

**IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

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**CASE NUMBER 2008-CA-00501**

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**JAMES ALTON WALLACE  
Plaintiff - Appellant**

**VERSUS**

**DONNA WALLACE  
Defendant - Appellee**

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**APPEAL FROM THE CHANCERY COURT  
OF  
LINCOLN COUNTY, MISSISSIPPI**

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**APPELLEE'S BRIEF**

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IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00501

JAMES ALTON WALLACE

PLAINTIFF/ APPELLANT

V.

DONNA WALLACE

DEFENDANT/ APPELLEE

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 Justices of Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Edward E. Patten, Jr., Chancery Court Judge of the Fifteenth Judicial District
2. James Alton Wallace, Plaintiff/ Appellant
3. Donna Wallace, Defendant/ Appellee
4. Durwood J. Breeland, Esq., P.O. Box 751, Brookhaven, MS 39601-0751  
Attorney for Defendant/ Appellee
5. Edwin L. Bean, Jr., Esq., P.O. Box 1322, McComb, MS 39649  
Attorney for Plaintiff/ Appellant



DURWOOD J. BREELAND  
Attorney of Record for Appellant

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### **STATEMENT OF ISSUE**

The issue before the court on this appeal is whether or not Donna Wallace (hereinafter referred to as "Donna") successfully rebutted the presumption of mutual financial support, after the parties stipulated that she was cohabiting with Terrance Hogan (hereinafter referred to as "Terrance") for approximately one year, thereby authorizing the court to terminate permanent periodic alimony?

## STATEMENT OF THE CASE

### **A. Nature of the Case**

Appellant James Wallace (hereinafter referred to as "James") filed the instant action against Appellee Donna Wallace for Modification of Alimony based upon her cohabitation with Terrance.

### **B. Course of Proceedings and Disposition Below**

After twenty-nine (29) years of marriage, Appellant James Wallace and Appellee Donna Wallace were divorced on March 18, 2002 in the Chancery Court of Lincoln County, Mississippi. In the Judgment of Divorce, James was ordered to pay Donna lump sum alimony in the amount of forty percent (40%) of James' annuity payments, which he received (and will receive) in installments in the years 2004, 2009, 2014, and 2019. In addition, James was ordered to pay permanent periodic alimony in the amount of Seven Hundred Dollars (\$700.00) per month.

James filed his Motion for Modification of Alimony on May 18, 2007 requesting that the Court terminate the permanent periodic alimony based upon Donna's cohabitation with Terrance. Donna filed her Answer to the Motion for Modification of Alimony on August 17, 2007. The Chancery Court of Lincoln County, Mississippi, dismissed James' Motion for Modification at trial on December 17, 2007. Ultimately, the Chancellor held that Donna was able to rebut the presumption of mutual financial support between Donna and Terrance. Furthermore, the Court found that James failed to prove that a *de facto* marriage existed between Donna and Terrance.

Thereafter, Appellant James Wallace filed his Motion for Reconsideration on January 9, 2008. The Chancery Court of Lincoln County, Mississippi, after hearing James' Motion for Reconsideration, found said Motion to be without merit, and entered its Order of Dismissal on February 21, 2008.

Appellant James Wallace filed his Notice of Appeal on March 20, 2008.

### **C. Statement of Facts**

The facts simply stated are that Appellant James Wallace and Appellee Donna Wallace were married on September 21, 1972. The parties divorced on March 18, 2002, and James Wallace was ordered in the Judgment of Divorce to pay his ex-wife, Donna, permanent periodic alimony.

Donna met Terrance in an on-line game room during September 2006. (T.6). After communicating with Terrance on a regular basis, he came for a visit in December 2006 from Green Bay, Wisconsin, to Appellee Donna's residence in Lincoln County, Mississippi. (T.7). When Terrance visited in December of 2006, he had not been working in Green Bay, nor did he immediately begin working in Mississippi until March, 2007. (T.7-8). Terrance worked from March, 2007 until September, 2007. (T.9). At the time of the trial, Terrance worked one (1) day a week at Shirley Guy's Antique Store, making eighty dollars (\$80.00) per month. (T.10).

Terrance lives in Donna's home. (T.10). Donna and Terrance have an agreement whereby he takes care of the yard work, home repairs, "outside work" and anything that needs to be done that Donna is unable to do, and she allows him to live there. (T.10). Each cooks their own meals. (T. 11). Terrance and Donna have sex once every

two (2) weeks. (T. 12). While living together for a year, Donna and Terrance do not spend time together socially. (T.14). Terrance is a friend and they have no plans to get married or to be engaged. (T. 13). Donna Wallace does not receive any of his money. (T. 18). He does not provide anything from his income of \$80.00 per month towards the household expenses. (T. 18). Terrance has a key to the house and his mail comes to the house, because he had to have a permanent address to receive said mail from Wisconsin. In addition, the tag on his car is registered to Donna's address for similar reasons. (T. 18). They have not been out on any social occasions except for Donna's daughter's birthday party (when she specifically asked Donna to bring Terrance), and a July 4<sup>th</sup> barbeque in Louisiana (40 miles). (T. 70). Donna and Terrance never held themselves out as being husband and wife or boyfriend and girlfriend. (T. 70).

Donna got sick in March, 2007, and needed help taking care of her property. (T.18). Donna and Terrance do not share money. (T.18). Since Donna has unlimited long distance calling (one rate), if Terrance makes a long distance call, it does not cost Donna any money. (T.19-20).

Donna has no vehicle and borrows her daughter's vehicle if she needs one. (T.29-30). Donna's house is paid for, and she lives on food stamps, alimony, eighty dollars (\$80.00) per month income and financial assistance from her daughter. (T.29-30). Terrance has never paid a bill for Donna, and Donna has never paid a bill for him. (T.32). They buy their groceries separately and pay for them separately. (T.32). They separate their groceries in the pantry. (T.34).



For his room, Terrance has mowed grass, did some plumbing, fixed the commode, cut the hedge, tore down the barn, cut a tree, built a burn pile, cleaned the yard, cleaned the flower beds, painted the pump house and put block filler on it, built steps, repaired the pump house roof and repaired light fixtures. (T.38-42).

They do not exchange Christmas presents. (T-46). Donna does not buy Terrance presents nor has birthday parties for him.(T.46).

### SUMMARY OF THE ARGUMENT

In Mississippi, an ex-spouse's cohabitation with a new partner providing support may qualify as a change in circumstances that terminates the receipt of alimony payments. Once the payor ex-spouse proves cohabitation, a presumption of material change in circumstances is established and must be overcome by the recipient ex-spouse that there is no mutual support.

In the present case, the payor ex-spouse did not have to prove cohabitation because Donna stipulated that she was living with Terrance. However, the Chancellor made a factual finding that there was no mutual support between Donna and Terrance. As such, the Chancellor's ruling should be upheld, as it was not manifestly wrong or clearly erroneous.

## ARGUMENT

### STANDARD OF REVIEW

The Mississippi Supreme Court has held that "... this Court always reviews a Chancellor's findings of fact, but we do not disturb the factual findings of a Chancellor unless such findings are manifestly wrong or clearly erroneous." *Bowers Window and Door Co., Inc. v. Dearman*, 549 So.2d 1309 (Miss. 1989). In addition, "... whenever there is substantial evidence in the record to support the Chancellor's finding of fact, those findings must be affirmed . . . ." *Johnson v. Hinds County*, 524 So.2d 947, 956 (Miss. 1988).

In the case *sub judice*, the Chancellor heard all of the necessary facts, evidence and testimony presented in the case. After hearing the same, the Chancellor applied those facts to the proper law resulting in a justifiable equitable result.

**I. THE CHANCERY COURT OF LINCOLN COUNTY WAS CORRECT, IN HOLDING THAT JAMES WALLACE, THE EX-HUSBAND, DID NOT HAVE THE RIGHT TO TERMINATE PERMANENT PERIODIC ALIMONY BASED ON DONNA WALLACE, THE EX-WIFE'S, COHABITATION WITH TERRANCE HOGAN.**

In recent history, the Mississippi Supreme Court ruled that post-divorce cohabitation with another party creates an automatic rebuttable presumption of a material change in circumstances which could terminate alimony. To rebut this presumption, the receiving ex-spouse must offer evidence that the cohabiting parties do not provide mutual support to one another. *Scharwath v. Scharwath*, 702 So. 2d 1210 (Miss. 1997).

While there has been some confusion regarding mutual support under this new standard, in *Rester v. Rester*, this Court recently rendered a decision clarifying the issue of mutual support. 2008 Miss. App. LEXIS 517.

In *Rester*, Beth Rester and John Rester were married for approximately ten (10) years before an irreconcilable differences divorce was. *Id.* at \*2. As part of the divorce decree, John Rester agreed to pay \$2,500.00 to Beth in periodic alimony payments until she died, remarried or the Chancery Court otherwise terminated the responsibility. *Id.*

Approximately ten years after the divorce, John filed a Complaint to terminate his alimony obligation based upon the allegation that a material change in circumstances had occurred. More specifically, John complained that Beth was living with a new partner and this triggered the rebuttable presumption that Beth was receiving mutual support from her new partner. The lower court held that Beth rebutted the presumption and alimony would continue. This Court agreed with John and held that Beth did not rebut the presumption of mutual support. The findings the Court relied upon are as follows:

- (1) John bought groceries for Beth;
- (2) John gave Beth money for clothes and she went on trips with said money;
- (3) Beth had free access to John's debit card PIN number;
- (4) John left money with Beth when he went out of town;
- (5) Beth checked John's post office box, opened the mail and paid his bills;
- (6) John helped Beth with her utilities;
- (7) John helped Beth with projects around her home;

(8) Beth provided a place for John to leave his personal vehicle when he went out of town for work; and

(9) Beth had the benefit of access to John's personal vehicle whenever she wanted to use it.

Accordingly, the Court found that Beth failed to rebut the presumption of mutual support. The judgment of the Chancellor was reversed and the judgment was rendered for John.

Conversely, in the present case, no mutual support can be unearthed. Appellee Donna Wallace openly testified that Terrance has performed tasks around her house such as yard work and repair work due to her deteriorating health, as part of their agreement for Terrance to have a place to stay. If Donna had paid Terrance for his yard work, plumbing, etc. and then rented him a room, this matter would not be before the Court. The real issue becomes whether Donna can barter a room for in-kind yard work/projects, and still be entitled to periodic alimony. After hearing all of the facts and evidence presented in the case the Chancellor found as follows:

- (1) Appellee, Donna Wallace testified that she provided Terrance with no money;
- (2) Terrance earns \$80.00 a month, and provides no money to Donna;
- (3) Both parties buy separate groceries and only go to the grocery store together to conserve fuel;
- (4) Donna does not wash any of Terrance's clothes other than on occasions in which his clothes are already in the washing machine.

(5) Donna and Terrance went to Donna's daughter's birthday party together as a matter of convenience, because he was invited separately from her and did not attend as her guest.

(6) Donna and Terrance do not go to other people's homes as a couple and they do not hold themselves as a couple, nor has she ever told anyone that she going to marry Terrance.

The Appellant cites *Tedford v. Dempsey* to support the notion that Terrance's in-kind services constituted "support". 437 So.2d 410, 422 (Miss. 1980). Terrance is being paid for his services (by having a place to stay). Appellant avers that the chancery court "failed to recognize" the monetary value of Terrance's services. The transcript, and findings by the court show otherwise. The court specifically inquired as to each job or service by Terrance.

Appellant also questions the lack of corroboration relating to Donna's testimony that her daughter provides most of her living expenses. I believe this testimony should more accurately be characterized as "uncontradicted." This is certainly an issue resolved by the Chancellor's findings of fact.

## CONCLUSION

There seems to be little dispute regarding the facts. The appellant testified that he could not dispute any of the testimony of Donna Wallace. Appellant wants this Court to reach the "inescapable conclusion" of mutual support. His basis for this, in part, is that since Terrance has very little income, Donna must be supporting him. The uncontradicted testimony is that she is not supporting Terrance. The undisputed testimony is that her daughter pays most of her expenses. The findings of fact and ruling in the chancery court should be affirmed.

**CERTIFICATE OF SERVICE**

I, Durwood J. Breeland, do hereby certify that I have this day mailed a postage prepaid by U.S. Mail, a true and correct copy of the above and foregoing documents to the following:

Hon. Betty W. Sephton  
Supreme Court Clerk  
P.O. Box 249  
Jackson, MS 39205

Hon. Edwin L. Bean, Jr.  
P.O. Box 1322  
McComb, Mississippi 39649

Hon. Edward E. Pattern, Jr.  
Chancellor of the Fifteenth Judicial District  
P.O. Drawer 707  
Hazlehurst, MS 39083

This the 18<sup>th</sup> day of September, 2008

A handwritten signature in black ink, appearing to read 'Durwood J. Breeland', written over a horizontal line.

DURWOOD J. BREELAND