had two other witnesses who testified about the one argument which occurred prior to his leaving in May. Kim testified that this argument basically ensued because she wanted her nephew to be able to drive her 1989 Ford Probe, which she owned prior to the marriage, and that would mean Tim would have to drive his truck while Kim’s nephew drove the car for a few weeks. Nobody could testify as to what happened inside the house (which was where the fight started). Furthermore, everybody’s testimony basically stated the argument only lasted about five (5) minutes or less.

The parties lived together as a married couple for approximately a year and a half before Tim left. There is only evidence of one corroborated argument where both parties used at least one curse word. Tim was not justified in leaving Kim and the marriage. Tim lived with his mother prior to marrying Kim and when he left Kim, he immediately moved back in with his mother and brother.

SUMMARY OF THE ARGUMENT

Tim Tackett left Kim Tackett on or about May 18, 2005. He left her without any financial support and he told the landlord that he would not be renewing their lease. Tim testified that Kim “nagged” him. Kim testified that Tim wouldn’t talk to her or tell her what was wrong. Kim further testified she tried to get him to go to counseling. Tim testified he didn’t want to go to counseling. Tim presented evidence of one argument that was corroborated by

testimony from neighbors, but the neighbors didn't know exactly what happened, nor could they hear exactly what was said, although it was shown that both parties said curse words. Tim had no evidence of any other disagreements. There is no evidence of verbal abuse. The only proof we had was there was one argument outside and Tim left. This does not prove that Kim was at fault in the separation. Any conduct of Kim that was shown was not enough to materially contribute to Tim leaving the marriage. The Court does not have to find Kim totally blameless, it just has to find that her misconduct must not have materially contributed to the separation. Kim's acknowledgment of a portion of the fault in the one fight does not show that she materially contributed to Tim leaving. Tim did not show that Kim substantially contributed to the parties' separation.

Kim testified that she loved Tim. She testified she would take him back. She testified she would go through counseling or do whatever it took in order for him to come home. Tim testified he didn't want to go to a counselor. Tim testified that he knew he had an obligation to financially support his wife, yet he refused to do so. Tim's income is substantially larger than Kim's income. Tim's reported expenses are *projected* and are not *actual*, yet the Court took those expenses into consideration in figuring the amount of separate maintenance to award Kim. The Court made an equitable finding as to the amount of separate maintenance in that the amount keeps Kim at basically the same standard of living without unduly depleting Tim's estate. Tim is left with more than enough financially after supporting Kim each month. The Court awarded Kim enough money to live on and pay her bills without relying on her mother and other family members, while Tim was left with an amount sufficient to provide for his monthly necessities. The Chancellor was appropriate in his ruling in that he did not abuse his discretion, he was not

manifestly wrong, and he did not apply an erroneous legal standard.

ARGUMENT

THE CHANCELLOR CORRECTLY RULED IN FAVOR OF APPELLEE IN FINDING SHE DID NOT MATERIALLY CONTRIBUTE TO THE SEPARATION OF THE PARTIES AND THE AMOUNT AWARDED AS SEPARATE MAINTENANCE WAS REASONABLE, ALLOWING KIM TACKETT TO REMAIN AT THE SAME STANDARD OF LIVING WITHOUT UNDULY DEPLETING APPELLANT'S ESTATE
A. Standard of Review

The standard of review in matters of this kind is limited. The Mississippi Supreme Court has held that, on appellate review, findings of fact by a chancellor will not be disturbed where there is substantial evidence to support those factual findings. Brooks v. Brooks, 652 So.2d 1113, 1124 (Miss. 1995). The Courts have further held the opinion of the lower court would not be reversed if there was found to be substantial evidence in the record with which to support the chancellor's findings. Brawdy v. Howell, 841 So.2d 1175, 1179 (¶ 8) (Miss. App. 2003). Furthermore, this Court has held that it "will not disturb the findings of a chancellor unless we find an abuse of discretion, an erroneous application of the law or a manifest error." Id. The Court has further held that in a domestic relations context, it 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. Ligon v. Ligon, 98-CA-00190-COA (¶ 5) (Miss. App. 1999) (citing Setser v. Piazza, 644 So.2d 1211, 1215 (Miss. 1994)). Under this standard of review, there is substantial evidence in the record to support the chancellor's findings; the chancellor did not abuse his discretion, was not manifestly wrong, and did not apply an erroneous legal standard.

The Court, on appeal, reviews all of the evidence in a light most favorable to the appellee and does not reverse unless the Chancellor's decision on such facts is manifestly wrong or unsupported by substantial evidence. Rawson v. Buta, 609 So.2d 426, 429 (Miss. 1992).

The appropriate standard of review in this matter is the familiar manifest error/substantial evidence rule since the Court is being asked to review the Chancellor's findings.

B. The Chancellor correctly ruled in favor of Appellee in determining Kim Tackett's conduct did not materially contribute to the separation of the parties.

The Court has held that "It is well-established 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.'" Lynch v. Lynch, 616 So.2d 294,296 (Miss. 1993). The Court went on to find that the power of the chancellor to grant a wife's request for separate maintenance is based on: (a) separation without fault on the part of the wife and (b) willful abandonment of the wife by the husband accompanied by a refusal to support her. Id. Furthermore, the Court does not have to find that the wife is totally blameless to award her separate maintenance, but her misconduct must not have materially contributed to the separation. Id. Tim presented evidence of one fight with Kim. During his eye witness' testimony of this one fight, it was shown that both parties were cursing, with Tim's own witness hearing him use the word "damn". One fight, a fight that Tim was at least partly responsible for having, was all Tim could prove during the twenty months that the parties lived together before Tim moved back in with his parents. One fight was what led him to walk away from the marriage before they even celebrated their second anniversary. Kim admitted they had the argument, but her acknowledgment of some fault in the fight does not necessitate finding that she materially contributed to the separation or that she is not entitled to separate maintenance. Shorter v. Shorter, 740 So.2d 352 (Miss. 1999). The Courts do not require her to be totally blameless to allow an award of separate maintenance, just that her

misconduct must not have materially contributed to the separation. *Id.* The allegations in the case at hand are very similar to those in the case of *Shorter*. Tim eluded to Kim's lack of desire to have sexual relations. Kim's testimony was contradictory in that Tim had to take a pill in order to consummate any sexual relations and that she had switched her medications in order to help with her sexual desires. Neither party ever testified to how long it had been since the couple had sexual relations, but both parties testified as to how good the first year of marriage was, so the period of time without sexual relations could not have been that great. Tim further testified as to Kim's "nagging". No other person was a witness to this alleged "nagging". Kim testified that she knew something was wrong with Tim and was asking him to talk to her, go to counseling with her, something to help with whatever problems he had. As in the case of *Shorter*, the Court heard conflicting testimony and made his findings based on this testimony. In both cases, there is not any evidence to suggest a different conclusion than the wife's lack of substantial contribution to the parties' separation.

C. The amount of separate maintenance ordered by the Chancellor was reasonable and kept Kim Tackett at the same standard of living without unduly depleting appellant's estate.

The case at hand is a text book case for Separate Maintenance. Kim loves Tim and wants him to come home. Tim has left and refuses to return home. Kim did not contribute to Tim leaving the marital dwelling. Tim has the greater earning capacity and if he refuses to come home, then he should financially support Kim to the extent she is in the same financial position as she was while the parties were cohabitating. Tim, after leaving Kim, refused to support Kim in any fashion. Tim went to the landlords of the marital home and told them the lease was not to

be renewed the following month. This left Kim without a place to live. Kim repeatedly called him to try and discuss the situation and Tim refused to answer her calls and/or return her messages. The Supreme Court has found that the allowance of separate maintenance and the amount to be awarded are for the most part matters within the discretion of the chancellor and these decisions will not be reversed unless they are against the overwhelming weight of the evidence. Shorter v. Shorter, 740 So.2d 352 (¶ 10) (Miss. App. 1999) (citing Honts v. Honts, 690 So.2d 1151, 1153 (Miss. 1997)). The Supreme Court has further held that six criteria must be considered in setting awards of separate maintenance: 1) the health of the husband and wife; 2) their combined earning capacity; 3) the reasonable needs of the wife and children; 4) the necessary living expenses of the husband; 5) the fact that the wife has free use of the home and furnishings; and 6) other such facts and circumstances. Shorter v. Shorter, 740 So.2d 352 (¶ 21) (Miss. App. 1999) (citing Honts v. Honts, 690 So.2d 1151, 1153 (Miss. 1997)). The chancellor walked through all six elements and found that 1) Kim is not in good physical condition, but Tim is healthy; 2) Tim earns gross wages of approximately \$3700.00 per month, whereas Kim earns gross wages of approximately \$700 per month and Tim's earnings are greatly superior to Kim's. Together they earn \$4,400, so for the court to award Kim \$1200 leaves Tim with \$2500 and gives Kim \$1900; 3) Kim's monthly needs average \$1,825.80; 4) Tim's *projected* expenses are \$2,270.00 (Tim testified that he is living at home, where he lived for over forty years prior to marrying Kim and where he immediately moved back to after leaving Kim, but looking for a place to live. He is still living at home and incurring none of the *projected* expenses.); and 5) Kim wasn't left with a home in which to live. The amount of separate maintenance award does not unduly deplete Tim's estate. After paying the awarded separate maintenance amount, he still

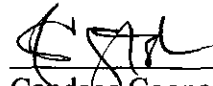
has \$2500 per month for his *projected* expenses of \$2,270.00. Furthermore, since he does not have any *projected* expenses at this time, he has even more money in his pocket than what is shown on paper. His estate is left intact.

CONCLUSION

In conclusion, the chancellor correctly ruled in favor of appellee in finding she did not materially contribute to the separation of the parties and the amount awarded as separate maintenance was reasonable, allowing Kim Tackett to remain at the same standard of living without unduly depleting appellant's estate. The proof has failed to show that Kim Tackett materially contributed to Tim Tackett leaving her and refusing to support her. Furthermore, Tim Tackett, after paying his monthly obligation of twelve hundred dollars (\$1,200.00) to Kim Tackett, is left with more than enough money to live given his *projected* expenses in his Rule 8.05 Financial Statement. Given the fact that Tim Tackett is currently residing with his mother and brother, then he has even more money without any *actual* expenses. Kim prays that this Honorable Court affirms the trial court's decision.

Respectfully submitted, this the 13th day of March, 2007.

Respectfully Submitted,
KIM OLIVER TACKETT,
Appellee



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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

I, Candace Cooper Blalock, attorney for the Appellee in the above styled cause, do hereby certify that I have this day filed the original Brief of the Appellee and three copies thereof by placing the original brief and the copies in the United States Mail, postage prepaid, addressed to Betty W. Sephton, Clerk of the Mississippi Supreme Court, at her customary mailing address of Post Office Box 249, Jackson, MS 39205-0249.

I further certify that I have on this date, served a true and correct copy of the Brief of the Appellee by United States Mail, postage prepaid, to the following individuals at his usual mailing address:

Honorable Talmadge D. Littlejohn
First Chancery Court District Chancellor
Post Office Box 869
New Albany, Mississippi 38652

Hon. Duncan Lott
The Lott Law Firm, P.A.
Post Office Box 382
Booneville, MS 38829

This, the 13th day of March, 2007.



CANDACE COOPER BLALOCK