

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DESMOND FORTHNER, SR.

APPELLANT

VERSUS

CAUSE NO.: 2009-TS-00916

LAKENYA BONNER FORTHNER

APPELLEE


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BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

APPEALED FROM: THE CHANCERY COURT of the First Judicial  
District of Jasper County, Mississippi

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned Counsel of Record for Lakenya B. Forthner does hereby certify that the below listed individuals have an interest in the outcome of this case. Theses representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. Desmond Forthner, Sr. – Appellant
2. Hon. Thomas Tullos – Attorney for Appellant
3. Lakenya Bonner Forthner – Appellee
4. Hon. Michael D. Mitchell – Attorney for Appellee
5. Hon. Sam Creel, Jr. – Attorney for Appellee
6. Hon. H. David Clark, Chancellor.

So Certified this the 6<sup>th</sup> day of January, 2010.

  
MICHAEL D. MITCHELL

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## **STATEMENT OF THE CASE**

### **I. LOWER COURT PROCEEDINGS**

The Lower court, the Chancery Court for the First Judicial District of Jasper County, Mississippi, held a number of bifurcated hearings on this case. The first hearing was had on September 9, 2008. The second hearing was had on January 27, 2009. The third hearing was had on January 27, 2009, as well as part of a bifurcated hearing.

The Chancellor awarded custody of the minor children to Lakenya Forthner at the first hearing. At the second hearing the Court denied Lakenya Forthner a divorce on grounds of habitual cruel and inhumane treatment. At the third hearing, held on the same date as the divorce hearing, the Court denied Desmond Forthner's request for Separate Maintenance.

Aggrieved by the findings of the Chancery Court of the First Judicial District of Jasper County, Mississippi, Desmond Forthner appealed.

## **II. STATEMENT OF THE FACTS**

The Chancery Court of the First Judicial District of Jasper County, Mississippi, conducted several bifurcated hearings in this case. The first bifurcated hearing was regarding the issues of child custody and child support. (T. p. 4). The second bifurcated hearing was regarding the Complaint for Divorce. (T. p. 227). The third bifurcated hearing was regarding the issue of separate maintenance and support. (T. p. 227).

Minnie Bonner, hereinafter referred to as “Mrs. Bonner,” was the first witness called by Lakenya Forthner, the appellee herein, and herein referred to as “LaKenya.” Mrs. Bonner testified she was LaKenya’s mother. (T. p. 10). Mrs. Bonner further testified she and Tina Bonner (maternal grandmother) would help take care of children while Desmond Forthner, hereinafter referred to as “Desmond,” and LaKenya were in school. (T. p. 11). Mrs. Bonner testified she was in the home regularly and that while LaKenya cooked, both parents looked after the kids, and both parents had a good relationship with the children. (T. p. 12). Mrs. Bonner further testified Lakenya and the children live with her since the parties separated. (T. p. 13). According to Mrs. Bonner LaKenya helps the children with their schoolwork, tucks them in at night, and bathes them while she works full time, 8:00 a.m. to 5:15 p.m., at Riley Nursing Home in Meridian. (T. p. 13-14). Mrs. Bonner also testified about Christmas. (T. p. 14-15). Mrs. Bonner testified the children loved Christmas and would get all excited about celebrating Christmas. (T. p. 15).

On Cross-Examination Mrs. Bonner testified about LaKenya’s work history and the fact LaKenya has always worked during the marriage. (T. p. 15-24). Mrs. Bonner also testified LaKenya was in school the last two to three years of the marriage. (T. p. 25). LaKenya was

seeking a Bachelor of Science in Nursing degree from the University of Southern Mississippi. (T. p. 25-26). On further Cross Mrs. Bonner noted LaKenya would check on the progress of the children at school, and that the children were in school, not being taken care of by Desmond, in 2006 and 2007. (T. p. 27, 29). Mrs. Bonner admitted both parents would share the responsibility for the children during the marriage, and Desmond worked on cars in the back yard rather than practicing catch with the children when she was at the marital home. (T. p. 34, 31). Mrs. Bonner testified Desmond does auto-body work for the public, not only family at the shop behind his house. (T. p. 36). Mrs. Bonner further testified LaKenya is in excellent health, but Desmond has lingering problems from his motorcycle wreck to the extent he cannot get out of bed on some days prior to the separation. (T. p. 36).

LaKenya testified next. LaKenya testified about her two different jobs while Desmond was in school in the year prior to the separation. (T. p. 44-45). Both Desmond and LaKenya preformed domestic work in the marital home. (T. p. 45-46). Desmond was incapacitated for a number of months in 2005 due to a motorcycle wreck. (T. p. 47). While Desmond was incapacitated LaKenya would work to prepare everything so Desmond could look after himself while LaKenya at work or in school, and the children in school or daycare. (T. p. 47). Desmond still has limitations from the injury. Some days Desmond cannot get out of bed, sometimes for three to four days at a time, and LaKenya would be fully responsible for taking care of their minor children. (T. p. 48). LaKenya also testified about the auto-body work Desmond does for the public for cash out of the shop in their back yard. (T. p. 48).

LaKenya went on to testify about the difference of opinion between herself and Desmond on subject of religion. (T. p. 49). Shortly after the marriage, Desmond changed religions and

announced his family would not celebrate Christmas. (T. p. 50). Desmond does not want his children to celebrate Christmas or believe in Santa Clause, which caused a conflict between the parents. (T. p. 50).

LaKenya testified Desmond adopted their daughter. (T. p. 51). LaKenya further testified the children currently get off the school bus, after she put them on it, at their grandmother's (Mrs. Minnie Bonner) or their great-grandmother's (Mrs. Tina Bonner). (T. p.52). LaKenya testified she or Mrs. Bonner cooks, while LaKenya puts the children to bed and ensures they say their prayers. (T. p. 52). LaKenya wants full custody of her children because she feels she treats them equally while Desmond, in LaKenya's opinion, shows favorites, and living in one home is a more stable environment for the children to grow up and attend school in. (T. p. 53). LaKenya also testified about the circumstances around how her car was put in Desmond's name, the fact she made the car and insurance payments on the vehicle, and the fact Desmond was holding the insurance check hostage because he wanted half of the money. (T. p. 54-56). LaKenya also testified about Desmond interfering with the information she provided to Desmond Forthner, Jr.'s school, but not the information she provided to her daughter's school. (T. p. 60-62).

On Cross-Examination LaKenya testified she would be at home cooking while Desmond and kids were outside playing ball, but she sometimes found time to play catch as well, in amongst her domestic duties. (T. p. 63-64). LaKenya testified she is enrolled as USM Meridian campus for the past several years, and will graduate with a Masters degree in Nursing, as a Nurse Practitioner in December 2009. (T. p. 68-72). LaKenya testified the children would get off the school bus at her mother's house, not the marital home, during the marriage. (T. p. 74). LaKenya is currently employed, and also enrolled in school; she feels it would not be a stable



environment for her children if they were forced to move from one home to another every other week, or for a number of days a week. (T. p. 79). LaKenya testified she cannot make plans regarding where she is to live until she graduates and has the credentials to find employment. (T. p. 84). Desmond took the minor son and refused to allow LaKenya access, but willfully failed to take his adopted daughter. (T. p. 89). LaKenya also testified further concerning Desmond's accident and disability monies. LaKenya testified Desmond got his disability check and put specific amounts into the account to pay specific bills. (T. p. 85-86). LaKenya testified she had to ask Desmond for money when she needed it, because Desmond took all of the money and controlled it. (T. p. 86, 195). LaKenya also testified when Desmond was injured, the children got off the school bus at daycare, not into Desmond's custody. (T. p. 86-87). LaKenya also testified, on rebuttal, that Desmond regularly works on vehicles for the public, and charges them for his services. (T. p. 197).

Jean Morgan, hereinafter referred to as "Morgan," was the next witness called. Morgan testified she is a teacher at East Jasper Head Start where she taught Desmond Forthner, Jr., hereinafter referred to as "Lil'D," for two years. (T. p. 95-96). Morgan testified Desmond took an active role in Lil'D's education, and she would see Desmond 5-6 times in 30 days, but only saw LaKenya once. (T. p. 96-99). On Cross-Examination, Morgan admitted Desmond could have purposefully scheduled events when LaKenya was not going to be at home. (T. p. 103-107).

Desmond was the next person called to testify. Desmond testified about still being hurt from the motorcycle wreck he suffered in 2005. (T. p. 110). Desmond testified he did all the cleaning and cooking in the household, and that LaKenya did nothing around the house. (T. p.

113-114). Desmond testified LaKenya was employed at Hattiesburg Clinic Dialysis and that she also worked at Rush Hospital while still attending school to get her degree. (T. p. 114).

Desmond testified he did the cooking, cleaning, and vacuuming while LaKenya ignored the house and the kids. (T. p. 115-124). Desmond admitted telling the minor children there was no Santa Claus without discussing it with his LaKenya, the mother of the children. (T. p. 125, 138). Desmond claims LaKenya disciplines the children by yelling at them while he sits down with the Bible and shows them where their behavior is wrong. (T. p. 126). Desmond still has pelvic and neck problems from injury. (T. p. 127, 145).

On Cross-Examination Desmond admits he knew Lil'D wanted to play T-Ball, but failed to take the time to register him, although he knew there was a registration process, so he could say the LaKenya failed to register the child. (T. p. 135-136). Desmond also admitted that LaKenya would come home from working all day and cook, despite Desmond's earlier testimony that she never cooked. (T. p. 138). Desmond admitted on Cross-Examination he drives a vehicle titled in his father's name since the parties separated, and that Desmond has three vehicles at his home he is working on. (T. p. 146-148). Desmond claimed he did not charge people for working on their vehicles he takes the "little change" the people "throw" at him for fixing their vehicles. (T. p. 149). Desmond admitted getting roughly \$8,000.00 since the separation from income taxes, stimulus payments, and vehicles sold which were purchased with marital funds without sharing any of the monies with LaKenya. (T. p. 152-156). Desmond admitted he had went to the Social Security office and had one of the children's checks sent to him, despite the fact the children live with LaKenya, and have since the separation. (T. p. 156). Desmond admitted he preformed work for well below market value so he will not have income so his

request for alimony would look better. (T. p. 163-165). The Chancery Court had to recess because it was too taxing on Desmond to sit in the witness chair and answer questions, but he claims he can take care of, and is asking for full custody of, his children. (T. p. 167, 109). Desmond admits he takes three or four prescribed medications which have warnings on them about driving after taking the medications. (T. p. 1067-168). Desmond admits he is withholding the insurance payments from LaKenya on her vehicle which was totaled, but does not want to pay her any of the monies he has received since separation. (T. p. 169-179).

The next witness was Desmond's mother, Betty Forthner, hereinafter referred to as "Mrs. Forthner." (T. p. 181). Mrs. Forthner testified Desmond did everything for the children while LaKenya was absent. (T. p. 182-183). On Cross-Examination, Mrs. Forthner admitted Desmond still some disability from the accident, and that LaKenya was a good, attentive parent. (T. p. 189-191).

At this point the Chancery Court of the First Judicial District of Jasper County, Mississippi, made its decision regarding the Care, Custody, and Control of the minor children of the parties. The Court made clear its lack of criticism regarding Desmond's religion. (T. p. 218-219). The Court stated it was a court of equity which means doing the right thing, but the Court does not feel that is Desmond's intention. (T. p. 220).

The Chancery Court of the First Judicial District of Jasper County, Mississippi granted the permanent primary physical and joint legal care, custody, and control of the minor children of the parties to LaKenya. The Chancellor conducted a thorough review of the Albright factors concerning child custody. (T. p. 199-225). Desmond was granted the continued, exclusive use of the marital domicile with his shop. (T. p. 221).

The next hearing was concerning the issue of LaKenya's Complaint for Divorce on grounds of Habitual Cruel and Inhumane Treatment. The first witness called to testify was Desmond. Desmond testified on Direct Examination he is 30 years old with college degrees in carpentry and auto-body repair. (T. p. 231). Desmond testified he has an automobile work area and shed on the marital property to store his tools and equipment. (T. p. 232).

Desmond testified further on Cross-Examination concerning his change in religion since the marriage. (T. p. 233). Desmond testified he changed religions and faiths after the parties were married. (T. p. 234). Desmond testified his new faith specifically indicated the man should rule the home, but he did not force his beliefs upon LaKenya. (T. p. 235). Desmond admitted to disconnecting the electricity from the family home because LaKenya was not behaving in what he thought to be a proper manner. (T. p. 237-238). Desmond claimed he "doesn't like" raising his voice, but LaKenya would holler and scream during their discussions of his new religion and the role it leaves for LaKenya to play, and the lack of celebrating Christmas. (T. p. 242, 237-239). Desmond was very evasive in his answers to the questions propounded by counsel on Cross-Examination. (T. p. 251). Desmond admits he and LaKenya argued frequently about the requirements of his new religion which say Desmond is in charge and LaKenya has to follow his commands. (T. p. 238-251). Desmond finally stated LaKenya is not entitled to any monies and he kept cash, instead of depositing the monies into a bank, so LaKenya would have to come to him to get spending money. (T. p. 259, 264-266).

The next witness on the issue of Divorce is LaKenya. LaKenya testified she and Desmond fought over his change in religion, and the fact he did not want her celebrating Christmas. (T. p. 269-270). LaKenya testified about Desmond disconnecting the electricity from

the marital home because LaKenya used marital funds to pay the bill rather than using her own, separate funds to pay the power bill, and Desmond admitted unhooking the electricity from the home his children lived in on a cold, winter morning. (T. p. 270-271). LaKenya testified she left the marital home because of the stunt with the electricity, the continued conflict of faiths regarding what was allowed and what was banned, and Desmond's statement "...it would be his way or no way and if I didn't like it, I could go." (T. p. 272-273).

LaKenya went on to testify regarding the finances of the parties. LaKenya testified at first the money and finances were separate until after the wreck when Desmond would get very controlling about money. (T. p. 274). LaKenya testified Desmond would get her paycheck and force her to ask for money to buy groceries or pay bills. (T. p. 274-275). Desmond said he was the head of the household and LaKenya was expected to fall in. (T. p. 275). Desmond also refused to talk with LaKenya about their differences to try and save the marriage, and it affected LaKenya because Desmond was very mean after the children went to sleep, and LaKenya could not sleep because of Desmond's words and actions. (T. p. 275-276).

On Cross-Examination LaKenya testified Desmond's actions made her feel like a piece of property because Desmond attempted to physically force her to attend his church, leading to a situation where LaKenya is scared of Desmond. (T. p. 277-279). LaKenya testified the parties finally separated around February of 2008. (T. p. 279). LaKenya testified Desmond drug her down the steps to their home in one disagreement. (T. p. 280). LaKenya testified she never went to the police or to the hospital with injuries inflicted by Desmond because of embarrassment. (T. p. 290-291). LaKenya testified Desmond never deposited he received as charity and employment never was deposited into a joint account, that Desmond kept his money to spend. (T. p. 293-

294). LaKenya further testified Desmond put her in fear of her life with his efforts to control her. (T. p. 297, 296). LaKenya further testified that Desmond works on automobiles for the public for cash, despite his earlier testimony to the contrary. (T. p. 304).

The next person called to testify about the divorce was Mrs. Minnie Bonner, hereinafter referred to as "Mrs. Bonner." (T. p. 310). Mrs. Bonner is LaKenya's mother. (T. p. 310). Mrs. Bonner testified LaKenya's demeanor changed during the marriage when Desmond started the new church; LaKenya went from happy and outgoing to miserable and depressed. (T. p. 312). Mrs. Bonner testified she heard Desmond say he was the controller in his house, whatever he says goes or a man has no reason to have a house. (T. p. 313). Mrs. Bonner testified Desmond's attitude was well known in family circles. (T. p. 314). Mrs. Bonner testified she witnessed Desmond's attitude cause a change in LaKenya. (T. p. 314). Mrs. Bonner further testified Desmond did not want LaKenya to celebrate Christmas after his change in religion, despite the fact the family celebrated Christmas, as a family, the first two years of the marriage, and Desmond refused to allow LaKenya to celebrate certain holidays after his change in religion. (T. p. 316).

At this point the Chancellor ruled that LaKenya failed to prove her case of Habitual Cruel and Inhumane Treatment, and denied her a divorce, but reiterated the validity of the prior order regarding child custody and support. (T. p. 321-325).

Desmond was called to testify on his request for Separate Maintenance. (T. p. 330). Desmond testified he did nothing to make LaKenya leave, when the marriage was not happy before the wreck at the fault of LaKenya because Desmond is blameless. (T. p. 331). Desmond testified LaKenya would scream and holler but he always stayed cool, calm and collected. (T. p.

334). Desmond testified LaKenya did not approve of his change in church membership because he told the minor children there was no Santa Claus and his refusal to allow her to celebrate Christmas. (T. p. 334-337). Desmond claimed he paid all the marital bills out of his Social Security Disability, despite his earlier admission to the contrary, because he was the perfect husband and LaKenya was a horrible wife. (T. p. 339-343).

On cross-examination Desmond admitted he would agree to a divorce if LaKenya were to give him alimony so he could get the benefit of the education she obtained during the marriage despite his best attempts to stop her. (T. p. 346-349). Desmond further admitted he failed to follow the Chancellor's prior ruling concerning a Social Security check received by one of his minor children. (T. p. 350). Desmond also admitted he does not feel good and cannot work every day, and, despite receiving his degree in auto-body repair, he did not complete the requirements of the course. (T. p. 352-355). Desmond also claimed Medicare refused to pay for all of his medical bills despite his 100% Social Security Disability. (T. p. 356).

## **STANDARD OF REVIEW**

The Standard of Review of decisions of the Chancellor is limited. *Harrison v. Roberts*, 989 So.2d 930, 932 (¶ 9) (Miss. Ct. App. 2001). “The Chancellor’s findings will not be disturbed by the appellate court when they are supported by substantial, credible evidence unless the Chancellor’s findings are an abuse of discretion, manifestly wrong, clearly erroneous, or the result of an erroneously applied legal standard.” *Williams v. King*, 860 So.2d 847, 849 (¶8) (Miss. Ct. App. 2003). In its review of a Chancellor’s factual findings, the Mississippi Supreme Court will not set aside the Chancellor’s determination of the facts unless the Chancellor’s findings are “manifestly wrong or clearly erroneous.” *Bardwell v. Bardwell (In Re Bardwell)*, 849 So.2d 1240, 1245 (¶ 16) (Miss. 2003).

“It is not the responsibility of this Court to redetermine questions of fact that have been resolved by the Chancellor.” *Jackson v. Peoples Bank & Trust Co*, 869 So.2d 422, 423 (¶ 5) (Miss. Ct. App. 2004). “Thus where there is substantial evidence to support the chancellor’s findings, this Court is without the authority to disturb his conclusions, although this Court might have found otherwise as an original matter. *Dew v. Langford*, 666 So.2d 739, 742 (Miss. 1990) (citing *In re Estate of Harris*, 539 So.2d 1040, 1043 (Miss. 1989). “This Court has a limited standard of review of a chancellor’s decision in domestic relation matters, reversing only in cases where ‘the chancellor abused his or her discretion, was manifestly in error, or applied an erroneous legal standard.’” *G.B.W. v. E.R.W.*, 9 So.3d, 1200, 1204 (¶ 8) (Miss. Ct. App. 2009).



## **SUMMARY OF THE ARGUMENT**

The Chancellor correctly evaluated and followed the *Albright* factors when determining which parent should have custody of the minor children in this case.

The Chancellor followed the correct legal standard in making his decision to deny separate maintenance to Desmond, and his decision was supported by substantial, credible evidence. The Chancellor found Desmond to be partially at fault for the separation of the parties due to his arguments with LaKenya and his incredible testimony regarding his work activities, income, and actions in the home while the parties were still together.

The Chancellor did not violate Desmond's Freedom of Religion. The Chancellor repeatedly said he had no opinion regarding Desmond's religion, it was the impact Desmond's religion had on the family relationship which was at issue. The Chancellor found Desmond's testimony to be incredible, and unbelievable, and based his decision on that fact..

The Chancellor followed the correct legal standard in denying Desmond his request for attorney's fees, in part because the Chancellor found Desmond's testimony to be incredible, and because of Desmond's failure to follow the Court's Order after the first hearing.

## ARGUMENT

### **ISSUE I:     THE CHANCELLOR CORRECTLY APPLIED THE ALBRIGHT FACTORS TO THE FACTS OF THIS CASE.**

“(W)here there is substantial evidence to support the (C)hancellor’s findings, this Court is without the authority to disturb his conclusions, although this Court might have found otherwise as an original matter.” Ballard v. Commercial Bank of DeKalb, 991 So.2d 1201, 1205 (¶ 13) (citing In re Estate of Harris, 539 So.2d 1040, 1043 (Miss. 1989). “It is not the responsibility of this court to redetermine questions of fact that have been resolved by the Chancellor. Jackson v. Peoples Bank & Trust Co., 869 So.2d 422, 423 (¶ 5) (Miss. Ct. App. 2004). A Chancellor’s findings cannot be overruled when they are supported by credible evidence unless they are “. . . an abuse of discretion, manifestly wrong, clearly erroneous, or the result of an erroneously applied legal standard.” Williams v. King, 860 So.2d 847, 849 (¶ 8) (Miss. Ct. App. 2003).

The Mississippi Supreme Court has made a determination of the factors to be applied when a Chancellor is determining child custody. Those factors are:

“ . . . the health and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary childcare; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties with the parent and child; moral fitness of the parents; the home, school and community record of the child; the preference of a child at the age sufficient to express a preference by law; stability of the home environment and the employment of each parent, and other factors relevant to the parent-child relationship.”

Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983).

In this case the Chancellor’s findings were fully substantiated by the evidence. The testimony was clear concerning which party had the continuing care, custody, and control of the

minor children during the separation of the parties. The testimony shows that Lakenya took an active part in taking care of her children, cooking for them, cleaning up after them, and making sure they have their baths despite her heavy workload of college courses.

The testimony was also clear concerning the problems which Desmond faced after his motorcycle injury. The testimony indicated that Desmond continued to suffer from the aftereffects of his motorcycle wreck more than three years after the fact. The testimony indicated that there were some days which Desmond could not get out of bed, sometimes for 3 to 4 days at a time leaving Lakenya as the children's sole provider. Lakenya also would fix food and prepare things in the kitchen so that her husband could look after himself while she was at work or in school, and the children were in day care. Lakenya disputed the testimony of Desmond that he would take care of the children while she was in school in 2006 and 2007. Lakenya testified she would put the minor children on the school bus in the morning during 2006 and 2007, and the children would get off the school bus at her mother's house, not into Desmond's custody.

The testimony was clear concerning the Lakenya's activities in the marital home during the marriage. Lakenya testified she would be in the kitchen cooking while Desmond and the kids are outside playing catch, but that she sometimes found the time to play catch in amongst her other domestic duties. Lakenya testified the minor children would get off the school bus at her mother's house, not the marital home as Desmond indicated, during the marriage. Lakenya admitted she cannot make any plans regarding her future until after she graduates and is licensed as a nurse practitioner. Lakenya also testified about Desmond taking Lil'D and refused to allow her access to her minor son until she obtained a court order; however, Desmond showed no interest in taking his adopted daughter. Lakenya feels she can provide a more stable environment

where both children are treated equally while Desmond treats his son much better than his adopted daughter.

Jean Morgan also testified concerning the issue of child custody. Morgan testified she was Lil'D's teacher while he attended the East Jasper Head Start for two years. Morgan testified she saw Desmond regularly but seldom saw Lakenya at the Head Start program. Morgan testified she visited with the minor child in his home on at least two occasions while the minor child was enrolled in Head Start, and that she saw Desmond in the home on both occasions; however, on cross-examination Morgan admitted Desmond could have scheduled the visits at a time he knew Lakenya would not be present.

Desmond also testified concerning his view of who had taken care of the minor children during the course of the marriage. According to Desmond despite still suffering daily from the 2005 motorcycle accident he cooked every meal, washed every load of clothes, vacuumed each time the house was vacuumed, and mopped the floors daily while Lakenya ignored the house and the children. In fact Desmond was forced to ask for a recess of the trial to allow him time to ease his back; Desmond's back injury still affected him more than three years after the accident then he was forced to ask for a recess of his testimony to allow him to ease his back. Desmond admitted on the witness stand he told the minor children there was no Santa Claus without consulting with Lakenya. Desmond also testified that Lakenya hollers and screams at the children as a form of discipline while he takes the Bible and shows them where their behavior is wrong.

The Chancellor's review of the Albright factors to be considered in making a child custody determination occurred on page 199 through 225, especially pages 212 through 225, of the transcript. The Chancellor's review of the testimony and application of the testimony to the

Albright factors indicates the strength of the evidence supporting the Chancellor's custody determination. There was ample credible evidence for the Chancellor to base his decision granting custody of the minor children of the parties to Lakenya Forthner. The Chancellor's decision is supported by substantial and credible evidence sufficient to support his findings in this appeal.

This court should affirm the decision of the Chancery Court of the First Judicial District of Jasper County, Mississippi.

**ISSUE II: THE CHANCELLOR'S DENIAL OF SEPARATE MAINTENANCE WAS  
SUPPORTED BY THE CREDIBLE EVIDENCE PRESENTED THROUGH  
TESTIMONY**

“Separate Maintenance is ‘court created equitable relief’ based upon the marital relationship.” Pool v. Pool, 989 So.2d 920, 927 (¶ 20) (Miss. Ct. App. 2008). Separate Maintenance may be awarded: 1. When the parties have separated through no fault of wife and 2. The husband has willfully abandoned the wife and refused to support her. Lynch v. Lynch, 626 So.2d. 294, 296 (Miss. 1993). The wife need not be totally blameless in order to be awarded Separate Maintenance. Robinson v. Robinson, 554 So.2d 300, 304 (Miss. 1989).” The purpose of a decree awarding separate maintenance is to force the husband to “resume cohabitation with his wife or to provide for her separate maintenance.” Thompson v. Thompson, 527 So.2d 617, 622 (Miss. 1988). In order to “be denied separate maintenance on the basis of conduct the wife’s misconduct must have materially contributed to the separation.” Id.

In issuing its ruling concerning the custody of the minor children of the parties herein, the court voiced its concerns regarding the truthfulness of Desmond and the things he wanted out of the divorce. The court noted, although it is a court of equity, that the court did not feel of those vibes from Desmond. (T. p. 220). The court noted several instances where Desmond was less than truthful in his testimony before the court. The court specifically recalled the testimony of Desmond that he would work in his yard on vehicles and be paid only what the people “threw” at him for working on their vehicles.

The court also determined that Desmond had received almost \$8000.00 in funds from various sources including United States government as a stimulus check, selling vehicles, and

work around his house without sharing any of that money with Lakenya. The court noted that Desmond was asking it to receive one half of the \$4400 the parties received when Lakenya's vehicle was totaled out even though he had not shared any of the monies he received with her, nor did he provide her with any of that money for the benefit of the children. The trial court noted that Desmond was not even trying to be fair regarding the monies he was seeking out of the divorce. (T. p. 222).

The trial court noted the Desmond's attitude during his testimony and its impact upon Desmond's credibility. Desmond testified he did nothing to make Lakenya leave the marital home. Desmond testified that he was the perfect husband and always stayed cool, calm, and collected while Lakenya hollered and screamed. Despite his earlier admission to the contrary, Desmond claimed to pay all of the marital bills out of this Social Security money because he was the perfect husband who did nothing to force Lakenya to leave the home. They could have had a happy home if she would have only followed his commands.

Despite his perfection Desmond did admit to unhooking the electricity service from the marital home on a cold winter morning because Lakenya had used marital funds to pay the electric bill rather than using her own separate funds which she had earned to pay marital bills. Lakenya testified she left the marital home because of Desmond's actions. The actions of Desmond she was speaking about included the stunt with the electricity, the continued conflict of faiths regarding what was allowed and what was banned by Desmond, and Desmond statement "... it would be his way or no way and if I didn't like it, I could go." (T. 272, 273). Lakenya's testimony clearly indicates she left the marital home due to Desmond's actions, words and attitude which had changed tremendously since they were married.

Lakenya also testified concerning the finances of the parties during the marriage.

Lakenya testified the couple's finances were separate up until Desmond's wreck at which time he became very controlling over the finances. Lakenya testified Desmond would take her paycheck and force her to ask for money to buy groceries or pay bills. (T. P.274, 275). Lakenya went on to testify that Desmond expected her to simply fall in and follow him and his commands as head of the household. (T. p.275). Lakenya testified she attempted to talk to Desmond about the differences between them, but Desmond waited until the children went to sleep and then became very cruel and mean to the extent that she could not go to sleep because of his words and actions. Lakenya testified Desmond's actions made her feel like a piece of property because he attempted to physically force her to attend his church, leading to a situation where Lakenya is scared of Desmond. (T. p.277 - 279). Lakenya also testified about Desmond's untruthfulness in his testimony concerning his work at home on vehicles for the public and the fact he charged the public and family members for his work on their vehicles despite his earlier testimony to the contrary. (T. p. 304).

The record is replete with instances of misconduct and fault on behalf of Desmond Forthner. The court had an ample and substantial basis for which to deny Desmond Forthner his request for separate maintenance, due to his misconduct and the fact he forced Lakenya to leave the marital home. This court should affirm the lower court's denial of separate maintenance to Desmond Forthner.



### **ISSUE III. THERE WAS NO VIOLATION OF DESMOND'S CONSTITUTIONAL RIGHT TO FREEDOM OF RELIGION**

“ . . . the First Amendment to the Constitution of the United States provides in the first sentence that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .’ Harris v. Harris, 343 So.2d 762 (Miss. 1977). The Constitution of the state of Mississippi has a similar provision. *Art. 3, § 18* (Miss. Const. 1890).

In Muhammad v. Muhammad, 622 So.2d 1239, 1243, (Miss. 1993), the Court paraphrased the United States Supreme Court regarding freedom of religion. The Mississippi Supreme Court noted that government may not penalize or discriminate against an individual or a group because of their religious beliefs. *Id.* (Citing Fowler v. Rhode Island, 345 U.S. 67, 97, 97 L.Ed. 828, 73 S.Ct. 526 {(1953)}).

As the record shows the Chancellor was very cognizant of the fact that Desmond would be filing an appeal based upon his (Desmond's) feeling that he was punished because of his religion. The record is full of instances where the court found Desmond's testimony to be less than truthful and honest. For instance on page 149 of the transcript Desmond testified that he charges nothing when he works on someone's car, that he takes “a little change” that people give him. Desmond also testified that he was not paying any child support for the use and benefit of his children despite the fact he had retained almost \$8000 of marital funds which he did not share with Lakenya. Desmond testified that he was entitled to one half of all funds which Lakenya obtained despite the fact he refused to share his funds with her.

In fact Desmond failed to follow the trial court's order that he redirect one of his minor children's Social Security benefits to Lakenya; instead, Desmond kept the check coming to him

and forced Lakenya to ask him for the money. Desmond continually misstated the facts and outright lied about his payment of monies to Lakenya for the repair of her Acura which he sought to keep the insurance check from Lakenya and use it for his own purposes. But Desmond continually lied about the number of vehicles at his house, whether those vehicles were in working order, and the ownership of said vehicles. (T. p. 159 - 165).

“As stated, the Court has no problem with and finds no fault with Desmond’s religion.” (T. p. 219). The court was very cognizant of the fact that Desmond would appeal his decision based upon the issue of free exercise of religion. The court carefully crafted its decisions to exclude any possibility of favoritism of one party over another based upon religion. The Chancellor’s decision in this case was amply supported by the testimony and evidence which was before the court.

The trial court clearly found Desmond’s testimony to be less than entirely truthful. The court’s determination that Desmond was untruthful is amply supported by the evidence before the court in this case. There were numerous inconsistencies and outright misstatements throughout Desmond’s testimony. The only person who can read the transcript and say the Chancellor made his decision based upon religion is Desmond; any other, impartial reader of the transcript will see Desmond’s inconsistencies and outright lies. The Chancellor did not infringe upon Desmond’s free exercise of religion, and this court should affirm the findings of the lower court.

This Court should affirm the decision of the Chancery Court of the First Judicial District of Jasper County, Mississippi.

**ISSUE IV: THE CHANCELLOR CORRECTLY REFUSED TO AWARD  
ATTORNEYS FEES TO DESMOND**

In order to be awarded attorney's fees, a party must prove their inability to pay their own attorneys fees. Doe v. Doe, 644 So.2d 1199, 1208 (Miss. 1994). It is a matter of the Chancellor's discretion over whether to award attorneys fees to any party in the litigation, and the appellate court will reverse an award of attorney's fees only when. . . the award amounts to an abuse of discretion. McKee v. McKee, 418 So.2d 764, 767 (Miss. 1982).

Throughout the three different hearings had in the present case Desmond presented testimony which was incredible at best and outright unbelievable at worst. However, the Chancellor was presented no evidence concerning the attorney's fees incurred by Desmond throughout the course of the divorce. There was evidence presented regarding the incomes of the parties, but there was absolutely no evidence presented to the court concerning Desmond's attorney fees.

However, neither Desmond or his attorney put forth any evidence at all regarding the amount of attorney's fees Desmond had contracted to pay. Surely the Chancellor cannot be held in error for failing to award attorney's fees when the party requesting said fees has not met its burden to show they are entitled to the award of attorney's fees. Throughout his entire testimony Desmond failed to indicate to the court a monthly income level which the court could use to determine his ability to pay his own attorneys fees.

Desmond testified on at least three different occasions during the course of this case. Desmond testified he received a degree in auto body repair. However, Desmond testified he charges nothing to do auto body repair in his backyard for members of the public. He testified he

would get “a little change” for working on these vehicles. (T. p. 149). Desmond also testified concerning the number of vehicles in his backyard, the \$8000 he has received for selling vehicles and as federal stimulus funds after the separation which he retained for themselves and failed to share with the Lakenya at all. (T. p. 149 - 161). A telling insight into the credibility of the Chancellor gave Desmond’s testimony occurred on page 220 of the transcript: the Chancellor said, “equity equals do the right thing” and he had no “vibes” from Desmond like that.

There was no evidence presented to the Chancellor regarding Desmond’s actual monthly income, his monthly expenses, or the amount of attorney’s fees he had incurred in defending against Lakenya’s complaint for divorce. Therefore, there was no factual basis for the Chancellor to award him attorneys fees from Lakenya at all. The Chancellor acted well within his discretion in refusing to award attorneys fees to Desmond. There was no abuse of discretion, therefore the Chancellor’s decision not to award attorneys fees cannot be disturbed.

This court should affirm the decision of the Chancery Court of the First Judicial District of Jasper County, Mississippi and refuse to award attorney’s fees to Desmond Forthner.

### CONCLUSION

The Chancellor applied the correct law to the facts of the case at bar. The Chancellor's decision was well supported by the evidence presented before him. Both parties had numerous opportunities to testify before the Chancellor regarding their case and what they felt the Chancellor should award them. The Chancellor's decision was supported by substantial credible evidence, and should be affirmed.. Any objective reading of the transcript shows the Chancellor bent over backwards to avoid penalizing Desmond due to his religious beliefs.

The decision of the Chancellor for the First Judicial District of Jasper County, Mississippi should be affirmed in its entirety.



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**Certificate of Servicea**

I, Michael D. Mitchell, do hereby certify I have, this date, mailed a true and correct copy of the above and foregoing Brief of Appellee to:

Hon. Tom Tullous  
P.O. Drawer 567  
Bay Springs, MS 39422

and the original and 6 copies to:

Mrs. Betty Sephton  
P.O. Box 117  
Jackson, MS 39205

So Certified this the 6<sup>th</sup> day of January, 2010.

  
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Michael D. Mitchell