

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

CASE NUMBER 2008-CA-00501

**JAMES ALTON WALLACE
Plaintiff - Appellant**

VERSUS

**DONNA WALLACE
Defendant - Appellee**

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

APPELLANT'S BRIEF ON BEHALF OF JAMES ALTON WALLACE

ORAL ARGUMENT REQUESTED

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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. Hon. 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 39602-0751
Attorney for Defendant/Appellee
5. Edwin L. Bean, Jr., Esq., P. O. Box 1322, McComb, MS 39649
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TABLE OF CONTENTS

	PAGE
Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Issues	-1-
The Understatement of the Case	-2-4
I. The nature of the case	
II. The course of the proceedings	
Summary of the Argument	-5-
Argument	-6-8
I. Standard Review	
II. Cohabitation and Mutual Support	
Conclusion	-9-
Certificate of Service	-10-

TABLE OF AUTHORITIES

PAGE

JURISPRUDENCE

<i>Gregg v. Montgomery</i> , 587 So. 2d 928, 931 (Miss. 1991)	6
<i>Scharwath v. Scharwath</i> , 702 So. 2d 1210 (Miss. 1987)	6
<i>Tedford v. Dempsey</i> , 437 So. 2d 410, 422 (Miss. 1980)	8

STATEMENT OF ISSUES

The issues before the court on this appeal is whether or not Donna Wallace, the ex-wife, (hereinafter referred to as “Donna”) overcame the presumption of mutual financial support after the parties stipulated that she was cohabiting with a one Terrance Hogan (hereinafter referred to as “Terrance”) for a period of approximately one year prior to trial thus allowing James Wallace, the ex-husband, (hereinafter referred to as “James”) the right to terminate permanent periodic alimony?

THE UNDERSTATEMENT OF THE CASE

I. The nature of the case.

James was ordered in the decree of the divorce to pay his ex-wife Donna, permanent periodic alimony. Donna began cohabitation with Terrance in December, 2006. Based upon the cohabitation, James filed his petition before the Chancery Court of Lincoln County, Mississippi, to terminate Donna's permanent periodic alimony.

II. The course of the proceedings.

On March 18, 2002, the Chancery Court of Lincoln County, Mississippi, entered its Final Judgment of Divorce forever severing the bonds of matrimony between James and Donna. In the Judgment of Divorce James was ordered to pay Donna lump sum alimony in the amount of 40% of James' annuity payments that he receives in installments in the years 2004, 2009, 2014, and 2019. Additionally, he was ordered to pay permanent periodic alimony in the amount of Seven Hundred (\$700.00) dollars per month. On the 18th day of May, 2007, James filed his Motion for Modification of Alimony praying for the court to terminate the permanent periodic alimony payments payable to Donna. (C.P.2). On the 17th day of August, 2007, Donna filed her answer to the Motion for Modification of Alimony. (C.P.36). On the 27th day of December, 2007, the Chancery Court of Lincoln County, Mississippi, entered its order finding that Terrance and Donna had been cohabiting since December, 2006, and that Donna was able to rebut the presumption of mutual financial support, and the court further found that James had failed to prove that a *de facto* marriage existed between Donna and Terrance; and thereby dismissed James' Motion for Modification. (C.P.42). On the 9th day of January, 2008, James filed his Motion for Reconsideration. (C.P.44). On the 21st day of February, 2008, the Chancery Court of

Lincoln County, Mississippi, after having considered James' Motion for Reconsideration found the same was without merit and entered its Order of Dismissal. (C.P.47). On the 20th day of March, 2008, James timely filed his Notice of Appeal. (C.P.48).

III. Statement of Facts.

The parties stipulated that Donna and Terrance had been cohabiting with each other since December of 2006, and were still cohabiting on the date of trial, being December 11, 2007. (T.3). Donna met Terrance in an online game room in the month of September, 2006. (T.6). As a result of them communicating online via the internet, Terrance moved from Green Bay, Wisconsin to Donna's residence at Park Hill Lane in Lincoln County, Mississippi, in December, 2006. (T.7). At the time Terrance moved in with Donna in December, 2006, he was unemployed and presumptively living off money that he had brought from Green Bay. (T.7). It wasn't until March, 2007, that Terrance secured employment in Mississippi. (T.7-8). Terrance had lived in Donna's residence everyday for the year proceeding the date of trial. (T.8). Also, at the time of trial on December 11, 2007, Terrance was not working a full-time job and had not done so since September, 2007. (T.9). At the time of trial Terrance was working one day a week at Shirley Guy's Antique store making only (emphasis ours) Eighty (\$80.00) dollars per month. (T.9-10). Donna testified that she and Terrance had an agreement that he would do the outside work or yard work, repairs on the house or anything else that needed to be done that she can no longer do, and that in exchange she will put a roof over his head. (T.10). Terrance mows the yard, cuts the trees, trims the bushes, and edges the yard. (T.11). Occasionally, Donna washes Terrance's clothes. (T.11). Donna and Terrance share the same kitchen, refrigerator, and pantry. (T.11). Donna and Terrance are sexually active with each other having sex once every two (2) weeks.

(T.12). Donna and Terrance travel in the same vehicle to shop and for social outings. (T.14).

Terrance has a key to Donna's house, his mail comes to her residence address, and his car is

registered to Donna's residential address. (T.18). Donna pays for all the toiletries that are

purchased for the residence. (T.21). When Donna and Terrance go shopping they place their

groceries in one cart. (T.32). Terrance took care of the outside and things like plumbing.

Terrance built Donna a flower bed (T.41), built steps to her metal building (T.41), repaired her

toilet (T.38), repaired her sewer line (T.38), replaced light fixtures (T.42), tore down an old barn

(T.39), built a burn pit (T.39), and sealed concrete blocks. (T.41). Donna had someone tell her

that they would mow her yard for approximately Two Hundred (\$200.00) dollars per month.

(T.35).

SUMMARY OF THE ARGUMENT

Under Mississippi's laws, the ex-spouse's cohabitation with a new partner providing support has been found to be a significant change in circumstance to terminate the receipt of alimony payments. That law was recently changed when the court recognized the difficulty the payor, ex-spouse, has in proving mutual support. The court changed the law to the effect that once cohabitation is proven by the payor, ex-spouse, that it in and of itself creates a presumption of a material change in the circumstances which must be overcome by the recipient ex-spouse that there is no mutual support.

In the case *sub judice*, the parties stipulated that for the one (1) year preceding the hearing to terminate alimony that Donna had cohabited with Terrance; thus invoking the presumption of mutual support. Although the Chancellor found that there was no mutual support, James argues to the contrary when considering the living arrangement between his ex-wife, Donna, and Terrance.

ARGUMENT

A. Standard of Review

The scope of judicial review of the decision of a chancellor is generally that the chancellor's ruling will not be disturbed unless such ruling is not supported by substantial evidence or is manifestly in error. *Gregg v. Montgomery*, 587 So. 2d 928, 931 (Miss. 1991). In the case *sub judice*, the chancellor applied the proper law, but misapplied the facts of this case to the law resulting in an inequitable, and thus erroneous result.

B. Cohabitation and Mutual Support

In 1997, this court announced its decision in *Scharwath v. Scharwath*, 702 So. 2d 1210 (Miss. 1987), and is so doing modified the previous decisions of the court with regard to the effect of cohabitation by an ex-spouse and its effect on whether or not the ex-spouse's alimony should be terminated. The court recognized in *Scharwath, Id.* the difficulty that a providing ex-spouse faced in presenting direct evidence of mutual financial support between cohabiting parties. In *Scharwath, Id.* the court announced that cohabitation would create an automatic presumption of a material change in circumstances which then had to be rebutted by the receiving spouse. In *Scharwarth, Id.* this court held that the chancellor erred in failing to consider the mutual support between Dianna and Jim (the man she was living with) when it considered the following facts:

- (1) Dianna provided Jim with a pick up truck and a rent free home;
- (2) Jim lived in Dianna's home where he lived as if married to Dianna;
- (3) Jim provided continuous support around the house and engaged in large projects such as building a deck, re-tiling the basement, and various other carpentry and

maintenance task.

(4) Jim even moved furniture into the home and maintained duties such as cutting the grass, washing the car, carrying out the garage and purchasing insurance on the truck.

As a result of finding those facts this court reversed and remand the case to the chancellor to address the question of whether the presumption of mutual support had been over come. In the case *sub judice*, the following facts are found in the record:

(1) Donna and Terrance had been living together for one (1) year prior to the trial on the merits;

(2) They engaged in sexual relations at least once every two (2) weeks;

(3) Of the one (1) year that they have been living together, Terrance had only worked six months;

(4) Donna provided Terrance with a key to her house so he would have twenty-four (24) hour access;

(5) They went grocery shopping together and placed all their food in one cart;

(6) Terrance performed yard work around Donna's house;

(7) All of his mail comes to Donna's house, and his car tag is registered to her address;

(8) It would cost Donna approximately Two Hundred (\$200.00) dollars per month to have her yard mowed if Terrance was not there to do it;

(9) He performed projects around Donna's house such as repairing the sewerage system, toilet, cutting hedges, tearing down an old barn, building a burn pit, cutting a tree off the house, building flower beds, building steps, sealing concrete blocks, and repairing light fixtures;

(10) Donna washed Terrance's clothes;

(11) They rode in Terrance's car; as she had none.

It is plainly obvious that Terrance provided "in kind" services to Donna that the chancellor failed to assign a monetary value. In *Tedford v. Dempsey*, 437 So. 2d 410, 422 (Miss. 1983). This court stated "by support" we include both monetary and "in kind" services.

In the case *sub judice*, Terrance's in kind services surely had a monetary value which the chancellor erroneously failed to recognize. Additionally, the court apparently overlooked the fact that of the twelve (12) months that Donna and Terrance cohabited, Terrance only worked six (6) of those months. At the time of trial, he was making only eighty (\$80.00) dollars per month, which by no stretch of the human imagination, could support a person given the current cost of living. Donna's 8.05 Uniform Chancery Court Financial Declaration reflects that her only income are the alimony payments from James, Eighty (\$80.00) dollars that she receives from Guy's Antiques, and One Hundred and Twenty-Six (\$126.00) dollars in food stamps. Therefore, when combining Donna's income of Nine Hundred and Six (\$906.00) dollars per month and Terrance's income of Eighty (\$80.00) dollars per month, it results in the two of them living off Nine Hundred and Eighty-Six (\$986.00) dollars per month. Although Donna testified that her daughter provided most of her living expenses, her daughter was not called as a witness, and she provided no documentary proof to corroborate her testimony in that regard. In the case *sub judice*, Donna failed to rebut the presumption of mutual financial support when considering that Terrance was for the three (3) months proceeding the trial living off of only Eighty (\$80.00) dollars per month, and the "in kind" services provided by Terrance.


CONCLUSION

Donna's long term cohabitation with Terrance, and his "in kind services," provided to Donna during the cohabitation, Terrance's long period of unemployment during the cohabitation, and his low income while Donna supported the household, leads to the inescapable conclusion that Donna and Terrance are mutually supporting each other which Donna did not rebut. Therefore, Donna's permanent periodic alimony should be terminated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edwin L. Bean, Jr., do hereby certify that I have this day mailed 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
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Jackson, MS 39205**

**Hon. Durwood J. Breeland, Esq.
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Brookhaven, MS 39602-0751**

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

This the 20th day of August, 2008.



EDWIN L. BEAN, JR.