

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NUMBER 2009-CA-00765

JAMES DONALD KILLEN

APPELLANT

VS.

MATTIE BEATRICE JENKINS KILLEN

APPELLEE

BRIEF FOR THE APPELLEE

Appeal From The Chancery Court Of Lauderdale County
State of Mississippi

COUNSEL FOR THE APPELLEE

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MISSISSIPPI STATE BAR NO [REDACTED]

CERTIFICATE OF INTERESTED PARTIES


IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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The undersigned Counsel Of Record certifies the following listed persons have an interest in the outcome of the case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal:

1. Honorable Lawrence Primeaux, Chancery Court Judge
2. Honorable Steven D. Settlemyres, Attorney for James Donald Killen
3. Honorable Robert J. Bresnahan, Attorney for Mattie Beatrice Jenkins Killen
4. James Donald Killen, Appellant
5. Mattie Beatrice Jenkins Killen, Appellee

This the 8th day of December, 2009.

MATTIE BEATRICE JENKINS KILLEN
BY: 
ROBERT J. BRESNAHAN

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STATEMENT OF THE ISSUES

PROPOSITION 1: THE CHANCERY COURT OF LAUDERDALE COUNTY, MISSISSIPPI WAS CORRECT IN DENYING JAMES DONALD KILLEN (J.D.) A DIVORCE FROM MATTIE BEATRICE JENKINS KILLEN (MATTIE) ON THE GROUND OF HABITUAL CRUEL AND INHUMAN TREATMENT AS THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY A DIVORCE. FURTHER, THERE WAS NO CORRABORATING WITNESS.

PROPOSITION 2: THE COURT WAS JUSTIFIED IN GRANTING SEPARATE MAINTENANCE AS THE PARTIES SEPARATED WITHOUT FAULT OF MATTIE KILLEN, AND J.D. KILLEN HAS WILLFULLY ABANDONED HER AND REFUSES TO SUPPORT HER.

REQUEST FOR FEES: APPELLATE COURT IS REQUESTED TO AWARD REASONABLE ATTORNEY'S FEES.

STATEMENT OF CASE

James Donald Killen (hereinafter referred to as "J.D.") and Mattie Beatrice Jenkins Killen (hereinafter referred to as "Mattie") were married December 18, 1999. Mattie and J.D. resided together as husband and wife until their final separation in May, 2008, at which time J.D. refused sexual relations with Mattie, told her that he no longer had feelings for her and banished her from the marital home. At J.D.'s insistence, Mattie moved out of the marital residence, which was once owned solely by J.D., and moved into her sister's home. The separation was without fault on Mattie's part.

J.D. has made it clear that he no longer wants to be married to Mattie and states that he has wanted a divorce since the separation in the spring of 2008. He does not want to reconcile, has willfully abandoned Mattie, and refuses to support his 61-year-old wife after ten (10) years of marriage.

STATEMENT OF CASE

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J.D. has made it clear that he no longer wants to be married to Mattie and states that he has wanted a divorce since the separation in the spring of 2008. He does not want to reconcile, has willfully abandoned Mattie, and refuses to support his 61-year-old wife after ten (10) years of marriage.

SUMMARY OF THE ARGUMENT

J.D. has alleged nothing that would qualify as grounds for a divorce from Mattie. He has abandoned her, banished her from the marital home, and refuses to support her. The modest award of separate maintenance is justified and is supported by the evidence. Reasonable attorney's fees should be awarded to compensate Mattie for the expenses incurred by her.

ARGUMENT

PROPOSITION 1: THE CHANCERY COURT OF LAUDERDALE COUNTY, MISSISSIPPI WAS CORRECT IN DENYING JAMES DONALD (J.D.) KILLEN A DIVORCE FROM MATTIE BEATRICE JENKINS (MATTIE) KILLEN ON THE GROUND OF HABITUAL CRUEL AND INHUMAN TREATMENT AS THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY A DIVORCE. FURTHER, THERE WAS NO CORRABORATING WITNESS.

In *Diagle v. Diagle*, 626 So.2d 140 (Miss.1993), this Court reviewed the requirement to obtain a divorce on the ground of habitual cruel and inhuman treatment.

This Court has recently restated the basis for divorce on the ground of habitual cruel and inhuman treatment. In order to establish habitual cruel and inhuman treatment, the evidence 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, this destroying the basis for its continuance. S. Hand, *Mississippi Divorce, Alimony and Child Custody* § 4-12 (2d ed. Supp.1991).

Gardner v. Gardner, 618 So.2d 108, 113-114 (Miss.1993) (quoting *Rawson v. Buta*, 609 So.2s 426, 431 (Miss.1992)). "Although cruel and inhuman treatment usually must be shown to have been 'systematic and continuous,' see *Robinson v. Robinson*, 554 So.2d 300, 303 (Miss.199), a single incident may provide grounds for divorce. *Ellzey v. Ellzey*, 253 So.2d 249, 250 (Miss.1971).... A casual connection between the treatment and separation must exist. *Fournet v. Fournet*, 481 So.2d 326, 328 (Miss.1985)...." *Gardner*, 618 So.2d at 114.

The ground of habitual cruel and inhuman treatment may be established by a preponderance of the evidence, rather than clear and convincing evidence, and the charge "means something more than unkindness or rudeness or mere incompatibility or want of affection." *Smith v. Smith*, 614 So.2d 394, 396 (Miss.1993) (quoting *Wires v. Wires*, 297 So.2d 900, 902 (Miss.1974)).

Diagle v. Diagle, 626 So.2d 140 (Miss. 1993)

The specific allegations of habitual cruel and inhuman treatment listed in J.D.'s *Brief* against Mattie are as follows:

1. Mattie refused to attend the funeral of J.D.'s older brother.
2. Mattie refused to allow J.D. to attend the funeral of her aunt.
3. Mattie refused to be seen in public with J.D.
4. Mattie told other people she was embarrassed by J.D.
5. Mattie made false accusations of adultery.
6. Mattie called J.D.'s daughter a "low-life bitch."

7. Mattie would not let J.D. display photographs of his daughter and granddaughter.

Mattie's response to these allegations is as follows:

1. Mattie admits that she did not want to go to J.D.'s brother's funeral, because she wanted to avoid the embarrassment of a connection with Edgar Ray Killen, J.D.'s brother. Edgar Ray Killen, a convicted felon, was to be let out of jail to attend the funeral. T.V. coverage and news reporters were likely to be present. (Transcript, (hereinafter T) 29, 40) At Edgar Ray Killen's trial, J.D. had knocked down a news reporter and was suing the news media as a result. (T119) Because of the notoriety of Edgar Ray Killen, Mattie was afraid that her name or photo might be in the news. (T125, 126)
2. Mattie did request that J.D. not come to her aunt's funeral. That request originated with her family member with whom J.D. could not get along. (T121) J.D. had had "fusses" with Mattie's family to the extent that one niece had asked J.D. not to touch her children. (T121)
3. J.D. had a problem getting along with people other than Mattie's family. (T122) He would embarrass Mattie with fits he would throw

because of his inability to get along with others. (T104) He knocked down a news reporter during the trial of his brother, Edgar Ray Killen. (T119) He had a falling-out with the congregation at Blackwater Baptist Church because they allowed an inmate choir from the Lauderdale County Detention Center to perform gospel music at the church. (T121, 191) Although J.D. denies it, his witness, Billy Holiday, testified that J.D.'s objection to the inmate performance was that some of the inmates were black. (T201, 202) During a trip to the Smoky's, J.D. got aggravated with a couple with whom they were traveling because of the man's driving and ruined the trip for all concerned. (T206) He threw a fit and cursed the couple. (T123) While performing with a bluegrass band, he became agitated over the song selection and cut the strings to his mandolin in front of everybody. (T122) In addition, he had emotional problems that preceded the marriage, had been in and out of the psychiatric ward at the VA hospital since 1996 (T188), and had spent two of the three weeks prior to the final hearing at the psychiatric ward at the VA hospital. (T166, 167)

4. See answer to Number 3 above.

5. There was no accusation of adultery, although Mattie did call Renee his girlfriend. (T24, 38) For more on Renee, see J.D.'s tortured explanation as to why this woman had his car. Also see a letter Mattie received at her work (Exhibit (hereinafter E) -77).
6. Mattie acknowledges making one disparaging remark about J.D.'s daughter (but not to his daughter) because the daughter wanted to move in with them (T18) with her "crack-head boyfriend." (T28) J.D., in his testimony, defended the young man, saying that he was not a dope head. "His teeth were rotted out from being a crack addict, but he has straightened his life up." (T46) The daughter testified that Mattie was pleasant, was not hostile (T149), that no names were called, and Mattie had never made a direct comment to her. (T151)
7. No such allegation was made in discovery that refusal, if any, to display photographs of family members constituted grounds for divorce, and although it's a minor point, an objection to the "no photos" contention was sustained by the Court. (T169)

Further, the record is devoid of any corroborating witness to support J.D.'s claim of habitual cruel and inhuman treatment.

"The party alleging cruel and inhuman treatment typically must corroborate the testimony." *Shavers v. Shavers*, 982 So.2d 397, 403 (Miss.2008)

GBW v. ERW, 9 So.3d 1200 (Miss. App.2009)

J.R. totally failed to provide evidence to justify a divorce on the ground of habitual cruel and inhuman treatment, he had no corroborating witness, and the chancellor was correct in denying the divorce.

PROPOSITION 2: THE COURT WAS JUSTIFIED IN GRANTING SEPARATE MAINTENANCE AS THE PARTIES SEPARATED WITHOUT FAULT OF MATTIE KILLEN, AND J.D. HAS WILLFULLY ABANDONED HER AND REFUSES TO SUPPORT HER.

J.D. Killen's argument that Mattie is not entitled to separate maintenance would be more credible had he not sued Mattie for divorce and continued to pursue a divorce through the appellate process. The parties separated because J.D. insisted that Mattie leave the marital home. By this appeal, he has conceded the point of abandonment with refusal to support.

In *Diagle v. Diagle*, *supra*, separate maintenance is described as follows:

"Separate maintenance is 'a court-created equitable relief' based upon the marriage relationship." *Lynch v. Lynch*, 616 So.2d 294, 296 (Miss.1993) (quoting *Robinson v. Robinson*, 554 So.2d 300, 303 (Miss.1989)). "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*, 616 So.2d at 296 (quoting Bunkley & Morse, *Amis on Divorce and Separation in Mississippi*, § 7.00 (2d ed. 1957)).

This court has stated that the chancellor may grant the wife separate maintenance if the wife is without fault in the

separation, and the husband willfully abandoned her and refuses to support her. *Robinson*, 554 So.2d at 303 (quoting *Etheridge v. Webb*, 210 Miss. 729, 50 So.2d 603 (1951)). However, a wife is not required to be totally blameless to allow an award of separate maintenance, "but her (mis)conduct must not have materially contributed to the separation." *Lynch*, 616 So.2d at 296 (citing *Robinson*, 554 So.2d at 304)).

The testimony that J.D. has abandoned Mattie and will no longer support her is as follows:

STATEMENTS OF J.D. KILLEN:

1. The reason that Mattie left the marital home is that I asked her to leave. (T5)
2. Even if I had access to more money, I would not provide for Mattie. (T9)
3. "I did ask Mattie to leave." I told her that I was going to file for divorce. (T13)
4. I asked Mattie to sign a *Joint Complaint for Divorce*. (T13)
5. I told Mattie when I married her that I was going to provide her with a house. (T13-14)
6. When it came time to separate, I (J.D.) asked her to leave. (T51)
7. "She got to packing her stuff and started moving, and I told her to take her time. And I -- and I kept saying, you know, 'I'm so sorry, this thing won't work,' but it was not another woman. I can tell you that." (T51)
8. I (J.D.) asked her to leave, and she, in fact, did leave. (T54)
9. The reason for the separation is that I asked her to leave the marital home. (T67)

10. I filed for divorce on the ground of habitual cruel and inhuman treatment. (T67-68)
11. As of this date, March the 18th, 2009, I want a divorce from Mattie. (T68)
12. I do not want to reconcile with Mattie. (T68-69)
13. I do not want to support her. (T69)
14. Prior to me asking Mattie to leave the marital home, I was having some contact with a woman named Renee. (T69)
15. The reason that Renee had access to my checkbook was because I allowed Renee to drive my vehicle. (T72.)
16. The woman who asked me to dance at the casino was Debra. She has long, blonde hair. (T74)
17. The woman who I was with at the fish camp in December was Helen McCool's little niece. (T75)
18. It was shortly after I danced with Debra at the casino in the spring of 2008 that I asked Mattie to get out of the house. (T75-76)
19. I told Mattie that she couldn't sign any more checks on the checking account. (T76)
20. I told her that I wanted a divorce from her. (T76)
21. After dancing with the young lady at the casino, Mattie asked me to have sexual relations with her, and I told her that I did not want to have anything to do with her. (T193)

More to the point as to the abandonment and refusal to support Mattie is the following exchange between the attorney for Mattie and J.D. Killen at the final hearing:

Q. And you told her you wanted a divorce from her?

A. Yes, sir. ...

Q. And what you did was you presented her with a divorce, which was a

Joint Complaint for Divorce, that was signed by you on April the 8th, 2008?

A. That's -- I'm not good with dates, but --

Q. Is that your signature?

A. That looks like my scribbling, yes, sir.

Q. And is the date on there April the 8th, 2008?

A. That is correct.

Q. So, at that point in time you had determined that you no longer wanted Mattie to be your wife?

A. I would say that's correct, sir.

Q. You had determined at that point in time that you wanted her out of your house?

A. That's correct, sir.

Q. You had determined at that point in time that you no longer wanted to support her?

A. Yes, sir, we had a prenuptial. Yes, sir.

Q. ... You had determined on April the 8th, 2008 that you no longer wanted to support Mattie? ...

A. Sir, to the best of my knowledge it is. ...

Q. My question to you is you determined on April the 8th that you no longer wanted to support Mattie?

A. I guess that answer would be correct.

Q. Okay. Your answer to my question is, yes, you determined on April the 8th that you would no longer support her?

A. That's correct.

Q. ... And in fact, you have not supported Mattie in any fashion financially since April the 8th, 2008?

A. I don't -- whenever it happened when she left, no I have not supported her since she left.

Q. So, there was a separation sometime in the spring, possibly May of 2008, and you have refused to support her since that period of time?

A. That would be correct, sir.
(T76-78)

Further in that exchange regarding the prenuptial agreement (E-19) is the following:

Q. ... Does it not say perspective husband -- that would be you, wouldn't it? Wouldn't you be the perspective husband?

A. I sure would.

Q. During the continuance of his marriage with the perspective wife -- and that would be Mattie, wouldn't it?

A. That's correct, sir.

Q. Shall provide a home and maintain and support perspective wife. That's what it says, isn't it?

A. Yes, sir, we were -- yes, sir. That's correct.

Q. And the person who drafted this was an attorney who was representing you, Mr. Christopher Collins?

A. That's correct. ...

Q. You employed Mr. Collins --

A. That's correct. I paid for that, sir.

Q. -- to draft this antenuptial agreement?

A. That is correct.

Q. But irrespective of what this says, you haven't supported Mattie since May of last year?

A. That is correct.

(T79-80)

Also in that exchange and to demonstrate J.D.'s position is the following:

Q. But now she can't come home, because you want a divorce and don't want her home?

A. That's correct, sir.

Q. So, at some point in time when you determined that you wanted a divorce, can I assume that that was about the time you file for divorce?

A. I would assume it was.

(T81)

Q. Well, you've already testified that you want a divorce from her. My question to you really is at what point did you make that determination?

I understood it was at the time of filing for divorce. Am I wrong?

A. That's correct, sir.

Q. At the time you filed for divorce is when you came to the determination that you didn't want to be married to her anymore?

A. I would say that was correct, sir.

(T83)

Further, the testimony of J.D. Killen was:

Q. When you told Mattie she had two weeks to get out, was that before or after you signed a *Joint Complaint for Divorce*?

A. Around about the same time, sir, I -- to the best of my knowledge.

Q. And at that time you told her that you didn't have feelings for her anymore?

A. That is correct, sir.

Q. That was the way you felt then?

A. Yes, sir.

Q. ... When you told her that she had two weeks to get out, what you basically said is, "You have two weeks to get out, because I've already filed for divorce"?

A. I would think that would be correct, sir.

Q. But what you meant to say is, "I've already signed the divorce documents"?

A. I'm gon' say to the best of my knowledge it was all in there -- it could

be, yes, sir. I would say that.
(T85-86)

At the final hearing, Mattie's testimony was as follows:

- A. Well, after we went to the casino and the lady asked could she borrow -- could she dance with my husband, I knew there was a change. So, then that's when I wanted to make love with him. And he told me he didn't have no more feelings for me and that he had filed for divorce, and I had two weeks to get out. and he said, "And don't write no more checks, because I've closed the account."
- Q. The business at the casino -- do you know about when that was?
- A. That was around in -- that was around when he told me -- about two weeks before he told me to get out.
- Q. All right. So that the woman coming to him and asking him to dance, that was approximately two weeks before he told you to get out?
- A. Yes, sir.
(T87-88)

Regarding the woman named Renee, J.D.'s association with her, and J.D.'s Toyota Corolla, J.D.'s story never really gels:

TESTIMONY OF J.D. KILLEN:

1. "I sold the vehicle (to Renee) and had to repossess it." (T11)
2. "She (Renee) had took the car and was going to pay me for it and didn't." (T11)
3. "She (Renee) had an old car that I traded." (T11)
4. She had a brain tumor, and I let her use it. (T12)
5. "She told me that she wanted the car, and I told her to make the payments on it and I would let her have it." (T12)
6. "I knew her two aunts from going up to the casino, when we would go

- up. And they introduced me to their niece and she told me that she had an inoperable tumor and asked could she borrow my car." (T45)
7. "She (Renee) stole it (my checkbook) out of my car when she borrowed it." (T57)
 8. "She (Renee) had my vehicle and she was in the process of buying my vehicle. And my checkbook was in there. " (T72)
 9. "She had my vehicle with the intention, sir, of buying it." (T73)
 10. "And I told her (Renee) that she could take it and make my -- and go to the bank and pay for it if she wanted it." (T73)

Nevertheless, he told his friend Helen McCool, who testified on his behalf, that not only did he loan Renee his car, he also loaned her money. (T142)

After first denying having loaned Renee money during the first part of this testimony, J.D. acknowledged after Helen McCool's testimony that he did not recall if he had loaned Renee any money, but if he did, it was very little. (T187)

The Court on Page 1 of its *Opinion*, dated March 26, 2009, stated as follows:

"The parties were married on December 18, 1999. They separated in May, 2008."

"In May, 2008, the parties went to a local casino. While they were there, a woman who was not known to Mattie asked to dance with J.D., and J.D. did dance with the woman. Mattie testified that J.D. began acting distance toward her so that she became concerned. When Mattie and J.D. returned home, Mattie suggested that the parties have sexual relations, but J.D. refused,

telling Mattie that he no longer had feelings for her. J.D. denies that he and the woman have had an improper relationship, but Mattie is not convinced. J.D. told Mattie she needed to pack her bags and get out, and he directed her not to write any further checks against the checking account. Mattie asked for two weeks to move, and J.D. agreed, although it appears from the testimony that Mattie took less than the two weeks. Mattie did move out of the former marital residence and into her sister's home."

"On April 8, 2008, J.D. signed a *Joint Complaint for Divorce*. At some point after that, he brought the document home with him and presented it to Mattie to sign, but she refused. J.D. testified at trial that it was on April 8, 2008, that he had decided that he wanted a divorce and no longer wanted to be married to Mattie. J.D. was asked several times whether he wanted a divorce or to return to the marital relationship, and he steadfastly stated that he wanted a divorce. He did state hypothetically that if Mattie were to return home to him, they would need to talk about her spending habits, but he did not say that he did want her to return to the marital relationship."

"Mattie, on the other hand, was steadfast in her testimony at final hearing that she did not want a divorce and that she wanted to resume the marital relationship provided that J.D. would reform his conduct, including giving up the woman or women with whom she has concluded that he is involved."

(Record Excerpts (hereinafter RE) 51, 52)

Further, on Page 3 of that *Opinion* is the following:

"In any event, the situation in September, 2008, was that both parties wanted to continue the marriage, and that Mattie had left

home due to her suspicions about J.D.'s relationships with other women. The situation in March, 2009, is that J.D. states that he has wanted a divorce since April, 2008, no longer wants to support Mattie, and his position has not changed since then; Mattie wants the relationship to continue and wants J.D. to show signs that he has reformed. J.D.'s position certainly has changed, and Mattie's has not. The Court finds J.D.'s position at the final hearing to be the more credible because it was subjected to extensive, substantial direct and cross examination, contrary to the temporary hearing, which was limited to one hour per side and did not allow full development of the facts. The Court finds, then, that J.D. no longer wants to be married to Mattie, that he made the decision as of April 8, 2008, and that he not only does not want to be responsible for her support, but he has not contributed to her support since the separation."

"There is no dispute that before the separation, J.D. paid most of the household bills, and that Mattie's car note was paid from J.D.'s bank account. During their time together, Mattie was financially dependent on J.D. Mattie has had to bear her own expenses since the separation."

(RE 53)

Regarding the specific issue of separate maintenance, the Court in its

Opinion stated as follows:

"As this court noted in its temporary judgment, the typical scenario in a separate maintenance case involves the husband having left the unoffending wife and refusing to return home or support her. The order of separate maintenance requires the

husband in such a case to return home, and until he does so in good faith, to support the wife. *Kennedy v. Kennedy*, 650 So.2d 1362, 1367 (Miss. 1995). If the parties reconcile, or if the husband offers in good faith to resume the marital relationship and is rejected by wife, the right to separate maintenance ceases." *Rylee v. Rylee*, 142 Miss. 832, 840-841, 108 So. 161, 163 (1926).

"In this case, Mattie left the marital domicile when told to do so by J.D. She has remained away from home having little or no communication with J.D. Unlike the situation at the temporary hearing, J.D. now takes the position that he is no longer willing to accept Mattie's return home or to support her, and he wants a divorce from her. Mattie, on the other hand, testified that she would like to resume cohabitation if J.D. would give up the other women of which Mattie accuses him.

"Separate maintenance is appropriate when the recipient is financially dependent on the other party, and she was not substantially at fault in the separation, *Thompson v. Thompson*, 527 So.2d 617, 621 (Miss 1988). She need not be totally blameless so long as her conduct did not materially contribute to the separation." *King v. King*, 152 So.2d 889, 890 (Miss 1963).

"In this case, the record establishes that Mattie was financially dependent on J.D., and her conduct did not materially contribute to the separation. J.D. complains about Mattie's behavior in several respects, but although the marriage had grown unpleasant and argumentative on both sides, it had not reached extreme proportions that would have rendered continued cohabitation unsafe or repugnant to a reasonable marital relationship. Moreover, it is J.D. who, in a sense, pulled the trigger and ended the cohabitation. It is not required in Mississippi law that Mattie be totally blameless, and the fact that the relationship was contentious does not disqualify Mattie for separate maintenance." *Shorter v. Shorter*, 740 So.2d 352, 355 (Miss, App. 1999).

"As for whether she should have left when told, Mattie described J.D.'s outbursts and the "confusion" they caused. The court finds it reasonable that Mattie followed J.D.'s bidding when told to leave. She should not have had to remain only to be subjected to an outburst of temper."

"In sum, we now have a situation in which Mattie has been financially dependent on J.D., she separated from him at his instigation, and he is no longer willing to contribute to her support. The court finds these circumstances in combination sufficient to support an award of separate maintenance."

(RE 59, 60)

There can be no doubt for those who observe the personality and demeanor of these two in the courtroom, that when J.D. told Mattie to leave, he fully intended her to do so, and Mattie knew she had no alternative but to leave. No verbal threat of consequences was necessary.

"In domestic relations cases the scope of review is limited by the substantial evidence/manifest error rule." *Hensarling v. Hensarling*, 824 So.2d 583, 586(¶ 7) (Miss.2002) (citing *Magee v. Magee*, 661 So.2d 1117, 1122 (Miss.1995)). An appellate court will reverse a chancellor's finding of fact only in cases where the record lacks substantial evidence to support a finding. *Id.* (citing *Henderson v. Henderson*, 757 So.2d 285, 289(¶ 19) (Miss.2000)). The *Hensarling* court also held that "[an appellate court's] scope of review in domestic relations matters is limited under the familiar rule that [an appellate court] will not disturb a chancellor's findings unless manifest wrong, clearly erroneous, or

if the chancellor applied an erroneous legal standard." *Id.*
(quoting *Johnson v. Johnson*, 650 So.2d 1281, 1285 (Miss.1994)).

Atkinson v Atkinson, 11 So.3d 172

The Court's ruling granting a minimum amount of separate maintenance to Mattie, was based upon substantial evidence, and the decision of the Chancellor should be affirmed.

REQUEST FOR FEES

Mattie Killen moves this Court to grant her a reasonable attorney's fees in the appeal stage of this action and in support thereof would show unto the Court that she was awarded attorney's fees in the lower court of \$500.00, that she has been required to file a brief before the Supreme Court of the State of Mississippi and requests judgment against J.D. Killen for a reasonable fee.

In the case of *Lauro v. Lauro*, 924 So.2d 584 (2006), the Court of Appeals found as follows:

This court generally awards attorney's fees on appeal in the amount of one-half (1/2) of what was awarded in the lower court. *Monroe v. Monroe*, 745 So.2d 249, 253 (Miss. 1999).

In the case of 1876 case of *Bridges v. Bridges*, 330 So.2d 260, the Supreme Court of Mississippi allowed:

The attorney's fees allowed in the lower court amounted to four thousand, seven hundred eighty-seven dollars and fifty cents (\$4,787.50). The motion for attorney's fees is sustained and fees for services here are allowed in the sum of two thousand, four hundred dollars (\$2,400.00), being in round figures, fifty percent (50%) of the attorney's fees allowed in the trial court.

Mattie has had to defend an action for divorce and now an appeal to the

reviewing court award additional attorney's fees to help compensate her for the expenses incurred by her as a result of J.D.'s actions.

CONCLUSION

The Court properly denied a divorce on the ground of habitual cruel and inhuman treatment as there was insufficient evidence to support a divorce on that ground. The Court further properly found that Mattie was entitled the separate maintenance as J.D. has abandoned Mattie, is adamantly opposed to reconciliation, and refuses to provide support for her. Mattie requests reasonable attorney's fees to help cover the cost of this appeal.

RESPECTFULLY SUBMITTED this the 8th day of December, 2009.


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CERTIFICATE OF SERVICE

I, the undersigned attorney, Robert J. Bresnahan, do hereby certify that I have this date by United States mail, postage prepaid, mailed a true and correct copy of the above and foregoing *Brief for the Appellee* to the Honorable Lawrence Primeaux, Lauderdale County Chancellor, Post Office Box 5172, Meridian, Mississippi 39302, and the Honorable Steven D. Settlemires, at the office of Settlemires, Graham & Mills, PLLC, 410 Beacon Street, Philadelphia, Mississippi 39350.

This the 8th day of December, 2009.


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