

THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

TIMOTHY LEE TACKETT

APPELLANT

VS.

NO. 2006-CA-01157

KIM OLIVER TACKETT

APPELLEE

APPEAL FROM THE CHANCERY COURT OF TISHOMINGO COUNTY, MISSISSIPPI

BRIEF OF APPELLANT, TIMOTHY LEE TACKETT

ORAL ARGUMENT REQUESTED

DUNCAN LOTT
ATTORNEY FOR APPELLANT
P. O. BOX 382
BOONEVILLE, MS 38829
(662) 728-9733
Mississippi State Bar No. [REDACTED]

THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

TIMOTHY LEE TACKETT

APPELLANT

VS.

NO. 2006-CA-01157

KIM OLIVER TACKETT

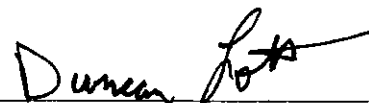
APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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 justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Talmadge Littlejohn, Chancellor, 1st Judicial District, New Albany, MS (trial judge);
2. Kim Oliver Tackett (appellee);
3. Timothy Lee Tackett (appellant);
4. Honorable Candice Blalock, Aberdeen, MS (appellee's trial attorney)
5. Duncan Lee Lott, Esquire, Booneville, MS (appellant's trial attorney)

This the 3rd day of January, 2007.



DUNCAN LOTT
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES	iii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS	1
B. STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
CONCLUSION	11
CERTIFICATE OF SERVICE	13

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

<i>Cox v. Cox</i> , 279 So.2d 612, 615 (Miss. 1973)	8
<i>Gardiner v. Gardiner</i> , 203 MS. 778, 93 So.2d 638 (Miss. 1957)	10
<i>Gray v. Gray</i> , 484 So.2d 1032 (Miss. 1986)	10
<i>Hilton v. Hilton</i> , 88 MS 529, 41 SO. 262 (1906)	8
<i>King v. King</i> , 246 MS. 798, 152 So.2d 889, 891 (1963)	7, 8
<i>Long v. Long</i> , 160 MS 492, 135 SO. 204 (1931)	8
<i>Lynch v. Lynch</i> , 616 So.2d 294, 296 (Miss. 1993)	7
<i>Marble v. Marble</i> , 457 So.2d 1342, 1343 (Miss. 1984)	7
<i>Nichols v. Nichols</i> , 254 So.2d 726, 727 (Miss. 1971)	11
<i>Robinson v. Robinson</i> , 554 So.2d 300, 303 (Miss. 1989)	7

STATEMENT OF ISSUES

- A. THE TRIAL COURT ERRED IN DETERMINING KIM TACKETT'S CONDUCT DID NOT MATERIALLY CONTRIBUTE TO THE SEPARATION OF THE PARTIES.
- B. THE TRIAL COURT'S AWARD OF SEPARATE MAINTENANCE WAS EXCESSIVE AND UNREASONABLE.

STATEMENT OF THE CASE

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

Tim Tackett (Husband) filed his Complaint for Divorce in the Chancery Court of Monroe County, Mississippi, seeking a divorce on the grounds of habitual, cruel, and inhuman treatment. Kim Tackett (Wife) filed her Answer and Counter-Complaint for Separate Maintenance, to which the counter-defendant, Timothy Tackett, filed his Answer denying counter-plaintiff, Kim Tackett's allegation of desertion.

After receiving testimony and evidence in this cause, the Chancellor entered his opinion on May 17, 2006, and subsequent Order was entered on the 12th day of June, 2006, Nunc Pro Tunc, May 17, 2006, denying Tim Tackett's request for divorce on the grounds of habitual, cruel, and inhuman treatment, and granting separate maintenance to Kim Tackett finding that Tim Tackett willfully abandoned Kim Tackett and refused to support her. The Court further awarded Kim Tackett \$1,200.00 per month as separate maintenance beginning June 1, 2006, and continuing thereafter on the 1st day of every month until further order of the Court. The Court ordered the plaintiff to further maintain all health insurance on the defendant/counter-plaintiff

and to leave the defendant/counter-plaintiff as beneficiary on his retirement. The plaintiff/counter-defendant being aggrieved as to the chancellor's Opinion and Judgment perfected his appeal to this Court by Notice of Appeal filed July 13, 2006.

B. STATEMENT OF FACTS

Tim Tackett filed his Original Bill of Complaint for Divorce (Vol. I, P. 1-6) against Kim Tackett in the Chancery Court of Monroe County, Mississippi, on or about May 20, 2005, alleging the parties were married on September 6, 2003, and lived together as husband and wife until their separation on May 16, 2005. Kim Tackett filed her Answer to the Bill of Complaint and Counter-Claim for Separate Maintenance (Vol. I, P. 8-13) on June 22, 2005. Tim Tackett filed his Answer to the Counter-Claim for Separate Maintenance (Vol. I, P. 21-23) on or about July 6, 2005. The Court's Order was entered on June 12, 2006, Nunc Pro Tunc May 17, 2006. Vol. I, P. 66-68) The Court denied Tim Tackett's Bill of Complaint for Divorce on the grounds of habitual, cruel, and inhuman treatment, and awarded separate maintenance to Kim Tackett finding that Tim Tackett had willfully abandoned Kim Tackett, and refused to support her. The Court rendered its Finding of Fact and Judgment after the trial of this case setting out the facts it relied upon in denying the Complaint for Divorce filed by Tim Tackett and granting Kim Tackett's Counter-Complaint for Separate Maintenance (Vol. III, P. 151-166). The Court in its Opinion and Judgment ordered Tim Tackett to pay \$1,200.00 per month to Kim Tackett as separate maintenance and further ordered him to maintain Kim Tackett on his health insurance and retirement account.

Tim Tackett (Tim) and Kim Tackett (Kim) dated for over 20 years and married on September 6, 2003. There were no children born of this marriage. (Vol. I, P. 6) When the

parties married, Tim worked for Tombigbee Electric Power out of Tupelo for 19 years, and had a monthly income of approximately \$3,700.00. (Vol. II, P. 4). Kim worked for the City of Amory as a meter reader (Vol. II, P. 8), but quit work 9 months after the parties' marriage due to a "chemical imbalance". (Vol. I, P. 52) Kim took up a full-time bus driving job for the city school district in August 2005. (Vol. I, P. 54)

Tim testified he left the marital home on May 18, 2005, because Kim was constantly yelling and cursing him. (Vol. I, P. 9, 14) Tim stated that Kim verbally abused him calling him a "asshole" and using other curse words. He indicated the separation occurred in May because Kim blew up over the fact that Tim did not want her to trade his truck for a new car because they did not have the money. (Vol. I, P. 14) Tim testified Kim had no desire to have sexual relations with him (Vol. I, P. 10), and when he discussed this with her, she indicated she didn't want to have sexual relations. Kim agreed the parties argued and admitted the argument which occurred in May led to Tim leaving (Vol. I, P. 45). Kim admitted to having a loss of sexual desire. (Vol. I, P. 49 & 50) Kim admitted she never told her doctor she was suffering from a loss of sexual desire as a result of taking her medication for her chemical imbalance. (Vol. I, P. 50) Kim acknowledged that her and Tim's problems centered around the lack of money and sexual issues. (Vol. I, P. 81) Tim indicated these arguments with Kim occurred on a weekly basis, once or twice a week, and these arguments made him a nervous wreck, and ultimately got to the point where he did not want to come home. (Vol. I, P. 14)

Tina Hodges, a friend of Kim, who worked with her, stated Kim told her she did not want to have sex with Tim, had no desire to, and was not going to. (Vol. I, P. 27) Kim acknowledged to Tina, she argued a lot with Tim over quitting her job, and that Kim called Tim ignorant and

stupid. (Vol. I, P. 28) Ms. Hodges stated Kim was the instigator of arguments she saw, while Tim was quiet and laid back (Vol. I, P. 29), and she observed arguments both before and after Kim and Tim were married. (Vol. I, P. 30)

Ann Hood, who rented the trailer to Kim and Tim Tackett, overheard the argument in May, and heard Kim yelling and screaming at Tim, some 150 feet away from the house, where she lived. (Vol. I, P. 32) She testified Kim's voice was hostile and angry and the argument lasted for approximately 5 minutes. (Vol. I, P. 33) Ms. Hood recalled Kim telling her that Tim was romantic, but she didn't care for that and it wasn't her thing. (Vol. I, P. 33)

Ann Carter, a neighbor, heard the argument in May, and heard Kim hollering and screaming at Tim, and heard Tim ask Kim to lower her voice, but that Kim cursed Tim. (Vol. I, P. 36) Before she heard Kim outside, she heard Kim in the trailer yelling at Tim with an angry voice, although she could not determine the exact language used. (Vol. I, P. 37) Kim admitted the May argument. (Vol. I, P. 45) Kim indicated that Tim was upset with her part-time bus driving job, and she was not bringing enough money in for them to live on. (Vol. I, P. 84) On cross-examination, Kim admitted the separation was both their fault, but felt that Tim was more at fault because he left her. (Vol. I, P. 99)

The parties' Rule 8.05 Financial Statement and Disclosure forms were filed. (See Exhibit Nos. "1" and "2") Said Rule 8.05 forms reflected Tim Tackett's net monthly pay at \$2,515.00 with projected living expenses of \$2,270.00. Kim Tackett's net monthly income was \$578.10 with combined total expenses of \$1,825.80. However during her testimony, Kim Tackett testified her monthly expenses were \$1,200.00 to \$1,300.00 per month, although her 8.05 form showed \$1,600.00 to \$1,800.00. (Vol. I, P. 85) After the parties' separation, Kim admitted

giving a 1998 Probe vehicle to her sister for no payment. (Vol. I, P. 46) When Kim retired from the City of Amory meter job she took out \$14,000.00 from her retirement (Vol. I, P. 126), which she used to pay off a \$5,000.00 loan, and gave \$2,000.00 to her sister, \$2,000.00 on a vet bill, and spent \$1,000.00 on Christmas. Even though Kim admitted money was a problem in their marriage (Vol. III, P. 112), when she got her retirement money, none went into the marriage, but went to her family members. (Vol. III, P. 106, 112)

Tim testified that he got a \$2,200.00 tax refund for the tax year 2005, and spent \$2,000.00 on the vet bill Kim said she paid. (Vol. III, P. 125, 128).

SUMMARY OF ARGUMENT

When the Wife seeks separate maintenance from her husband, her misconduct or fault must not materially contribute to the separation. This Honorable Court has denied separate maintenance where “the honors are even”; the wife’s conduct “materially contributed to the separation”; or “where each was as much of an offender as the other”.

The misconduct and fault of Kim Tackett caused or materially contributed to this separation. Kim Tackett cursed Tim regularly. Kim refused to have sexual relations with Tim. Kim quit her job and then refused to curtail her spending. Kim yelled and verbally abused Tim in such a manner that neighbors could hear her cursing and yelling at Tim from outside the home, and as far away as the neighbor’s home. Kim Tackett called Tim ignorant and stupid.

There is no testimony nor finding by the trial court that Tim’s conduct contributed to the parties’ separation. If the trial court finds that Kim’s conduct did not materially contribute to the separation, then the trial court must find that Tim’s conduct materially contributed to the separation. Tim can not be a material contributing factor in the separation when there was no

proof that Tim did anything to cause this separation. The only proof is that Tim left due to the conduct of Kim Tackett. The testimony as to Kim's conduct is all the Court had before it. There is absolutely no proof before the trial court that Tim Tackett did anything other than leave Kim, rather than continue to live with the abuse and cursing she gave Tim on a weekly basis.

The proof Tim presented for a divorce may not have been sufficient to grant him a divorce, but when Tim's proof of Kim's conduct is all the court had before it, the trial court can not logically state the conduct of Kim Tackett did not materially contribute to the separation. This Honorable Court must do what it has often done before and that is to say, "the honors are even"; "each was as much an offender as the other"; or "the fault and misconduct of Kim Tackett caused this separation." Tim Tackett may not have had grounds for divorce, but he had ample reason to leave or separate from Kim, and she is not entitled to separate maintenance.

The trial court further erred in awarding Kim Tackett \$1,200.00 per month as separate maintenance. The proof showed that Tim Tackett's take-home pay was approximately \$2,515.00 with living expenses of \$2,270.00. Kim Tackett's take-home pay was \$578.00 with living expenses of approximately \$1,200.00 per month. The Chancellor's award left Tim with \$1,315.00 to pay \$2,270.00 of monthly expenses, and left Kim with \$1,778.00 to pay \$1,200.00 of monthly expenses. This is a clear abuse of the Court's discretion. Tim Tackett has a right to lead a normal life, and Kim Tackett is not entitled to more money than her monthly needs. The Court's award leaves Tim Tackett destitute and allows Kim Tackett funds in excess of her monthly needs. This award ignores the reasonable needs of the wife and the necessary living expenses of the husband as required by this Court's ruling.

The trial court's award of separate maintenance was in error, and the amount of separate

maintenance was an abuse of discretion.

ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING KIM TACKETT'S CONDUCT DID NOT MATERIALLY CONTRIBUTE TO THE SEPARATION OF THE PARTIES.

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 separate maintenance of her until such time as they may be reconciled to each other. *Bunkley and Morse Amis on Divorce and Separation in Mississippi Section 7.00 (2nd Ed. 1957)*. The power of a 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. *Robinson v. Robinson*, 554 So.2d 300, 303 (Miss. 1989). In *Robinson*, we held that the wife need not be totally blameless to allow an award of separate maintenance, but that her (mis) conduct must not have materially contributed to the separation. *I.d.* at 304, citing *King v. King*, 246 Miss. 798, 152 So.2d 889, 891 (1963). See also: *Marble v. Marble*, 457 So.2d 1342, 1343 (Miss. 1984). Above is this Court's pronouncement as to separate maintenance through the years and the Court's recognition that the wife's (mis) conduct must not have materially contributed to the separation. *Lynch v. Lynch*, 616 So.2d 294, 296 (Miss. 1993)

What has this Court found to be conduct that materially contributed to the separation?

Betty's persistence nagging and accusations materially contributed to the separation. The Chancellor, too, found that Betty was not without fault in the separation. Accordingly we find that the Chancellor was manifestly in error by awarding Betty separate maintenance, *Lynch v. Lynch* at 297

The testimony shows that Mrs. Cox's conduct was a material factor in the separation and this conclusion is consistent with the Chancellor's finding that she was not free of fault. The duty to treat the husband with appropriate respect and conjugal kindness is just as binding on the wife as is the corresponding duty on the part of the husband. It is a prerequisite for separate maintenance that the wife be substantially without fault as far as the cause of separation is concerned. *Cox v. Cox*, 279 So.2d 612, 615 (Miss. 1973)

As to the cruel and inhuman treatment, the evidence discloses that honors are even between the parties, each being as much of an offender as the other, the acts of each being usually provoked by the acts and words of the other. *Long v. Long*, 135 SO. 204 (Miss. 1931)

Faults were doubtless on both sides; but we find nothing in the record to warrant divorce or separation. *Hilton v. Hilton*, 88 MS 529, 41 SO. 262 (1906)

In *Long v. Long*, 160 MS 492, 135 SO. 204 (1931) reversing a Decree and dismissing a Bill for Divorce, the Court, commenting on the Husband's allegations of cruel and inhuman treatment said the evidence reflected that the honors are even between the parties; that each was as much of an offender as the other, the acts of each being usually provoked by acts and words of the other. Where such is the case, neither party is entitled to relief. These observations are pertinent here. In summary, this record reflects that misconduct and faults on complainant's part materially contributed to her separation from her husband. Certainly her fault was equal to or greater than that of defendant. She failed to show desertion or habitual cruel and inhuman treatment of her by him. In their absence she was not entitled to separate maintenance. *King v. King*, 246 MS 798, 152 So.2d 889, 892 (Miss. 1963)

The trial court in its Opinion found as follows:

The fact she admitted she shared some of the blame for the breakup does not require a finding that she materially contributed to the breakup. However the wife's blame should be less than the husband. The Chancellor's Opinion infers that the parties' separation was due to the (mis)conduct of Tim Tackett. There is absolutely no proof that Tim's conduct in any way contributed to the separation. It was the (mis)conduct of Kim that caused Tim to leave. The proof before the Court is Kim cursed Tim regularly. Kim refused to have sexual relations with

Tim. Kim quit her job and then refused to curtail her spending. Kim yelled and verbally abused Tim in such a manner that neighbors could hear her cursing and yelling at him for outside their home and as far away as the neighbor's home. The Chancellor's Opinion is void of any finding that Tim's conduct contributed to the parties' separation. The Chancellor merely found that the conduct of Kim did not materially contribute to the parties' separation. The only proof before the Court was testimony as to the conduct of Kim. Tim Tackett is not accused of making false allegations of infidelity against Kim. Tim is not accused of verbally abusing and cursing Kim, nor was Tim accused of physically abusing Kim. Kim did not testify to a single incident of misconduct on the part of Tim. Rather the testimony focused on the misconduct of Kim and her frequent verbal abuse of Tim.

The Court's award of separate maintenance to Kim in essence was an abinition to Tim to resume the marital relationship with Kim and continued to live with the verbal abuse and denial fo sexual relations that made Tim a nervous wreck, and dread coming home from work.

The trial court should be reversed and the request for separate maintenance made by Kim Tackett should be denied.

II. THE TRIAL COURT'S AWARD OF SEPARATE MAINTENANCE WAS EXCESSIVE AND UNREASONABLE .

The jurisdiction of the Chancery Court to make allowance to a wife living apart from her husband for separate maintenance is to be exercised according to equitable principles and the amount to be allowed in any case in which such allowance may be properly made must be determined according to facts disclosed by the record in that particular case.

The amount to be allowed to wife for separate maintenance is largely within the trial

judge's discretion, and the appellant court will not undertake to substitute its judgment in such case for that of a chancellor unless it clearly appears the chancellor has abused his discretion or failed to apply correctly the equitable principles which govern in such cases. *Gardiner v.*

Gardiner, 203 MS. 778, 93 So.2d 638 (Miss. 1957)

The criteria to be considered by the Court in making the award include:

The health of the husband and his earning capacity;

The health of wife and her earning capacity;

The entire sources of income of both parties;

The reasonable needs of the wife;

The necessary living expenses of husband;

The estimated amount of income taxes the perspective parties must pay on their incomes;

The fact that the wife has the free use of the home and furnishings; and such other facts and circumstances bearing on the subject that might be shown by the evidence. *Gray v. Gray*, 484 So.2d 1032 (Miss. 1986)

The proof showed that Tim Tackett's take home pay was \$2,515.00 per month with living expenses of \$2, 270.00. Kim Tackett's take home pay was \$578.00 per month with living expenses of \$1,200.00. After the court's award of \$1,200.00 per month of separate maintenance to Kim Tackett, Tim was left with \$1,315.00 per month to pay \$2,270.00 of expenses while Kim now has \$1,778.00 per month to pay \$1,200.00 in monthly expenses. The trial court's award is a clear abuse of discretion and awards Kim Tackett funds in excess of her monthly needs while ignoring the reasonable needs of Tim.

The amount of separate maintenance award is within the discretion of the Chancellor and is not subject to reversal absent a clear abuse of that discretion. *Nichols v. Nichols*, 254 So.2d 726, 727 (Miss. 1971) However the chancellor should not overlook the fact that the husband has the right to lead as normal a life as reasonably possible with a decent standard of living. *Nichols* at 727. The chancellor's award ignores the fact that Kim Tackett quit a well-paying job nine months into this twenty month old marriage. Although Kim contends she was unable to continue her job with the City of Amory as a meter reader, she was able to work as a bus driver with the City of Amory School System. After twenty years of dating, Kim and Tim marry, and within nine months Kim quits her job and basically relies upon Tim's income to support the two of them. As Kim noted, her lack of income, and contribution to the marriage, was a major factor in the parties' marital discord. There is absolutely nothing in the record to indicate that Kim can not get a full-time job earning much more than the \$578.00 take-home she makes from driving a bus for the Amory School System. The chancellor's award of separate maintenance of \$1,200.00 per month to Kim Tackett is a clear abuse of the chancellor's discretion and awards Kim Tackett monies in excess of her monthly needs and deprives Tim Tackett of his right to lead a normal life with a decent standard of living.

CONCLUSION

Tim Tackett requests this Honorable Court reverse and remand the trial court's decision granting Kim Tackett separate maintenance. The proof shows that Kim Tackett was not only a material cause in the separation of parties, she was the only cause presented, to the court, as to the separation of the parties. In the alternative, Tim Tackett requests the Chancellor's award of \$1,200.00 per month for separate maintenance to Kim Tackett be reversed and reduced to an

amount to allow for her to meet her reasonable monthly expenses and allow Tim Tackett funds to live a reasonable existence.

Respectfully submitted,

THE LOTT LAW FIRM, P.A.
P. O. BOX 382
BOONEVILLE, MS 38829
(662) 728-9733
Mississippi State Bar No. [REDACTED]

By: 
Duncan Lott

CERTIFICATE OF SERVICE

This is to certify that I, Duncan Lott, attorney for Appellant, have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT to the following;

Honorable Talmadge Littlejohn
Chancellor, First Judicial District
P.O. Box 869
New Albany, MS 38652

Honorable Candace Blalock
Attorney at Law
Post Office Box 81
Aberdeen, MS 39730

This the 3rd day of January, 2007.



DUNCAN LOTT