

IN THE SUPREME COURT OF MISSISSIPPI

JAMES DONALD KILLEN

APPELLANT

vs.

Number 2009-CA-00765

MATTIE BEATRICE JENKINS KILLEN

APPELLEE

APPEAL FROM THE CHANCERY COURT OF LAUDERALE COUNTY, MISSISSIPPI
HONORABLE LAWRENCE PRIMEAUX, CHANCELLOR, PRESIDING

BRIEF OF APPELLANT

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Certificate of Interested Persons

The undersigned counsel of record for Appellant certifies the following listed persons have an interest in the outcome of the case. This representation is made in order that the Judges of this Honorable Court may evaluate the possible disqualifications or recusals:

Honorable Lawrence Primeaux, Chancery Court Judge for the Twelfth Chancery Court District;

James Donald Killen, Appellant;

Honorable Steven D. Settlemires, Counsel for Appellant;

Mattie Beatrice Jenkins Killen, Appellee;

Honorable Robert J. Bresnahan, Counsel for Appellee;




Steven D. Settlemires, MSB 
Attorney for Appellant, James Donald Killen

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STATEMENT OF APPELLANT'S ISSUE

ISSUE NO. 1

Whether the Chancery Court erred by not granting James Donald (J.D.) Killen a divorce from Mattie Beatrice Jenkins Killen on the grounds of habitual cruel and inhuman treatment.

ISSUE NO. 2

Whether the Chancery Court erred by ordering J.D. Killen to pay separate maintenance to Mattie Beatrice Jenkins Killen.

STATEMENT OF THE 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. Prior to the marriage, Mattie and J.D. entered into an Antenuptial Agreement on December 14, 1999, in anticipation and in consideration for their upcoming nuptials. (R. 109)

Mattie and J.D. resided together as husband and wife until their final separation from each other in May, 2008. The separation of the parties followed an argument where Mattie accused J.D. of having an affair. Mattie moved from the marital home of her own free will (Tr. 109). Mattie did not make any attempts to return home or to attempt to reconcile her marriage with J.D. Instead, by her testimony, Mattie placed conditions for changes J.D. must make before she would attempt to return home to the marriage. (Tr. 110). However, Mattie couldn't specifically say what had to change before she would make an attempt to return. (Tr. 111).

One of Mattie's biggest complaints with J.D. concerned his brother. Mattie told numerous people that she was embarrassed by J.D. and his family. (Tr. 104). In fact, she even refused to go to the funeral of J.D.'s older brother. (Tr. 105). When Mattie's aunt passed away, she told J.D. to stay away from the funeral home (Tr. 105).

Mattie acted this way despite having full knowledge of J.D.'s family prior to her marrying him in 1999. (Tr. 105).

Mattie refused to go places with J.D. saying she was embarrassed which caused J.D. to be depressed. (Tr. 172). Mattie refused to allow J.D.'s only daughter, Jenny to visit in

their home without any justification for her refusal. Mattie even refused to allow J.D. to display pictures of his daughter and grandchild (R. 56, Tr. 173 -174). Mattie said she would leave "on two-weeks notice" if his daughter set foot in the marital residence. (R. 56; Tr. 173-174).

Mattie's actions caused J.D. pain and suffering. The Chancellor found that "J.D. is not in particularly in good health. He has had back surgeries, surgeries to remove shrapnel from the Vietnam War, gall bladder surgery and treatment for depression. (R. 57). In fact, J.D. had just spent two (2) weeks in the Veterans Administration Hospital in Jackson just before the trial was conducted. (Tr. 166-167).

Subsequent to abandoning her husband and the marital residence in May, 2008, Mattie filed a Complaint for Separate Maintenance on or about August 19, 2008. Her Complaint requested the Court to order J.D. to be solely responsible for paying for her car note, insurance and tag; provide her a place to live and also, monthly payments of separate maintenance. (R. 3-4).

Mattie testified that at the time of the marriage, J.D. had in excess of \$15,000.00 in his checking account. (Tr. 115). However, Mattie further stated that at the time she left J.D. the balance in his account was less than \$1,000.00. (Tr. 115).

J.D. is retired/disabled and receives monthly disability payments from social security in the amount of \$1,500.00 per month (Tr. 84). J.D. also receives \$424.00, per month from Vanguard Fiduciary Trust Company, as retirement benefits from his twenty-four (24) years of employment at Weyerhaeuser Company (Tr. 83). J.D.'s Uniform Chancery Court Rule 8.05 Financial Disclosure Statement evidenced over \$2,000.00 in regular monthly expenses (R. 33-42).

Mattie is employed as a switchboard operator for Jeff Anderson Regional medical center in Meridian, MS. She has an adjusted gross income of \$1,436.42, according to her Uniform Chancery Court Rule 8.05 Financial Disclosure Statement. (R. 24-32).

Mattie listed \$3,243.48 as monthly expenses. However, on cross-examination, she stated she paid only \$200.00 per month for light bill, water bill, utility and cable, without any rent payment. (Tr. 101) Further, she admitted the expenses she had claimed on her financial statement, which she had sign under oath and admitted into evidence, were not a true and accurate reflection of her expenses. (TR. 101). In fact, her expenses would be significantly lower.

The Court ordered J.D. to pay the amount of \$200.00, per month to Mattie as separate maintenance. This payment would leave J.D. with a monthly deficit of several hundred dollars.

SUMMARY OF THE ARGUMENT

Cruelty may be proven by a series of acts, which taken together, cause pain and suffering to the innocent spouse. Savell v. Savell, 240 So.2d 628, 629 (Miss. 1970). J.D. suffers both physically and emotionally from Mattie's cruel and inhuman treatment of him. J.D. stated that he had just spent two (2) weeks in the mental ward, and that mentally he was "shell shocked", and that it just wasn't good (Tr. 174).

Mattie's actions toward J.D. of refusing to be seen with him in public, refusing to go to his brother's funeral, refusing to allow J.D. to attend her aunt's funeral, making comments that she was embarrassed by J.D., embarrassed by who his family was, refusing to allow J.D.'s daughter to visit, refusing to allow J.D. to display pictures of his daughter and granddaughter, making repeated false accusations of adultery, and her moving out of the marital home and refusing to even speak to J.D. constitute cruel and inhuman treatment and J.D. should have been granted a divorce thereon. Mattie's conduct toward J.D. is so unnatural as to make the marriage revolting to J.D.

Mattie should not have been awarded separate maintenance from J.D. Not only was she substantially at fault for the deterioration of the marriage, she voluntarily left the marital home and has steadfastly refused to return.

Separate maintenance is a court-created equitable relief based upon the marriage relationship and is a judicial command to the Defendant to resume cohabitation with the Plaintiff or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other. Perkins v. Perkins, 787 So. 2d 1256 (Miss. 2001); Daigle

v. Daigle, 626 So. 2d 140, 145 (Miss. 1993).

[W]here the wife contributes equally, or more, to the separation of the parties, she is not entitled to any award of separate maintenance. Rodgers v. Rodgers, 349 So. 2d 540 (Miss. 1997); Cox v. Cox, 279 So. 2d 612 (Miss 1973); Kergosian v. Kergosian, 471 So. 2d 1206 (Miss. 1985).

The learned Chancellor erred by awarding separate maintenance to Mattie because she was substantially at fault for the separation of the parties. Further, Mattie's refusal to resume the marital relationship prohibits her from receiving separate maintenance.

ARGUMENT

ISSUE NO. 1

Whether the Chancery Court erred by not granting James Donald (J.D.) Killen a divorce from Mattie Beatrice Jenkins Killen on the grounds of habitual cruel and inhuman treatment.

Mattie caused J.D. much emotional distress during a very difficult time. The transcript contains numerous examples of Mattie's inhumane treatment of J.D. there include but not limited to refusing to attend the funeral of J.D.'s older brother, refusing to allow J.D. to attend the funeral of her aunt. Refusing to be seen in public with J.D. , telling other people she was embarrassed by him, making fake accusations of adultery moving out of the mental home.

Counsel for Mattie made much a do about J.D.'s family, (over objection from counsel for J.D.), in particular J.D.'s brother in an effort to defend Mattie's actions. However Mattie's knew of the accusations against J.D.'s brother prior to the marriage and should not be permitted to justify her actions there. Mattie's actions are to unnatural as to make the marriage revolting to J.D. , as evidenced by the testimony of Jenny Tucker and Helen McCool.

Mattie's actions have contributed to J.D.'s health problems. Further, her actions were the proximate cause of the separation of the parties. "Habitual cruelty means 'something' more than unkindness or rudeness of mere incompatibility or want of affection." Bower v. Bower, 688 So. 2d 1374 (Miss. 1997).

The court must not look at the intention of the parties, but of effect, while looking at the practices of the (wife) as they relate to the (husband). Muhammad v. Muhammad, 622 So. 2d 1239 (Miss 1993).

Cruelty may be proven by a series of acts, which taken together, cause pain and suffering to the innocent spouse. Savell v. Savell, 240 So. 2d 628, 629 (Miss 1970).

Constant criticism in connection with other conduct was found sufficient to prove cruel and inhuman treatment. Steve v. Stone, 824 So. 2d 645, 647 (Miss Ct. App. 2002); Rakestraw v. Rakestraw, 717 So 2d 1284, 1286 (Miss. 1998).

Dehumanizing treatment was found sufficient with other conduct to prove cruel and inhuman treatment. Sproles v. Sproles, 782 So. 2d 742, 747 (Miss 2001); and Bullock v. Bullock, 699 So. 2d 1205, 1210 (Miss. 1997).

Lack of emotional support was found sufficient along with other conduct to prove cruel and inhuman treatment. Robinson v. Robinson, 722 So.2d 601, 603 (Miss. 1998).

False accusations of adultery along with other conduct have been found sufficient to prove cruel and inhuman treatment. Thames v. Thames, 102 So.2d 868 (Miss. 1958); Sproles v. Sproles, 782 So.2d 742, 745 (Miss. 2001); Richard v. Richard, 711 So.2d 884, 888 (Miss. 1998).

Extreme jealousy along with other conduct was found sufficient to prove habitual cruel and inhuman treatment. McBroom v. McBroom, 58 So. 2d 831,831 (Miss. 1952).

Mattie's behavior of repeatedly telling others she was embarrassed by J.D., her refusal to be around any of J.D.'s family, her refusal to be seen in public with J.D., her assertions of being embarrassed by who J.D.'s family was, and her unsubstantiated accusations of adultery made the marriage untenable to J.D. Mattie's actions as a whole

constituted cruel and inhuman treatment. Mattie's behavior caused a physical burden and suffering on J.D. In fact, J.D. was hospitalized for two (2) weeks in the psychiatric ward of the Veteran's Administration Hospital in Jackson for depression just before the trial of this matter (R. 57; Tr. 166-167). J.D.'s uncontradicted testimony was that Mattie's refusal to go places in public with him was very depressing (Tr. 172).

Mattie called J.D.'s daughter a "low-life bitch", (Tr. 172), without any provocation from J.D.'s daughter or anyone else (Tr. 174). Mattie would not even let him display pictures of his daughter and grand-daughter. Mattie stated she would leave on "two (2) weeks notice" if J.D.'s daughter set foot in the marital residence. (R.56; Tr. 173-174). When asked what effects Mattie's action had upon him J.D. stated "I'm already , you know, gun ---- I'm already shell-shocked and I'm already — it just wasn't good". (Tr. 174).

The Chancellor found that J.D. is not in particularly good health. "He has had back surgery, surgery to remove shrapnel from the Vietnam war, gall bladder surgery and treatment for depression". (R. 57).

Mattie's actions are much akin to the wife in the case McIntosh v. McIntosh, 977 So.2d 1257 (Miss. Ct. App. 2008). In McIntosh, the wife, inter alia, refused to attend church or social functions with the husband and accused him of having affairs. These acts, along with others, was conduct so unnatural as to make the marriage revolting to the innocent spouse.

All of the acts of misconduct by Mattie, taken together, including but not limited to, embarrassment at being seen and going places with J.D., baseless allegations of adultery, insulting J.D.'s daughter, refusal to let his daughter visit, stating she was embarrassed by J.D., constitute a series of acts which taken together caused pain and suffering to the

innocent spouse, J.D. Savell v. Savell, 240 So.2d 628,629 (Miss. 1970). Mattie's constant criticism and dehumanizing treatment, and unsubstantiated allegations of adultery clearly entitled J.D. to a divorce on the ground of habitual cruel and inhuman treatment. Mattie's conduct was so unnatural as to make the marriage revolting to J.D.

The Learned Chancellor erred by not granting J.D. a divorce from Mattie.

ISSUE NO. 2

Whether the Chancery Court erred by ordering J.D. Killen to pay separate maintenance to Mattie Beatrice Jenkins Killen.

At the very heart of the marital relationship there is a duty on the husband to support the wife and the duty of the wife to dwell with the husband. Maxey v. Maxey, 120 So. 179 (Miss. 1929).

"Separate maintenance is a court-created equitable relief based upon the marriage relationship and is a judicial command to the defendant to resume cohabitation with the Petitioner or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other." Perkins v. Perkins, 787 So.2d 1256 (Miss. 2001); Daigle v. Daigle, 626 So. 2d 140, 145 (Miss. 1993).

Where separation has occurred without fault on the part of the wife, she is entitled to be maintained according to same standard of living that she enjoyed during the period of togetherness. Robinson v. Robinson, 554 So.2d 300 (Miss. 1989); Thompson v. Thompson, 527 So.2d 617 (Miss. 1988); and Lynch v. Lynch, 616 So.2d 294 (Miss. 1993).

While she need not be totally blameless to pursue her case for separate

maintenance where the wife contributes equally, or more, to the separation of the parties, she is not entitled to any award of separate maintenance. Rodgers v. Rodgers, 349 So.2d 540 (Miss. 1997); Cox v. Cox, 279 So.2d 612 (Miss. 1973); Kergosain v. Kergosian, 471 So.2d 1206 (Miss. 1985).

Mattie not only contributed to the separation of the parties, she was the proximate cause. Mattie's misconduct includes, but is not limited to, Mattie's behavior of repeatedly telling others she was embarrassed by J.D., her refusal to be around any of J.D.'s family, her refusal to be seen in public with J.D., her assertions of being embarrassed by who J.D.'s family was, and her unsubstantiated accusations of adultery made the marriage untenable to J.D. Mattie's actions as a whole constituted cruel and inhuman treatment. Mattie's behavior caused a physical burden and suffering on J.D. In fact, J.D. was hospitalized for two (2) weeks in the psychiatric ward of the Veteran's Administration Hospital in Jackson for depression just before the trial of this matter. (R. 57; Tr. 166-167). J.D.'s uncontradicted testimony was that Mattie's refusal to go places in public with him was very depressing (Tr. 172).

Mattie called J.D.'s daughter a "low-life bitch", (Tr. 172), without any provocation from J.D.'s daughter or anyone else (Tr. 174). Mattie would not even let him display pictures of his daughter and grand-daughter. Mattie stated she would leave on "two (2) weeks notice" if J.D.'s daughter set foot in the marital residence. (R.56; Tr. 173-174). When asked what effects Mattie's action had upon him J.D. stated "I'm already , you know, gun ---- I'm already shell-shocked and I'm already — it just wasn't good". (Tr. 174).

The Chancellor found that J.D. is not in particularly good health. "He has had back surgery, surgery to remove shrapnel from the Vietnam war, gall bladder surgery and

treatment for depression". (R. 57).

Mattie left the marital residence of her own free will. It is undisputed in the record that J.D. did not force Mattie to leave, nor were there any threats of physical violence. There was not even a suggestion by J.D. as to what he would do if Mattie did not leave (R.56).

Usually in a separate maintenance case, the husband has left the residence and refuses to return home. This case has the opposite set of facts. Mattie moved out, refused to return home or even speak with J.D. about the possibility and then request J.D. to support her while she lives in a residence other than the marital home.

J.D. testified that Mattie could have come home. (Tr.81). J.D. further stated he did want Mattie in the house and tried to call her. Mattie had her number changed and didn't give it to J.D. (Tr. 82). J.D. even wrote her several letters (Tr. 82). Yet despite J.D.'s statements, Mattie said she could only return home and resume cohabitation, if J.D. would give up the other women of which Mattie accuses him (R.59). However, J.D. steadfastly denied any romantic involvement with any woman other than his wife. Mattie's allegations of another woman were without any support.

In Lynch v. Lynch, 616 So. 2d 294 (Miss. 1993), the grant of separate maintenance to the wife was reversed where the Court found her conduct had contributed significantly to the husband's departure from the marital domicile. In Lynch, since the wife had nagged constantly, had alienated her family, and had caused the separation with her husband, she was not entitled to demand and be awarded separate maintenance.

In Steen v. Steen, 641 So.2d 1167 (Miss. 1994), the wife had complained of the husband's nagging , criticism and lack of intimacy. It was determined she abandoned the

marriage without cause.

Mattie clearly abandoned her marriage to J.D. without cause. Her actions prior to and after the separation show her abandonment of the marriage without cause. It is almost ingenious for Mattie to leave the marital home and then claim she wants to resume the marriage and yet refuse to return to the marital home or otherwise attempt to do so. There was not any testimony of any attempts by Mattie to resume cohabitation and the marital relationship with J.D.

Mattie's actions significantly contributed to her departure from the marital residence and the separation of the parties. Yet now she places demands upon J.D., which are unfounded, before she would return.

The Learned Chancellor erred by granting any award of separate maintenance to Mattie due to her misconduct. Additionally, Mattie has not in good faith made any attempts to return to the marital domicile. As stated before, separate maintenance is a judicial command for the absent spouse, in this case J.D., to resume the cohabitation with the other spouse, Mattie. However, in this case, the situation is reversed as J.D. has remained in the marital domicile before, during and after these proceedings. J.D. continues to reside in the marital domicile and Mattie is the absent spouse who has refused to return.

When the wife is unwilling to live with a husband, she will not be entitled to support and her failure to do so will defeat any such claim. Smith v. Smith, 293 So.2d 266 (Miss. 1974). The husband is entitled to have his wife receive her support in his domicile, and her refusal to do so will defeat her rights to any claim for separate maintenance. King v. King, 191 So.2d 409 (Miss. 1996). One may not benefit, at the expense of another, as a result of one's own shortcomings or untoward behavior. Benson v. Benson, 608 So.2d 709 (Miss.

1992).

Mattie should not be allowed to benefit by her abandonment of the marital relationship. Likewise, she should not be allowed to benefit from her steadfast refusal to return to the marital domicile. Mattie is substantially at fault for the break-up of her marriage to J.D.

The Learned Chancellor erred by granting separate maintenance from J.D.

CONCLUSION

Mattie caused J.D. much emotional distress during a very difficult time. The transcript contains numerous examples of Mattie's inhumane treatment of J.D. there include but not limited to refusing to attend the funeral of J.D.'s older brother, refusing to allow J.D. to attend the funeral of her aunt. Refusing to be seen in public with J.D. , telling other people she was embarrassed by him, making fake accusations of adultery moving out of the mental home.

The Learned Chancellor erred by granting any award of separate maintenance to Mattie due to her misconduct. Additionally, Mattie has not in good faith made any attempts to return to the marital domicile. As stated before, separate maintenance is a judicial command for the absent spouse, in this case J.D., to resume the cohabitation with the other spouse, Mattie. However, in this case, the situation is reversed as J.D. has remained in the marital domicile before, during and after these proceedings. J.D. continues to reside in the marital domicile and Mattie is the absent spouse who has refused to return.

The Judgement of the Chancery Court of Lauderdale County, Mississippi should be reversed and J.D. Killen should be awarded a divorce absolute of and from Mattie Beatrice Killen on the ground of habitual cruel and inhuman treatment.

RESPECTFULLY SUBMITTED, this the 19th day of November, 2009.

J.D. KILLEN, APPELLANT

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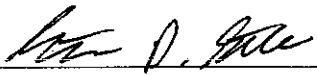
CERTIFICATE OF SERVICE

I, Steven D. Settlemires, attorney for Appellant, do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellant's brief to the following, at their normal business addresses, by mailing a copy via the United States Mail, first class, postage pre-paid:

Hon. Lawrence Primeaux
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This the 19th day of November, 2009.



STEVEN D. SETTLEMIRE
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