

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DESMOND FORTHNER, SR.

APPELLANT

V.

CAUSE NO. 2009-CA-00916

LAKENYA BONNER FORTHNER

APPELLEE

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

Appealed From: **The Chancery Court of the First Judicial District of
Jasper County, Mississippi.**

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judiciary may evaluate possible disqualifications or recusals.

1. Desmond Forthner, Sr., Appellant
2. Hon. Thomas L. Tullos, Attorney for Appellant
3. LaKenya Bonner Forthner, Appellee
4. Hon. Michael Mitchell, Attorney for Appellee
5. Hon. Samuel S. Creel, Jr., Attorney for Appellee
6. Honorable H. David Clark, Chancellor

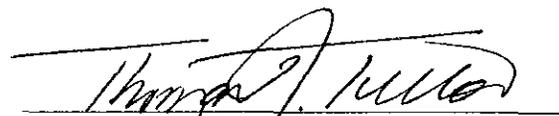

THOMAS L. TULLOS

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STATEMENT OF THE CASE

A. Lower Court Proceedings:

This case commenced when Lakenya Bonner Forthner (LaKenya) filed her complaint for divorce against Desmond Forthner, Sr. (Desmond). The complaint was filed on May 15, 2008, and it asserted as grounds habitual cruel and inhuman treatment. Desmond filed his answer and denied Lakenya's allegations.

Thereafter, on November 12, 2008, Desmond filed his counter-complaint for legal separation and separate maintenance, no counter-claim for divorce was filed.

In a somewhat unusual move, the Chancellor ruled that the issue of child custody would be heard first. Consequently, this issue was heard on September 9, 2008. At the end of the testimony, the Chancellor awarded primary custody of the parties' children unto LaKenya and reserved standard visitation unto Desmond.

On January 27, 2009, the court first tried the issue of whether or not LaKenya was entitled to a divorce. The court ruled that her proof did not meet the standard for granting a divorce on cruelty grounds. Then the court took up the issue of separate maintenance as requested by Desmond. The court bifurcated that issue and only took up the question of whether or not Desmond had substantially contributed to the separation of the parties. The financial aspects of separate maintenance were never reached. The court ruled that Desmond's actions had caused the separation of the parties; and, therefore, he was not entitled to separate maintenance.

On March 9, 2009, the court rendered an order denying LaKenya a divorce, denying Desmond separate maintenance and awarding to LaKenya the primary care, custody, and control of the minor children.

On March 12, 2009, Desmond filed a motion for a new trial. A hearing was held on this motion on April 21, 2009. On May 5, 2009, the Court rendered an order overruling Desmond's motion.

Feeling aggrieved by the lower court's ruling, Desmond timely filed this appeal.

B. Facts:

Desmond and LaKenya married on June 29, 2002. LaKenya already had a child, LaKendra, who had been borne out of wedlock. After the parties married, Desmond adopted Lakendra. Shortly afterwards, Lakenya gave birth to Desmond Jr., who was nicknamed "Little D." (see court pleadings file, page 5, 6, Tr. 233).

LaKenya was and remains a Methodist. Desmond had been a Baptist; but shortly after the marriage, he joined the Pentecostal Church. (Tr. 269, 272). LaKenya and Desmond had disagreements about their religious beliefs, however, they continued to live together and the marriage seemed to be doing well.

Desmond worked at Howard Industries from 1999 until April, 2005, when he was severely injured in a motorcycle accident. This accident left Desmond disabled. However, two years later he enrolled at East Central Community College in body shop repair. After finishing the course, he started fixing vehicles on a limited basis at his home. (Tr, 145, 146, 148, 149, 231, 232).

LaKenya graduated from Meridian Community College in 2001 and received a degree in nursing. (Tr. 26, 73). She returned to school in June, 2006, when she attended Jones County Junior College. She went four nights per week from 5:00 p.m. to 8:00 p.m. Then she started school at the USM nursing branch in Meridian, and attended from August, 2006, until July, 2007. During this time she went every other Friday from 8:00 a.m. until 5:00 or 6:00 p.m. She received her BS in nursing at the end of that semester.(Tr. 68, 69, 72, 79).

She started back to school at the USM nursing branch in August, 2007, and she was still going to school there as of September, 2008. Her classroom hours were from 6:00 p.m. until 9:00 p.m. on Thursday evenings. (Tr. 69, 70, 71). However, instead of going to Meridian, she started going to the Hattiesburg campus in September, 2008. (Tr. 76, 77).

She finished the classes that she was taking on October 22, 2008. However, she started back to class in Hattiesburg on January 1, 2009. She will continue to attend class there one day every other week from 1:00 p.m. to 3:30 p.m. (Tr. 70-71).

LaKenya has worked during the entire time that the parties were married. She has worked and gone to school at the same time. (Tr. 20, 44, 110, 111)

LaKenya has worked as the school nurse for the East Jasper School District. She has either worked for or is now working for the Hattiesburg Clinic Dialysis Unit, Riley Nursing Home, Rush Specialty Hospital, and CCI Hospice. She generally goes to work at 7:00 a.m. and gets off at 5:15 p.m. to 5:30 p.m., or she will work twelve hours days depending on the employer. (Tr. 20, 21, 22, 23, 24, 44, 74, 117, 118.)

Because of LaKenya's hectic schedule, Desmond became the primary care giver of the children. LaKenya was either working or going to school most of the time. Therefore, Desmond took over the main responsibility of caring and raising the children.

He would get the children up in the morning, carry them to the bus, and he would be waiting for them when they returned from school. He helped them with their homework, played games with them, and would see to it that they took their bathes and put them to bed. (Tr. 112, 113, 114, 115, 116, 119, 120).

Desmond was very attentive to the children's progress in school. Little D attended Headstart for two years. Desmond went to the school five or six times each month to check on

his progress. He attended luncheons, Men's day activities, and parent/teacher conferences. LaKenya never had time to go. (Tr. 96, 97, 98, 99, 100).

Desmond went to see LaKendra's teachers on a regular basis and helped her with her homework. LaKenya did not have the time to do this. (Tr. 112, 113, 114, 115, 116, 117, 118, 130).

Desmond cleaned, washed, and ironed the children's clothes. When they became ill, he was the parent who carried them to the doctor. He coached LaKendra's softball team for two years, carried her to the practices and the games. (At trial LaKenya could not even remember the name of the team that LaKendra played for.) Desmond taught both children how to run the bases, swing the bat, and ran fielding exercises with them. (Tr. 29, 63, 64, 65, 113, 114, 116, 117, 121, 123, 124).

Desmond took the time to teach the children right from wrong, and explained to them why he was disciplining them from a biblical standpoint. He prayed with his children on a daily basis. (Tr. 83, 124, 125, 126).

While LaKenya was at work or at school, Desmond took care of the children and the children did well under his care.

Not only was Desmond a good father, he was an exemplary husband. Before his injury, he worked on a continuous basis. He bought a nice home for his family. He did not curse nor abuse his wife. He did not drink, use drugs, or commit adultery. He was a committed husband and father.(Tr. 280, 285, 286, 287, 288, 289, 290, 296).

Desmond did not go to movies because of the pornographic content and vulgar language in most movies. Desmond sincerely believes that a man should show his wife love and treat her with respect. He believes strongly that a man should not cheat on his wife, should take care of his home, pay the bills, and work. A man should be a provider for his home. (Tr. 339, 340, 344)

Although Desmond and LaKenya had differences in their religious beliefs, Desmond did not force his views upon LaKenya. She never went to church with Desmond. She is a very strong willed person and has a good education. (Tr. 277, 278, 279).

At some point late in the marriage, LaKenya developed a romantic relationship with Jermaine Owens and this was the main reason for the break-up of the marriage. Although she argued that religious differences caused them to separate, the parties lived together from June, 2002, until February, 2008, a period of almost six years. It is interesting to note that she hid her relationship with Jermaine Owens even though she later admitted that they had been talking to each other for some period of time before January, 2009. It is not known when this relationship actually started. (Tr. 393-400).

SUMMARY OF THE ARGUMENT

ISSUE 1

THE CHANCELLOR ERRED IN HIS EVALUATION OF THE "ALBRIGHT" FACTORS

The Chancellor failed to properly evaluate the "Albright" factors. Although much evidence was presented that Desmond was the primary care-giver to the children, the Chancellor ignored that evidence. The Chancellor ignored the fact that LaKenya works long hours and is pursuing her education at the same time. The Chancellor ignored that fact that Desmond has ample time to devote to the children and that he retains the marital home.

The Chancellor unfairly penalized Desmond because of his religious beliefs and rewarded LaKenya for her adulterous affair. The Chancellor ignored the fact that by failing to award custody to Desmond that the children would not continue to go to the same schools, would not live in the same home and would not remain in the same environment as they did before the separation.

ISSUE II

THE CHANCELLOR ERRED IN REFUSING TO GRANT SEPARATE MAINTENANCE TO DESMOND

LaKenya was denied a divorce because she failed to prove that Desmond was guilty of habitual cruelty. However, the Chancellor committed error when he failed to award separate maintenance to Desmond. He is disabled from work and is relegated to drawing social security disability. LaKenya has a B.S. in nursing, will obtain a Masters in nursing in December, 2009, and has great earning potential.

The Chancellor unfairly penalized Desmond because he belongs to the Pentecostal church. Desmond is a committed Christian who actually practices his faith on a daily basis.

Desmond is an exemplary father and a good husband. He did all of the good things that a man should do in order to take care of his family.

The Chancellor ruled that Desmond did not commit wrongful misconduct during the marriage. However, he did rule that Desmond was not even entitled to a consideration of separate maintenance because his Christian beliefs had substantially contributed to the separation of the parties. The Chancellor erred.

ISSUE III

THE LOWER COURT ERRED BY VIOLATING DESMOND'S CONSTITUTIONAL RIGHT OF FREEDOM OF RELIGION

The First Amendment to the Constitution of the United States mandates that our citizens should not be penalized nor discriminated against because of their religious beliefs.

The Chancellor attempted to camouflage his prejudice against Desmond's religious convictions. However, a close reading of the Chancellor's questioning of Desmond and the statements of the Chancellor in his opinions makes it crystal clear that he was prejudiced against Desmond's religious convictions and his practice of those beliefs. The Chancellor unfairly based all of his rulings on a biased view of Desmond's religious convictions. The Chancellor erred.

ISSUE IV

THE CHANCELLOR ERRED IN NOT GRANTING DESMOND REASONABLE ATTORNEY'S FEES

The Chancellor refused to allow Desmond to even put on evidence of his need for an award of attorney's fees. The Chancellor simply ruled that because Desmond had failed to show that he was entitled to separate maintenance he could not put on proof of his entitlement to reasonable attorney's fees. The Chancellor erred.

ARGUMENT

STANDARD OF REVIEW

An appellate court must reverse a chancellor if the chancellor is manifestly in error or has applied an erroneous legal standard. Williams v. Williams, 656 So.2d 325, 330 (Miss. 1995). Appellate courts need only to determine if the chancellor's decision was supported by credible evidence. Lee v. Lee, 798 So.2d 1284 (para. 22) (Miss 2001).

An appellate court must find a chancellor in error where the chancellor improperly considers and applies the Albright factors. Hollon v. Hollon, 784 So.2d 943 (para. 11) (Miss. 2001). In determining whether the chancellor abused his discretion in applying the Albright factors, the appellate court "reviews the evidence and testimony presented at trial under each factor to insure [the chancellor's] ruling was supported by record." Hollon, 784 So.2d. at (para.13). Furthermore, differences in religion, personal values, and lifestyles should not be the sole basis for custody decisions. Albright, 437 So.2d at 1005. See: Watts v. Watts, 854 So.2d 11(para. 3, 5) pg.12, 13 (Miss. App. 2003).

ISSUE NO. I

THE CHANCELLOR ERRED IN HIS EVALUATION OF THE "ALBRIGHT" FACTORS

The Chancellor erred in awarding primary physical custody of the minor children to LaKenya. Based upon the applicable facts and law Desmond should have been awarded the primary physical custody of the children. A discussion of the Albright factors as it applies to the case at bar is as follows:

Continuity of Care Prior to Separation :

Without question Desmond provided the vast majority of care for the children before the separation. Desmond devoted his entire life to his children. On the other hand LaKenya could

not because she was working as a nurse five days per week, was working on weekends at a second job, and was attending school at night. She had very little time to devote to the children.

Desmond provided most of the care for the children's needs. Desmond did most of the cleaning, washing, mopping and ironing for the children. He kept the house and yard in good shape. (Tr. 113, 114, 182, 183)

Desmond did this because he wanted to, and LaKenya simply was not at home long enough to do it. She was too busy pursuing her career. (Tr. 115, 119, 128, 182, 183)

Although LaKenya denies that Desmond was the primary care-giver, her work and school schedule precluded her from being the primary caregiver. Starting in December, 2006, she started work at the Hattiesburg Clinic dialysis unit in Bay Springs and Laurel. She had to be at work at 5:00 a.m. and would leave home at 4:30 a.m. She would not return home until 5:00 or 6:00 p.m. While working for Hattiesburg Clinic, she moonlighted at Rush Hospital. In August, 2006, she went to work at College Professional Healthcare and would leave at 7:30 in the morning and would not return until 5:00 to 5:30 p.m. (Tr. 13, 20, 21, 22, 23, 24, 44)

After that she went to work at Oaks Rehabilitation Center at the Riley Nursing Center. She works there Monday through Friday. She leaves home at 7:00 a.m. and does not return until 5:15 p.m. She also works twelve hour days at the Specialty Hospital in Meridian three or four days per month. (Tr. 20, 21, 74, 75)

While she was doing all of this work, she was also going to school. Starting in June, 2006, and going through the end of July, 2006, she attended Jones County Junior College from 5:00 p.m. until 8:00 p.m. Afterwards she attended the USM nursing branch in Meridian every other Friday from 8:00 a.m. to 5:00 or 6:00 p.m., from August, 2006, to July, 2007. Starting in August, 2007, she changed her attendance to Thursdays from 6:00 p.m. to 9:00 p.m. for five weeks. (Tr. 70, 71, 72, 73)

This class ended on October 22, 2008. Starting on January 1, 2009, she goes to school one day every other week from 1:00 p.m. to 3:30 p.m. This attendance will continue until December, 2009. (Tr. 70, 71, 72, 73)

What is really eye-catching is just how little time that LaKenya spent with the children. The only thing that she really did was to do some cooking. She very seldomly carried the children to school, never played with them, very seldomly carried them to the doctor, and never went to the schools to check on the children's progress. (Tr. 13, 14, 21, 25, 63, 64, 65, 67, 75, 76, 78, 79, 81)

Desmond testified that when LaKenya got home from work that she was tired and didn't have a whole lot of energy. He said she would take a nap and talk on the telephone. She would do some cooking, but she was just real tired. (Tr. 116, 127) From a close reading of the record, it is clear that she would not be able to take care of the children now if it were not for her mother, Minnie Bonner.

Desmond testified that he kept Little D at home before he started Headstart. Desmond carried LaKendrea to and from her bus to go to school and would put Little D on the bus to go Headstart as well. (Tr. 112, 115).

Desmond was at home when the children came home from school. He helped them with their homework. He saw that the children were fed, and put them in bed. This continued on throughout the marriage. (Tr. 112, 113, 114, 115, 116, 117, 118).

The Chancellor completely ignored the evidence presented on this issue.

Parenting Skills and Willingness and Capacity to Provide Primary Child Care:

The Chancellor did not award this factor to either party. The Chancellor erred in not awarding this factor to Desmond.

The testimony is uncontradicted that Desmond has done most of the cleaning, washing, mopping, and ironing clothes. LaKenya was too busy working and going to school to do this. (Tr. 113, 114, 116, 117).

Before Little D went to Headstart, Desmond took care of him at home. When Little D went to Headstart, Desmond carried both Little D and LaKendrea to catch the bus, and he picked them up after school. He then took them home, helped them with their homework, and then they would play games. He made sure Little D took a bath at night. (Tr. 112, 113, 114, 115, 116, 118, 119, 120).

Desmond played ball with the children and coached LaKendrea's softball team. Desmond carried them to all of their practices and games. Sometimes LaKenya went and sometimes she did not. She did not go to any of the games played on Fridays because she was in class. But Desmond never missed a game nor practice. (Tr. 29, 63, 64, 65, 121, 122, 123, 124)

Desmond taught the children how to swing a bat, how to run the bases, how to catch pop-ups, hard ground balls, and bouncing ground balls. LaKenya got out to play ball with the children only once. (Tr. 122).

When the children need discipline, he talks to them, gives them warnings, and bases his teachings on Biblical precepts. If need be, he does employ corporal punishment. LaKenya, on the other hand, does a lot of fussing and screaming. Occasionally, she will whip them, but mainly she fusses and screams. (Tr. 83, 124, 125, 126)

The one point that so clearly contrasts the priorities of the two parents is how often they would check on the children's progress in school. In regards to LaKendrea, LaKenya would go once or twice a year to check on her grades. She never went to check on Little D's progress. (Tr. 60, 67, 130)

Desmond, on the other hand, went quite often to LaKendrea's school to check on her progress. He checked on her grades, picked up her report card, and went to the teachers and parents conferences. He went approximately four times a year for parent's visitation. LaKenya could not find the time to go.(Tr. 130)

LaKenya admitted that she never went to Headstart to check on Little D's progress. (Tr. 64)

Jean Morgan was Little D's teacher for two years at Headstart. She only saw LaKenya approximately eight times and this was when she either dropped Little D off or picked him up. She could not recall one time when LaKenya came to a parent's luncheon or a parent/teacher meeting. Headstart carries out two home visitations every year. Ms. Morgan only saw LaKenya on one home visitation. (Tr. 98, 99)

In regards to Desmond, Ms. Morgan testified that:

(1) Desmond would just show up to check on his son to see how he was doing in school and how he was interacting with the other children;

(2) She saw Desmond five or six times each month;

(3) He always came to the parent/teacher conferences and always came to the classroom;

(4) He came twice a year for luncheons scheduled for the parents and once each year for men's day meals;

(5) She saw him at each home visitation;

(6) Desmond was very concerned about Little D's progress; and

(7) Desmond and Little D had a very close relationship.

(Tr. 96, 97, 98, 99, 100).

Desmond is the parent best suited for the moral instruction of his children. He prays with his children twice a day on a daily basis, and he attends his church on a regular basis.(Tr. 125, 126)

LaKenya said she belongs to a church, but she never said how often she goes or if she even prays with the children. (Tr. 49) But she did admit that when Desmond corrected the children, he explained to them from a biblical standpoint why they should not do certain things. (Tr. 83)

When the children are sick, Desmond has the primary duty of carrying the children to the doctor. On occasion LaKenya would meet them at the doctor's office. (Tr. 131, 132)

Unfortunately, LaKenya does not have time for her children. She is preoccupied with work and school and when she is at home, she reads books, watches television and talks on the telephone. She does not spend time with her children. (Tr. 132, 134).

On the other hand, Desmond has devoted his life to his children, and he has exhibited the best parenting skills.

The Employment of the Parents and Responsibilities of that Employment:

The Chancellor erred when he found that this factor favors LaKenya. She works Monday through Friday, 7:00 a.m. until 5:15 p.m. She holds down a second job with Specialty Hospital and works there three or four days a month. Her hours there are from 7:00 a.m. to 7:00 p.m. On top of all of that, she is attending school in Hattiesburg on Thursday nights until 9:00 p.m. If it were not for her mother pitching in, LaKenya would not be able to take care of the children. (Tr. 13, 14, 20, 21, 69, 70, 74, 75, 76, 77).

On the other hand Desmond is not working because of his disability. He has ample time to take care of his children. Before the separation Desmond put the children on the bus, got them from the bus, helped them with their homework, played games with them, gave them their baths,

took them to the doctor, and did all things necessary to take care of them. (Tr. 63, 64, 65, 67, 68, 81, 82, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125,).

Desmond was the parent who spent the most time with the children, and he gave the majority of the child care. For LaKenya to be awarded primary custody, really means that her mother, Minnie Bonner, will raise the children. This issue was visited by this Court in Watts v. Watts, 854 So.2d. 11, 14 (Miss. App.2003). In that case the father was a full-time attorney with numerous demands on his time. His mother filled in the gaps. The court wrote

...The special judge was certainly made aware that Mark has a professional degree and a higher salary than Hollie; however, this higher salary is not beneficial to the children if Mark's work schedule necessitates the employment of others to care for the children.

This is the exact factual scenario in the case at bar. Watts mandates that this factor should have weighed heavily in Desmond's favor.

Moral Fitness of the Parents:

The Chancellor ruled that this factor favored neither party. The Chancellor erred.

Desmond is a member of Pentecostal Temple Church in Raleigh. He attends on a regular basis and he prays with his children twice a day on a daily basis. (Tr. 125, 126)

Even LaKenya admitted that Desmond went to church on a regular basis and that he disciplines the children by explaining from a biblical standpoint why they should not misbehave. (Tr. 83).

This case was bifurcated with the child custody issue being tried first and with grounds for divorce being tried at a later date. During the grounds portion of the case, LaKenya tried to prove her case on the grounds that Desmond was too zealous in his walk with Christ. She testified that Desmond told her that she should not show her body, that her clothing was too

tight, or that she needed to wear a certain type of clothing. (Tr. 272). However, she also testified that he never cursed her, was strong in his Pentecostal faith, that he had used alcohol but could not remember when or where, but that he did not buy beer or drugs, that he did not go to movies because of the cursing and pornography. She said that he did lie, but she could not remember any specific time when he had lied. Finally, she said that they just did not get along. (Tr. 280, 285, 286, 287, 289, 289, 290, 296).

LaKenya testified that she attended the Methodist Church but did not say how often. (Tr. 272) She gave no testimony whatsoever to reflect her moral fitness as a parent.

However, Desmond filed a motion for a new trial and a hearing was had upon the motion. At that time LaKenya admitted that she was having a romantic relationship with Jermaine Owens even though she was still married to Desmond. Mr. Owens lives in Texas, and she admitted to going to Texas in August, 2008. She also admitted that she had talked to Mr. Owens by telephone on numerous occasions and had done so during the pendency of the case, but she was not sure how long before February, 2009, that it was when she began talking to Mr. Owens by telephone. (Tr. 393, 394, 395, 396, 397, 398, 401).

This extra-marital affair of LaKenya reflects that she lacks the moral fitness to raise these children. In stark contrast there was never any allegation of adultery or other wrong doing on the part of Desmond.

This factor should have been awarded to Desmond. However, the Chancellor refused to do so. The Chancellor did not state in his ruling why this factor was not awarded to Desmond. (Remember that the custody issue was tried before the grounds issue.) On January 27, 2009, the grounds issue was tried. The Court denied LaKenya a divorce, but he also denied Desmond

separate maintenance. His opinion dealing with the denial of separate maintenance is enlightening and makes it crystal clear that he was prejudiced against Desmond from the very start of the trial because of Desmond's affiliation with the Pentecostal Church. Pertinent portions of his opinion are as follows:

... She married Mr. Forthner and he was a good Baptist and she was a good Methodist. They got along fine and he changes to the Pentecostal Holiness Temple in Raleigh and things change...(Tr. 367)

...This court cannot use a misconduct theory in this case because it tells her you're wasting your time coming in here because no court is ever going to say your religion, Mr. Forthner is misconduct.... (Tr. 368)

... It's got to go deeper than that. What did you do in this religion? How did things change? What was the effect of that change? Now, that to me, is getting at the heart of what is a material contribution to the separation. It cannot rely strictly on religion (Tr. 368)

...This case is basically a difference of opinion and it's basically a difference of opinion about religion. (Tr. 370)

... His life changed, and he wanted her to go with him. She didn't go with him. I'm not saying that he tried to drag her, but he did try to run his house and be in control of his house the way his religion, his new religion told him he should. (Tr. 371)

... And that brings us back to the discussion about misconduct. That's just a word that they used to define her actions. Whatever they were, and I don't think that they or anyone else—"they" being the Court of Appeals—is going to say that someone's religion is misconduct. But this case is all about religion. (emphasis added) (Tr. 374)

From a close reading of the Chancellor's opinion, it is clear that he harbored a prejudice against Desmond because he is Pentecostal. The law is clear that a Court cannot discriminate against a parent because of his or her religion. In Harris v. Harris, 343 So.2d 762, 764 (Miss. 1977), this Court held:

...Mrs. Harris believes in the doctrine of her church and she has a right to practice her faith as she believes it, and to indoctrinate her child in her religious beliefs so long as she has his custody.

The chancery court had no authority to dictate to Mrs. Harris what religion she should teach her child so long as it did not involve exposing him to physical danger or what society in general deems immoral practices.

The Chancellor allowed his prejudice against Desmond's religious views to taint his opinion in regards to the moral fitness issue. The moral fitness factor should be awarded to Desmond.

The Home, School and Community Record of the Children:

The Chancellor did not address this issue.

The children have always lived in the Heidelberg area. They have gone to school there, played ball there, and have done well there. Desmond has continued to live in the marital home, but LaKenya has moved them from the area where they grew up to her mother's home. This factor should have been awarded to Desmond. (Tr. 13, 16, 17, 115, 116, 132, 133).

Stability of Home Environment:

The Chancellor did not address this issue on September 9, 2008, because he had not determined to whom the home would be awarded if a divorce were granted. No divorce was granted, and Desmond has continued to live in the home. This factor should have been granted to Desmond.

Desmond's home is a 32'x 60' modular home. It has three bedrooms and each child has a bedroom. There are two baths in the home. It is a very nice home and Desmond keeps it immaculate. (Tr. 16, 17, 132, 133).

When LaKenya left, she moved in with her mother. Her mother's home is a twenty-two year old 16'x80' mobile home which only has three bedrooms. Further, it is in need of repair. (Tr. 16, 17, 133).

What is even more disturbing was LaKenya's testimony as to her future plans. The following testimony was elicited from her while under cross-examination.

Q. Let me ask you, what are your plans in the future in regards to where you are going to go? Do you anticipate staying in Beaver Dam or do you anticipate moving?

A. I have no idea at the present because I can't do anything until the divorce is final. I can't buy a house or anything. So all of that is pending on the divorce.

Q. So, what are your future plans as for as buying a house?

A. To become a successful nurse practitioner and be able to buy me somewhere to live.

Q. And where do you anticipate living?

A. I have no idea.
(Tr. 84)

It is obvious that, if LaKenya was being truthful, she has no idea what the future holds for her or the children. This certainly does not lend itself to any degree of stability. However, this writer suspicions that she has already made plans to move to Texas in order to be with her lover, Jermain Owens. In any event this factor should have been awarded to Desmond.

Application of the Law to the Albright Factors:

This case is very close to Watts v. Watts, 854 So.2d 11(Miss. App. 2003), except that the gender roles are reversed. In Watts the husband was an attorney who was very busy pursuing his career and had to rely upon his mother and secretary to help him with the children. The wife, on the other hand, was a school teacher who had ample time to spend with the children. The lower

court awarded custody of the parties' children to the husband. The Court of Appeals reversed and remanded. The appellate court found that the lower court erred when it found that the husband had the best parenting skills. The following language could very easily be applied in this case:

The special judge completely discredited any testimony citing to the fact that Hollie is a good mother and only focused on unsubstantiated testimony against Hollie. Mark testified that Hollie is a good mother, even though he constantly tried to discredit her abilities. Hollie gets the girls ready for school, takes them to school, picks them up after school, participates directly in their extracurricular activities, and takes them to the doctor. On the other hand, Mark's hectic work schedule prevents him from participating in the children's extracurricular activities. Mark claims to have the better parenting skills, but his only reason in support of this statement is the fact that he occasionally trims their fingernails or his mother gets their hair cut. ... In fact, the record shows that Mark's mother takes care of the children more than he does. We find the record does not support weighing this factor in Mark's favor, and the special judge abused his discretion in so finding. (pg. 14)

In regards to the employment of the parents and the responsibilities of that employment, the court wrote:

We find it inexplicable as to why the special judge found in favor of Mark on this factor. Hollie is a middle school teacher with work hours ideal for raising children, including have summers free to spend with the children. Hollie is able to pick the children up from school and take them to any activities in which they are involved. Mark is an attorney and is also the Jackson County prosecuting attorney. He has long work hours and would not be able to pick the children up from school. Mark testified that he would have to pay his secretary or someone else to pick the children up and keep them until he got off from work. If that failed, his mother would have to pick them up, take them to any extracurricular activities and keep them until Mark got home. According to Mark's testimony, he had problems staying up at night with the children when they were sick if he had to be in court the next day. The special judge was certainly made aware that Mark had a professional degree and a higher salary than Hollie; however, this higher salary is not beneficial to the children if

Mark's work schedule necessitates the employment of others to care for the children. (pg. 14)

This court should apply the principles enunciated in Watts to the case at bar. If this court does so, then a reversal would be in order.

Allocation of Albright Factors:

We believe a fair reading of the evidence calls for the Albright factors to be awarded as follows:

- | | |
|--|----------------|
| 1. Age, sex and health of children | Neither |
| 2. Determination of the parent that had the continuity of care prior to separation | Father |
| 3. Which parent has the best parenting skills and which has the willingness and capacity to provide primary child care | Father |
| 4. The employment of the parents and responsibilities of that employment. | Father |
| 5. Physical and mental health and age of the parents | Mother |
| 6. Emotional ties of parent and child | Neither |
| 7. Moral fitness of the parents | Father |
| 8. The home, school, and community records of the children | Father |
| 9. The preference of the child at the age sufficient to express a preference by law | Not applicable |
| 10. Stability of home environment | Father |
| 11. Stability of employment of each parent | Neither |
| 12. Other relevant factors | Neither |

ISSUE II

THE CHANCELLOR ERRED IN REFUSING TO GRANT SEPARATE MAINTENANCE TO THE HUSBAND

This trial was broken into three different segments. The issue of child custody was tried on September 9, 2008. Later, on January 27, 2009, LaKenya's grounds for divorce were tried. The Chancellor ruled that she did not have grounds.

At the conclusion of LaKenya's case, the Chancellor ruled that Desmond could go forward on his counter-claim for separate maintenance. However, the court ruled that the only issue to be tried at that point was whether Desmond's actions substantially contributed to the separation of the parties. Any testimony regarding Desmond's need for separate maintenance and LaKenya's ability to pay was to be held in abeyance. (Tr. 326, 327, 328, 329,330).

At that point Desmond testified that he had been a good husband, had performed his duties and responsibilities as a husband and father, had not forced LaKenya to leave the home and he wanted her to return. (Tr. 331-344).

At the conclusion of Desmond's testimony, the Chancellor ruled that the standard was whether Desmond's actions had substantially contributed to the separation of the parties. Then the Chancellor ruled that Desmond had not committed misconduct but did rule that his actions had substantially contributed to the separation of the parties. He found that although Desmond's religious beliefs did not constitute misconduct they did substantially contribute to the separation and, consequently, Desmond was not entitled to separate maintenance. (Tr. 363 -365)

The Chancellor ruled that the following facts deny Desmond the right to separate maintenance:

- 1) He might have told LaKenya that she was in danger of hellfire. (Tr. 369)

- 2) That Desmond's conversion to the Pentecostal faith caused Lakenya problems.
(Tr. 369)
- 3) LaKenya did not like the fact that Desmond told the children that there was no Santa Claus. (Tr. 369)
- 4) LaKenya did not like it when Desmond told her that if she was not baptized in a certain way, she was going to hell. (Tr. 370)
- 5) That Desmond told LaKenya at different times that he was the head of the household and things would be his way or no way. (Tr. 370)
- 6) That, basically, the parties had a difference of opinion about religion. (Tr. 370)
- 7) That LaKenya married a Baptist who became a Pentecostal, and she did not bargain for that (Tr. 370-371)
- 8) " But this case is all about religion." (Tr. 374)

The court specifically ruled that Desmond's religious beliefs and practices were not misconduct. But he ruled that his religious beliefs and practices precluded him from an award of separate maintenance.

The Chancellor erred.

In Daigle v. Daigle, 626 So. 2d 130, 145 (Miss. 1993), the standard is set out as 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))." (emphasis added).

In Honea v. Honea, 888 So.2d 1192 (Miss. App.2004), at pg. 1195, the court ruled "... the wife need not be totally blameless to allow an award of separate maintenance, but that her (mis)conduct must not have materially contributed to the separation." (emphasis added)

In Crenshaw v. Crenshaw, 767 So.2d 272 (Miss. App. 2000), the wife would sometimes not prepare food, would not launder or iron her husband's clothes, would not have sexual relations with her husband for a month at a time, and that her actions caused to be depressed and unable to sleep. Pg 275. The Court ruled that the action on the part of the wife did not preclude her from separate maintenance. pg. 276.

In Pool v. Pool, 989 So.2d 920 (Miss. App. 2008), the wife requested separate maintenance. At trial the testimony revealed that she nagged her husband about the house work, took her stress out on him, asked her husband to leave, transferred assets into her own name, and spent three nights in another man's apartment with the man being present. pg. 927. The court granted the wife her request for separate maintenance. The court wrote that " to be denied separate maintenance on the basis of fault, the wife's misconduct must have materially contributed to the separation." (emphasis added). Pg. 927-928.

In the case at bar the Chancellor ruled that Desmond's actions were not misconduct, but that they did substantially contribute to the separation of the parties. Obviously, the Chancellor applied the wrong standard.

Did Desmond's actions substantially contribute to the break-up of these parties? The answer may be found in LaKenya's testimony. She said that she was very intelligent, had a college education, had her own set of ideas, and was strong enough to withstand his efforts to get her to go to his church. (Tr. 272, 278, 279). She admitted that he had never struck her, never slapped her, never kicked her, and never cursed her. She admitted that he told her that he loved her and ironed her clothes as a way of showing that he loved her. She admitted that while she was going to school that he helped her by giving her money. She also admitted that at Christmas she put up a Christmas tree, put out Christmas candles and Christmas wreaths. She admitted that he had not used alcohol in years and had never gotten drunk. She admitted that before his wreck

he had been a steady worker and helped pay the bills. She admitted that he did not blow his money on women, drugs, or alcohol, (Tr. 277-287).

LaKenya testified that she had never gone to a doctor or any other medical provider because of any maltreatment from Desmond. (Tr. 290, 291, 292).

She finally admitted that they just didn't get along. (Tr. 308)

The undersigned would submit that the reason why they did not get along was because (1) she had a new man in her life--Jermaine Owens--and (2) she resented the idea that Desmond was disabled and that she had assumed the role of the primary bread winner in the family.

From a cold, hard look at the facts, Desmond's action did not constitute misconduct nor did they substantially contribute to the parties' separation.

Finally, the question arises as to the definition of misconduct . "Misconduct" is defined as "a transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness. Mandella v. Mariano, 61 R.I. 163, 200 A. 478, 479" See: Black's Law Dictionary, 1150 (4th ed. rev. 1968).

The conduct of Desmond in this marriage has been exemplary. He is the poster child for a good husband and good father. But yet he has been penalized for his Christian beliefs. He has been penalized for being a good husband and good father.

The Chancellor's ruling neither followed the law nor was it justified under the facts. The Chancellor erred.

ISSUE III

THE LOWER COURT ERRED BY VIOLATING DESMOND'S CONSTITUTIONAL RIGHT OF FREEDOM OF RELIGION

In Harris v. Harris, 343 So.2d. 762, 764 (Miss. 1977), the following language is found:

...The first amendment to the Constitution of the United States provides in the first sentence thereof that "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof... Article 3, section 18 of the Mississippi Constitution of 1890 provides in part as follows: ... the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred.

In Re Faust's Guardianship, 123 So.2d 218, 220 (Miss. 1960) held that "Religious views afford no ground for depriving a parent, who is otherwise qualified, of custody and control."

The following language is found in Muhammad v. Muhammad, 622 So.2d 1239, 1243 (Miss. 1993):

In Sherbert v. Verner, 374 U.S. 398, 402, 83 S. Ct. 1790, 1793, 10 L. Ed. 2D. 965 (1963), the United States Supreme Court held:

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs, as such, Cantwell v. Connecticut, 310 U.S. 296, 303, 84 L.Ed. 1213, 1217, 60 S. Ct. 900 [903] [(1940)]. Government may neither compel affirmation of a repugnant belief, Torcaso V. Watkins, 367 U.S. 488, 6 L. Ed.2d 982, 81 S. Ct. 1680 [(1961)], nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, Fowler v. Rhode Island, 345 U.S. 67, 97 L.Ed. 828, 73 S.Ct. 526 [(1953)]. (emphasis added)

Although the Chancellor denied that his ruling had any religious overtones, he admitted that " this case was all about religion." Then he rendered an opinion completely adverse to Desmond. Further, it is painfully obvious that the Chancellor just did not like Desmond.

Some of the Chancellor's comments were:

... He has the right to whatever religion he wants, but I think he should stop and think about this attitude of always tell the children the truth. (Tr, 218)

As stated, the Court has no problem with and finds no fault with Mr. Forthner's religion. But I would request that he rethink, and I don't know if that's a part of his religion or not, but he rethink the idea that children should always be told the truth. (Tr. 219, 220).

...Equity, basically do the right thing. I don't get those vibes from Mr. Forthner. I really don't. (Tr. 220).

These people need a divorce. Gosh, they need a divorce. They are on two different roads. Their lives are going in two different directions. I don't see what has transpired here as a plot or ploy by Mrs. Forthner to get rid of dead weight. I don't think that was her purpose. She might should have, but I don't think that was her purpose.

I think there is a difference of an opinion among these two people, between these two people; and it is not that unusual in a marriage for a husband and a wife to have a difference of opinion. It may be unusual for it to be in this area and for it to get to this point, but the truth is married couples have differences of opinions.

I see no testimony at this point that would establish grounds for divorce for Mrs. Forthner. I think she needs a divorce; and if I could grant her a divorce, I certainly would. Maybe I could do that anyway Mr. Creel, and Mr. Tullos can take this up and we will see if we can change the law. (emphasis added) (Tr. 323).

Q. Well, I'm wondering, Mr. Forthner, can you? Can you tell me the truth? That's just a question.

Mr. Tullos: I'm going to object to that your Honor. He's sworn to tell the truth.

The Court: He did. He did.

Q. (By the Court) But I want to know. Can you tell the truth?

A. Yes, Sir.

The Court: The objection is overruled.
(Tr. 423, 424).

Without going through everything already stated, the testimony had shown that Desmond was a good father and a good husband. LaKenya was not entitled to a divorce under the law. The

entire case went off on the religion issue. But yet the Court was prejudiced against Desmond. But, why was the Court so prejudiced? This can be easily answered by reading the Court's opinion when he refused to go into the issue of separate maintenance. See: (Tr. 362-375). The Chancellor just simply did not like Desmond's religious views. And, because of prejudice, he violated Desmond's constitutional right of freedom of religion.

ISSUE IV

THE CHANCELLOR ERRED IN NOT GRANTING DESMOND REASONABLE ATTORNEY'S FEES

The Chancellor refused to go into the issue of whether or not Desmond was entitled to reasonable attorney's fees in defending himself against LaKenya's complaint for divorce because he had asked for separate maintenance and he had lost.(Tr. 377-378).

The Chancellor erred.

The general rule is that:

An award of attorney's fees in a divorce case is a matter entrusted to the sound discretion of the Chancellor; absent an abuse of discretion, the chancellor's decision will generally be upheld... "[I]t is the function of the chancellor to weigh all of the facts and assess the circumstances and to award fees accordingly...

The party seeking attorney's fees is charged with the burden of proving inability to pay; usually where the party is able to pay his or her own attorney's fee, an award of such fees is inappropriate. See: Duncan v. Duncan, 915 So.2d 1124, 1128 (Miss. App. 2005).

The Chancellor abused his discretion in that he refused to allow Desmond to put on any proof that he was entitled to attorney's fees. It should be remembered that:

- 1) LaKenya filed for divorce upon the grounds of habitual cruel and inhuman treatment;
- 2) Desmond defended against the complaint and defeated her cause of action for divorce;
- 3) LaKenya is working two jobs as a registered nurse and has significant income of at least \$3,736.80 per month (see LaKenya's 805 at page 18 in the Exhibit's File);

- 4) LaKenya gets two checks from Social Security in the amount of \$628.00 each month for the two children;
- 5) Desmond only has income of \$1174.00 per month which is his Social Security disability check (See Desmond's 805 at page 11 in the Exhibit's File); and
- 6) Desmond has expenses of \$2169 each month and has no assets (See Desmond's 805)

LaKenya has a total income of at least \$4,364.80 each month when her salary and the children's social security checks are added together.

The Chancellor abused his discretion because (1) Desmond did defeat LaKenya's claim for divorce, (2) Desmond has very little money, and (3) LaKenya's income is almost four times that of Desmond's income.

CONCLUSION

Desmond was denied justice and equity in this case because of his religious beliefs and his gender. It is beyond question that if Desmond had been a Baptist or a Methodist and a woman, he would have won this case hands down. The lower court ruled against Desmond simply because he is a man and a Pentecostal.

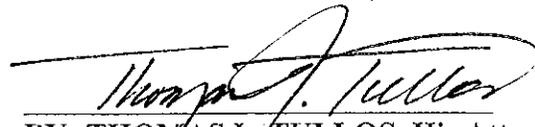
Very seldomly has any man tried any harder to be a good husband and father than Desmond. He took care of the children so that LaKenya could work and go to school. She has advanced her career and her income potential while Desmond took care of the children and the home. But she has found another man, and she has left Desmond. The Court could not give her a divorce because Desmond had done nothing which would have given her grounds for a divorce— even though the Court wanted to give her a divorce anyway.

In a gross abuse of discretion, the Court denied custody of the children to Desmond even though he was the primary caregiver. The Court denied separate maintenance even though Desmond had committed no misconduct.

If the lower Court is allowed to take advantage of Desmond in this way, then why should any man aspire to be a good husband and an exemplary father? Why should any man strive to do right and to perform his duties when the Court is going to penalize the husband and father regardless of how good he was? If the lower Court's ruling is allowed to stand, then it does not matter how hard the man tries to do right by his wife and children. The Court is going to hammer him anyway. This is just a terrible message.

This Court should reverse and render this case. It is the equitable thing to do, and it is the right thing to do.

Respectfully Submitted
DESMOND FORTHNER, SR.


BY: THOMAS L. FULLOS, His Attorney

CERTIFICATE OF SERVICE

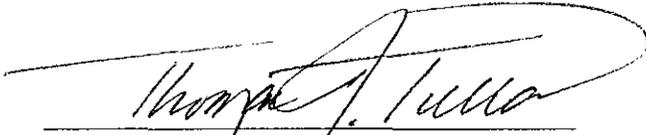
I, Thomas L. Tullos, Attorney at Law, do hereby certify that I have this date, mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to:

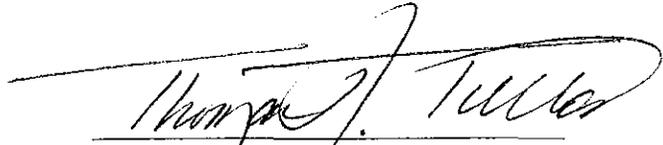
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This the 24th day of November, 2009.


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