

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STEPHANIE ELAINA BOUNDS

APPELLANT

VS.

NO. 2010-CA-00074-SCT

ROBERT EARL BOUNDS

APPELLEE

**APPEAL FROM THE CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI**

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Stephanie Elaina Bounds, Appellant;
2. Julie Ann Epps, Attorney for Appellant on Appeal;
3. E. Michael Marks, Attorney for Appellant at Trial and on Appeal;
4. Robert Earl Bounds, Appellee
5. John D. Fike, Attorney for Appellee at Trial and on Appeal
6. Honorable Denise Owens, Hinds County Chancellor

This the 21st day of September, 2010.

Respectfully submitted,



JOHN D. FIKE, MSB [REDACTED]
Attorney for Appellee

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STATEMENT OF ISSUES

- I. THE CHANCELLOR'S GRANTING OF A DIVORCE WAS BASED ON GROUNDS WHICH ROBERT BOUNDS WAS CLEARLY AWARE OF PRIOR TO THE FILING OF HIS COUNTER-COMPLAINT.**
- II. THE INDICTMENT AND SUBSEQUENT CONVICTION OF STEPHANIE BOUNDS FOR NEGLECT OF A CHILD, IN VIOLATION OF MISSISSIPPI CODE ANN. § 97-5-39(1)(C), IS SUFFICIENT GROUNDS TO AWARD ROBERT A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT.**
- III. THE CHANCELLOR CORRECTLY DENIED THE SEPARATE MAINTENANCE ACTION DUE TO THE FINDING OF SUFFICIENT FACTS TO GRANT ROBERT BOUNDS A DIVORCE ON THE GROUND OF HABITUAL CRUEL AND INHUMAN TREATMENT.**
- IV. THE EVIDENCE AT TRIAL SUPPORTED THE CHANCELLOR'S DIVISION OF THE MARITAL DEBT.**

STATEMENT OF THE CASE

Stephanie Elaina Bounds and Robert Earl Bounds were married on or about November 10, 1984. During the course of their marriage, the couple had three children: Michael, who has been emancipated, Victoria, born on December 15, 1993, and Sydney, born on October 19, 2000. R.E. 6. On April 25, 2008, Stephanie Bounds file a *Complaint for Separate Maintenance*. R.E. 1. She further asked for custody of Victoria and Sydney and child support and an equitable division of the property.

Based on the information set forth in an indictment Stephanie eventually pled guilty to, between the dates of January 1, 2008 and October 29, 2008, Stephanie Bounds permitted Armulfo Hernandez Vargas, a 24-year old male, to continuously sexually abuse her and Robert's then fourteen year old daughter. A.R.E 18. On May 30, 2008, Robert Bounds filed *Defendant's Response to Complaint for Separate Maintenance and Counter-Complaint for Divorce*, alleging grounds of habitual cruel and inhuman treatment, adultery, insanity and irreconcilable differences. He also requested custody of the minor children. R.E. 14-17.

Stephanie Bounds was indicted by the grand jury in the First Judicial District of Hinds County, Mississippi for violation of Miss. Code Ann. § 97-53-39(1)(c), on February 27, 2009. A.R.E. 18. That indictment held that between the dates of January 1, 2008 and October 29, 2008, Stephanie Bounds had "willfully, unlawfully, feloniously and knowingly permit[ted] the continuing sexual abuse of V.B., a fourteen year old female child... by Armulfo Hernandez Vargas,¹ a 24-year old male..." A.R.E. 18.

¹ Armalfo Hernandez Vargas was also subsequently convicted on a related charge. He is referred to as "Chico" at the trial of this matter; this tradition will be continued on appeal.

Stephanie pled guilty to neglect of a child, in violation of Miss. Code Ann. § 97-53-39(1)(c), on August 3, 2009. R.E. 18.

After trial, Chancellor Denise Owens granted a divorce to Robert on the ground of habitual cruel and inhuman treatment. She awarded Robert full physical custody of both Victoria and Sydney. She directed Robert to pay \$11,000.00 in marital credit card debt and gave him an offset of half from the money she awarded Stephanie from Robert's retirement fund. R.E. 5-8. Stephanie Bounds subsequently filed her *Notice of Appeal* on January 15, 2010.

STATEMENT OF THE FACTS

Robert Bounds moved out of the marital home in April of 2006. Stephanie Bounds filed a divorce on the grounds of adultery in or around April of 2007. The matter was tried before the Honorable Denise Owens on or about December 15, 2007, the same being Civil Action No. G-2007-548 O/3. Judge Owens found that Stephanie Bounds did not prove her grounds for divorce and the same was dismissed. On April 25, 2008, Stephanie Bounds filed a *Complaint for Separate Maintenance*. R.E. 1.

Based on the information set forth in an indictment, Stephanie eventually pled guilty to permitting Armulfo Hernandez Vargas, a 24-year old male, to continuously sexually abuse her and Robert's fourteen year old daughter between the dates of January 1, 2008 and October 29, 2008. A.R.E. 18. On May 30, 2008, Robert filed *Defendant's Response to Complaint for Separate Maintenance and Counter-Complaint for Divorce*, alleging grounds of habitual cruel and inhuman treatment, adultery, insanity and irreconcilable differences. He also requested custody of the minor children. R.E. 1.

Stephanie Bounds was indicted by the grand jury in the First Judicial District of Hinds County, Mississippi for violation of Miss. Code Ann. § 97-53-39(1)(c), on February 27, 2009. A.R.E. 18. That indictment held that between the dates of January 1, 2008 and October 29, 2008, Stephanie Bounds had "willfully, unlawfully, feloniously and knowingly permit the continuing sexual abuse of V.B., a fourteen year old female child... by Armulfo Hernandez Vargas, a 24-year old male..." A.R.E. 18. Stephanie pled guilty to neglect of a child, in violation of Miss. Code Ann. § 97-53-39(1)(c), on August 3, 2009. A.R.E. 18.

On December 16, 2009, the Chancellor held that Stephanie's violation of Miss. Code Ann. § 97-53-39(1)(c) constituted sufficient grounds to award Robert Bounds a divorce on the ground of habitual cruel and inhuman treatment. As such, the Chancellor granted Robert Bounds a divorce on that ground and simultaneously denied Stephanie's *Complaint for Separate Maintenance*. R.E. 8-16.

BRIEF OF APPELLEE

SUMMARY OF THE ARGUMENT

Based on the undisputed facts of this case, Robert Bounds clearly knew about Stephanie Bounds' criminal activity prior to filing his Counter-Complaint for Divorce. Robert Bounds' testimony clearly shows that this aforementioned criminal behavior was causally related to and/or proximately caused the separation. As a question of fact, this finding was subject to the chancellor's discretion.

Furthermore, the continuing criminal activity and subsequent indictment and conviction of Miss. Code Ann. § 97-5-39(1)(c), permitting sexual abuse of a child, is clearly sufficient to award Robert Bounds a divorce on the grounds of habitual cruel and inhuman treatment. However, the awarding of separate maintenance, if the fault-based divorce is overturned on appeal, is still a matter of discretion for the chancellor based on the facts presented and the parties' testimony and should be left undisturbed by this Court.

Lastly, the chancellor was correct in her division of marital debt, as Robert Bounds' undisputed testimony was that the credit card debt was incurred in order to raise the children. As it is also Stephanie Bounds' responsibility to support the children, offsetting the credit card debt against her share of Robert Bounds' retirement account was imminently fair and reasonable.

I. THE CHANCELLOR'S GRANTING OF A DIVORCE WAS BASED ON GROUNDS WHICH ROBERT BOUNDS WAS CLEARLY AWARE OF PRIOR TO THE FILING OF THE COUNTER-COMPLAINT.

On April 25, 2008, Stephanie Bounds filed a *Complaint for Separate Maintenance*.² On May 30, 2008, Robert Bounds filed *Defendant's Response to Complaint for Separate Maintenance and Counter-Complaint for Divorce*. In that Counter-Complaint, he asked for a divorce on the grounds of irreconcilable differences, adultery, insanity, and habitual cruel and inhuman treatment.³

These dates are important, particularly when viewed against the dates of Stephanie Bound's criminal behavior, indictment, and subsequent conviction. It is undisputed that Stephanie Bounds was indicted by grand jury in the First Judicial District of Hinds County, Mississippi, prior to February 27, 2009, the date the indictment was filed with the district court. A.R.E. 18.

Furthermore the indictment held that there was probable cause to find that "on, about and between the 1st day January 2008 and the 29th day of October," Stephanie Bounds "did willfully, unlawfully, feloniously and knowingly permit the continuing sexual abuse of V.B., a fourteen year old female child . . . by Armulfo Hernandez Vargas, a 24-year old male . . ." A.R.E. 18 (emphasis added).

Robert Bound's Counter-Complaint for divorce was filed on May 30, 2008, over five months *after* the behavior that lead to Stephanie Bounds' indictment and subsequent conviction began. R.E. 1. Therefore, appellant's argument that there is no causal

² Stephanie Bounds filed a divorce on the grounds of adultery in or around April of 2007. The matter was tried before the Honorable Denise Owens on or about December 15, 2007, the same being Civil Action No. G-2007-548 O/3. Judge Owens found that Stephanie Bounds did not have grounds for divorce and the same was dismissed.

³ The ground of insanity was abandoned by Appellee at trial.

connection between the separation and the behavior surrounding the granting of a divorce on the grounds of habitual cruel and human treatment is simply not borne out by the facts of the case. Robert Bounds clearly knew about the behavior prior to filing his Counter-claim, and he testified at trial how it affected his willingness to repair the marriage:

Q: So you have made every effort to save your marriage?

A: On many occasions, yes.

Q: And with what you know about your wife's conviction now, is there any way that you can stay in this marriage?

A: Absolutely not. A.R.E. 19.

A particularly illuminating exchange followed shortly thereafter:

Q: And why is that?

A: Why am I asking for habitual cruel and inhuman treatment?

Q: Yes.

A: The habitual cruel and inhuman treatment to my children. No child should ever have to endure what those children endured, nor myself.

MR. MARKS: Judge, we're going to object to that, now, because you stopped us from going behind the last divorce.

THE WITNESS: I'm not going behind it, Your Honor.

THE COURT: Okay. When an objection is made, you need to wait till I rule on it.

THE WITNESS. I'm sorry.

THE COURT: I'll overrule it. His reference was to the recent indictment. A.R.E. 20-21.

Appellant is correct that *Fournet* is the governing standard for causation in the state of Mississippi:

There is a necessity for this causal relationship [between the treatment and the separation] to be proved when relying on the ground of habitual cruel and inhuman treatment, and it must be related in point of time to the separation. *Harrison v. Harrison*, 285 So.2d 752 (Miss. 1973); Bunkley and Morse's Amis Divorce and Separation in Mississippi, § 3.14(17) (1957); N. Hand, Divorce, Alimony and Child Custody, § 4.12, (1981); Divorce; Habitual Cruel and Inhuman Treatment, 45 M.L.J. 1073 (1974). *Fournet v. Fournet*, 481 So.2d 326, 329 (Miss. 1985). Accord, *Rawson v. Buta*, 609 So.2d 426, 430-432 (Miss. 1992); *Chamblee v. Chamblee*, 627 So.2d 850, 859-860 (Miss. 1994).

Appellant's error lies in application. A chronological view of the relevant documents surrounding the divorce clearly shows an action filed in the spirit of *Fournet*. Stephanie's criminal behavior clearly was the causal spark that caused the irrevocable end of the marriage and set in motion the filing of the original Counter-Claim for Divorce. At the very least, it was motivation for the filing of the Amended Counter-Claim filed on December 16, 2009.

As was shown at trial, the behavior which led to the indictment, as noted by the Chancellor, was one of the main reasons why Robert Bounds filed for a habitual cruel and inhuman treatment grounds divorce. As such, Robert was clearly aware of Stephanie Bounds' behavior and subsequent indictment prior to the time he filed his Counter-Complaint for divorce.

Furthermore, it is undisputed that Robert Bounds filed an Amended Counter-Complaint that contained a collusion oath as mandated under Miss. Code Ann. § 93-5-7 (Rev. 2004) on December 16, 2009, the day of trial. A.R.E. 22-26. The Mississippi Supreme Court has stated that "[w]hile the trial court has discretion to allow an

amendment and should do so freely under the proper circumstances, an amendment should not be granted when it would prejudice the other party.” *Jones v. Fluor Daniel Services Corporation*, 2008-CA-00456-SCT (Miss. 2010) citing *Hester v. Bandy*, 627 So.2d 833, 839 (Miss. 1993).

Although Appellant duly objected to the introduction of this Amended Counter-Claim during trial, *she has failed to raise the issue on appeal*, thereby waiving any attendant prejudicial issues that may have arose from its filing. *Beene v. Ferguson Automotive, Inc.*, 2009-CA-00540-COA (Miss. Ct. App. 2010) (Conversely holding that because county court judge’s decision not to allow the amending of a complaint was not properly appealed, all ability to litigate the propriety of the denial was terminated). As this issue was not raised on appeal by the appellant, no prejudice, even if it existed, can be raised.

As such the Amended Counter-Complaint is clearly sufficient to maintain the requirement of the *Fournet* standard. The Amended Counter-Complaint, which was identical to the original Counter-Complaint with the exception of the added collusion oath, was filed *over nine months* after Stephanie Bounds’ indictment and *over four months* after her subsequent conviction. This is important, because even if Robert Bounds was unaware of the behavior leading to Stephanie Bounds’ indictment and subsequent conviction at the time of the filing of the initial Counter-Complaint, he surely was aware at trial on December 16, 2009.

For these reasons, the Chancellor’s granting of a divorce did not violate the *Fournet* standard and was based on sufficient evidence in the record. As such, this Court

should uphold the Chancellor's decision to grant Robert Bounds a divorce on the grounds of habitual cruel and inhuman treatment.

II. THE INDICTMENT AND SUBSEQUENT CONVICTION OF STEPHANIE BOUNDS FOR NEGLECT OF A CHILD, IN VIOLATION OF MISSISSIPPI CODE ANN. § 97-5-39(1)(C), IS SUFFICIENT GROUNDS TO AWARD ROBERT A DIVORCE ON THE GROUND OF HABITUAL CRUEL AND INHUMAN TREATMENT.

It is undisputed that Stephanie Bounds was indicted on a charge of neglect of a child, in violation of Miss. Code Ann. § 97-5-39(1)(c). On August 3, 2009, she pled guilty and was convicted of the aforementioned criminal charge and was sentenced to 10 years in the custody of the Mississippi Department of Corrections, with 10 years to be suspended and 5 of those years to be with supervised probation.⁴ A.R.E. 18. The charges underlying the conviction was that Stephanie Bounds allowed Chico Vargas, a 24-year-old man, to stay in the house and have a continuing sexual relationship with Victoria, Stephanie and Robert's then 14-year-old daughter. A.R.E. 18.

At the divorce trial, Robert testified about the effect of Stephanie's actions on their marriage:

Q: And you left the marital home?

A: Yes.

Q: And where you're staying today, is there any possible scenario that you would go back to the marital home?

A: No.

Q: And why is that?

⁴ The Order contains an obvious scrivener's error- it states that Stephanie Bounds was guilty of violating Miss. Code Ann. 97-53-39(1)(c)- a statute that does not exist. The correct citation is Miss. Code Ann. 97-5-39(1)(c).

A: I can't even stand to even—I can't even bear to see the house to know what went on there before and after our previous trial. My father has to go cut the grass over there. The house has been vandalized. I continue to pay the note, but I simply cannot make myself go over there. AR.E. 27.

He also further testified:

Q: And why is that?

A: Why am I asking for habitual cruel and inhuman treatment?

Q: Yes.

A: The habitual cruel and inhuman treatment to my children. No child should ever have to endure what those children endured, nor myself. A.R.E. 20.

In her findings of fact, the Chancellor held that the activities of Stephanie and resulting conviction constituted sufficient grounds for habitual cruel and inhuman treatment under Mississippi law:

Initially, I would address the Complaint for Separate Maintenance first; however, the Court finds that because Mr. Bounds has established that he is entitled to a divorce on the grounds of habitual cruel and inhuman treatment, then it would not be necessary to address the grounds of separate maintenance, as a divorce will be granted.

And this particular case is a more unusual ground of habitual cruel and inhuman treatment because it does not come with the attendant physical abuse that most often characterizes a ground of habitual cruel and inhuman treatment. It does, however, come with acts of other type of habitual cruel and inhuman treatment. For example, the courts have held that a spouse's conduct, for example, in taking children and secreting them from a spouse would constitute a habitual cruel and inhuman treatment if the spouse also, as a result of that, feels as if the act is habitually cruel.

Other instances, allowing certain people to live in a home who have criminal records while the other person may be afraid of them has been found to constitute habitual cruel and inhuman treatment. Even situations where a spouse dresses in male and

female clothes has been held to constitute habitual cruel and inhuman treatment.

In this particular case, Mrs. Bounds was, based on the indictment and on the sentencing report, convicted of neglect of a child, a felony pursuant to § 97-53-39. The acts more specifically are set forth in the Youth Court report, indicating the facts on which the indictment and guilty plea is based.

After the testimony of Mr. Bounds, it is clear that he was affected by that in such a way that it would constitute habitual cruel and inhuman treatment towards him. That was evidenced by his inability to even go by the marital home in which the events occurred. So the Court finds that, based upon that, he is entitled to a divorce on the ground of habitual cruel and inhuman treatment. R.E. 8-10.

As will be shown below, this finding is clearly supported under Mississippi law.

In Mississippi, evidence sufficient to establish habitual cruel and inhuman treatment should prove conduct that:

[E]ither endangers life, limb or health, or creates a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief or, in the alternative, be so unnatural and infamous as to make the marriage revolting to the offending spouse and render it impossible for that spouse to discharge the duties of the marriage, thus destroying the basis for its continuance. *Rawson v. Buta*, 609 So.2d 426, 430-31 (Miss. 1992).

Appellant's reliance on *Jones v. Jones*, is misguided. The *Jones* Court made it clear that the statutory language above provides two *separate* and *distinct* bases for granting a divorce in Mississippi based on the grounds of habitual cruel and inhuman treatment. 2008-CA-00675-COA (Miss. App. 2009). The quote cited by the Appellant refers to the first prong of the statute, which allows a divorce on the grounds of habitual cruel and inhuman treatment due to the endangering of life, limb, or health, and is inapplicable to the instant case.

Robert Bounds was granted a divorce on the grounds of habitual cruel and inhuman treatment based on the second prong of the statute, which allows for the divorce

if the conduct “is so unnatural and infamous as to make the marriage revolting to the non-offending spouse and render it impossible for that spouse to discharge the duties of marriage, thus destroying the basis for its continuance.” Miss. Code Ann. § 93-5-1 (Rev. 2004).

Furthermore, the Mississippi Court of Appeals has noted, under the second prong of the statute, that the “impact of the conduct upon the non-offending spouse is a subjective test, thus falling within the province of the chancellor; therefore, it is beyond this Court's scope of review. *Keough v. Keough*, 742 So.2d 781, 782 (¶5)(Miss. Ct. App. 1999); Deborah H. Bell, *Bell on Mississippi Family Law* § 4.02(8)(b) at 72 (2005). Intrinsic in this analysis is whether the record supports the chancellor's findings that the offensive conduct occurred, and if it occurred, whether it was so repugnant as to render the discharge of marital duties impossible for the offended spouse. *Jones v. Jones*, 2008-CA-00675-COA (Miss. App. 2009).

The offensive conduct – Stephanie’s neglect of Victoria by allowing Chico Vargas to have continual sexual relations with her in the home – is undisputed. The subsequent guilty plea and conviction, in addition to Victoria’s testimony at trial, prove that the offensive conduct occurred. A.R.E. 18; A.R.E. 28-38.

Thus the sole issue is whether or not the behavior of Stephanie was so repugnant as to render Robert’s discharge of the marital duties impossible. The appellate court’s role is not to determine whether or not the offending conduct affected Robert; that is a finding of fact left to the sole discretion of the Chancellor. *Id.* It is the appellate court’s role to determine whether or not the conduct itself was severe enough to warrant a granting of divorce on the grounds of habitual cruel and inhuman treatment. *Id.*

Mississippi case law is silent on whether or not a conviction of neglect of a child, in violation of Miss. Code Ann. § 97-53-39(1)(c) (Rev. 2004), constitutes grounds to grant a divorce on the grounds of habitual cruel and inhuman treatment. However, there is case law showing less severe conduct as qualifying to meet the standard. The Mississippi Supreme Court has recognized that sexual indignity can rise to the level of being so repugnant to the non-offending spouse so as to render impossible the discharge of marital duties, thereby defeating the whole purpose of the marriage. *Crutcher v. Crutcher*, 86 Miss. at 231, 38 So. 33 (Miss. 1905); *Stockton v. Stockton*, 203 So.2d 806, 807 (Miss. 1967). Furthermore, this sexual indignity can extend to activities with the children. In *Jones*, for example, the Mississippi Court of Appeals held that a father's "inappropriate bathing rituals" with his children also constituted evidence of sexual indignity. 2008-CA-00675-COA (Miss. App. 2009).

The *Jones* Court, surveying Mississippi law, further explicated the role of sexual indignity for granting a divorce on the grounds of habitual cruel and inhuman treatment:

In seeking guidance from precedent regarding repugnance of sexual indignities, we turn to the early case of *Crutcher*, 86 Miss. at 231, 38 So. at 337, where the supreme court found that pederasty on the part of a spouse, like sodomy, fell within the meaning of cruel and inhuman treatment under the divorce statutes as an infamous indignity to the wife. In *Crutcher*, the wife considered the indignity to be so revolting that she could not discharge her duties as a spouse, and the court recognized that such inability to discharge the marital duties would defeat the whole purpose of the relation. *Id.*

Similarly, in *Cherry* [*v. Cherry*, 593 So.2d 13, 17 (Miss. 1991)], the supreme court found that testimony concerning the husband's sexual problems, including impotence and dressing in women's clothing, provided sufficient evidence to support granting a divorce on the ground of habitual and inhuman treatment. Additionally, the wife testified that her husband's sexual problems

"like to [have] drove her insane." *Id.* In *Stockton*, 203 So.2d at 807, Mr. Stockton asked Mrs. Stockton to engage in unnatural sexual relations, and suggested that they whip each other. He also allegedly asked Mrs. Stockton to engage in similar relations with another man. *Id.* The supreme court affirmed the chancellor's grant of a divorce based upon habitual cruel and inhuman treatment. *Id.* at 808.

Jones, 2008-CA-00675-COA. If pederasty, a form of sexual child abuse, is sufficient grounds to grant a divorce on the grounds of habitual cruel and inhuman treatment, then clearly permitting continuing sexual abuse of a child rises to the same level of offensive conduct. In *Jones*, there was no sexual abuse alleged other than "inappropriate bathing rituals," which the court held to be evidence of sexual indignity. And, as noted by the Chancellor in her findings of fact, the Mississippi Supreme Court has granted a divorce on these grounds due to the spouse's impotence and inclination to wear women's clothing. *Cherry*, 593 So.2d at 17. Surely permitting continuing sexual abuse of a child is a far more heinous activity.

It is undisputed that Stephanie Bounds plead guilty to a criminal count of neglect of a child, in violation of Miss. Code Ann. § 97-5-39(1)(c), and was sentenced to 10 years in the custody of the Mississippi Department of Corrections, with 10 years to be suspended and 5 of those years to be with supervised probation. The statute in question she pled guilty to violating states:

(c) A parent, legal guardian or other person *who knowingly permits the continuing physical or sexual abuse of a child* is guilty of neglect of a child and may be sentenced to imprisonment for not more than ten (10) years or to payment of a fine of not more than Ten Thousand Dollars (\$10,000.00), or both. Miss. Code Ann. § 97-5-39(1)(c) (emphasis added).

It is important to note that violation of Miss. Code Ann. § 97-5-39(1)(c) is considered a violent crime under Miss. Code Ann. § 47-7-3(1)(g)(Rev. 2004) for purposes of parole and revocation of suspended sentences.⁵ Although not conclusive, this statute does show the level of abhorrence with which the State of Mississippi views violation of this particular statute. Furthermore, defining the criminal act as “violent” infers that to permit the continuing sexual abuse of a child is just as much a “violent” act as performing the sexual abuse oneself, rendering the *Crutcher* case law perfectly relevant to the case at bar.

The offensive act is clearly corroborated, as evidenced by the guilty plea and Victoria’s testimony in court. A.R.E. 18; A.R.E. 28-38. The offensive acts Stephanie was convicted of allowing is clearly repugnant enough, based on both commonsense and existing Mississippi case law, to warrant a granting of divorce on the grounds of habitual cruel and inhuman treatment. As Robert’s reaction to this offensive activity is a subjective test and the Chancellor’s fact-based discretion that he was clearly affected by this offensive conduct is beyond the review of this Court, the granting of a divorce on the ground of habitual cruel and inhuman treatment was based on sufficient fact-based grounds and should be upheld by this Court.

III. THE CHANCELLOR CORRECTLY DENIED THE SEPARATE MAINTENANCE ACTION DUE TO THE FINDING OF SUFFICIENT FACTS TO GRANT ROBERT BOUNDS A DIVORCE ON THE GROUND OF HABITUAL CRUEL AND INHUMAN TREATMENT

⁵ The statute defines “nonviolent crime” to mean “a felony other than homicide, robbery, manslaughter, sex crimes, arson, burglary of an occupied dwelling, aggravated assault, kidnapping, felonious abuse of vulnerable adults, felonies with enhanced penalties, the sale or manufacture of a controlled substance under the Uniform Controlled Substances Law, felony child abuse, or exploitation or any crime under Section 97-5-33 or Section 97-5-39(2) or 97-5-39(1)(b), 97-5-39(1)(c) or a violation of Section 63-11-30(5).” Miss.Code Ann. § 47-7-3-(1)(g)(Rev.2004) (emphasis added).

The Chancellor began her findings of facts at the conclusion of this trial by stating:

Initially, I would address the Complaint for Separate Maintenance first; however, the Court finds that because Mr. Bounds has established that he is entitled to a divorce on the grounds of habitual cruel and inhuman treatment, then it would not be necessary to address the grounds of separate maintenance, as a divorce will be granted. R.E. 8-9.

Because the Chancellor correctly granted a fault-based divorce, there is no need for an award of separate maintenance. "[A] decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife, or in default thereof, to provide suitable maintenance of her until such time as they may be reconciled to each other." *Kennedy v. Kennedy*, 650 So.2d 1362, 1367 (Miss. 1995) (quoting BUNKLEY & MORSE, AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI, § 7.00 (2d ed.1957)). To grant separate maintenance there must be "a separation *without fault on the wife's part*, and willful abandonment of her by the husband with refusal to support her." *Lynch v. Lynch*, 616 So.2d 294, 296 (Miss. 1993), quoting *Etheridge v. Webb*, 210 Miss. 729, 50 So.2d 603, 607 (1951) (emphasis added.) However, the Mississippi Supreme Court has held that the wife need not be totally without fault as long as her conduct did not materially contribute to the separation. *Wilbourne v. Wilbourne*, 748 So.2d 184, 187 (Miss. App. 1999), citing *Robinson v. Robinson*, 554 So.2d 300, 303 (Miss. 1989).

As shown above, Stephanie Bounds' continued criminal activity and subsequent admission of guilt to permitting the sexual abuse of her child is clearly sufficient grounds for granting Robert Bounds a divorce under the habitual cruel and inhuman treatment standard. She is clearly at fault; thus, no separate maintenance in this action is warranted. Likewise, her conduct was certainly a material – if not the only – reason for both the

irrevocable destruction of the marriage and the filing of Robert Bound's Counter-Claim for divorce.

In the alternative, if the behavior complained of is not found to rise to the level of habitual cruel and inhuman treatment, the propriety of granting a separate maintenance action is not necessarily dependent on whether or not a fault-based divorce is granted. In *Wilbourne*, the Mississippi Court of Appeals upheld the chancellor's decision to deny the husband a fault-based divorce and to award the wife separate maintenance. However, further analysis of the reasoning behind this decision shows that separate maintenance need not be awarded in every case in which a fault-based divorce is denied. The *Wilbourne* Court upheld the award of separate maintenance because, "[i]n this case, the evidence supports a determination by the chancellor that Mathilde's fault did not materially contribute to the separation therefore entitling her to separate maintenance." *Id.* at 187, citing *Robinson*, 554 So.2d at 303. This rationale strongly implies that one can deny a habitual cruel and inhuman treatment divorce as well as separate maintenance, if that is suggested by the evidence. Although Appellee is confident that the continuing criminal behavior of the Appellant is sufficient grounds to award him a habitual cruel and inhuman treatment divorce, he is even more confident that said charge would forestall any claim to separate maintenance Stephanie Bounds might have. To say she is not at fault, when she has been *convicted precisely for being at fault*, would be legally absurd.

Regardless, a reversal of the fault-based grounds in this case should not instantly serve to overrule the Chancellor's discretion in rendering a fact-based analysis concerning separate maintenance. When determining a chancellor's opinion regarding separate maintenance on appeal, the appellate court "will not overturn the chancery court

unless its findings were manifestly wrong." *Id.* at 186. (Miss.App. 1999), citing *Daigle v. Daigle*, 626 So.2d 140, 144 (Miss. 1993).

IV. THE EVIDENCE AT TRIAL SUPPORTED THE CHANCELLOR'S DIVISION OF THE MARITAL DEBT

The Chancellor ruled at trial that "Mr. Bounds is currently supporting the minor children. He has received no support from Mrs. Bounds because she is currently unemployed. He has *accumulated credit card debt as a result of that* and there's no other option, really, but for him to assume that particular debt." R.E. 12. (emphasis added).

Paragraph 11 of the Final Judgment of Divorce which granted Robert a divorce on the ground of Habitual Cruel and Inhuman Treatment found that "[t]he parties have accrued \$11,000.00 in marital credit card debt. Robert Earl Bounds is required to pay the credit card debt as he is the only spouse gainfully employed. Robert Earl Bounds is entitled to an offset of \$5,500.00 towards any equity owed to Stephanie Elaina Bounds." R.E. 7. In Paragraph 12, entitled "Retirement Account", the offset was specifically identified:

Robert Earl Bounds has a retirement account with a balance of Forty One Thousand Six Hundred Thirty Seven Dollars (\$41,637.00). Stephanie Elaina Bounds is entitled to a lien on one-half this amount of Twenty Thousand Eight Hundred Eighteen Dollars and 50 cents (\$20,818.50) less the \$5,500.00 offset for the marital debt. Her lien is Fifteen Thousand Three Hundred Eighteen Dollars and 50 cents (\$15,318.50).

R.E. 7. This finding was amply supported in the record. Robert testified at trial that he accrued the debt for the benefit of the children. He testified that the charges were for "expenses, clothing for the children, school expenses and things like that for the children or for myself... and also for their medical care as well." A.R.E. 40.

The Chancellor clearly accepted Robert's testimony as true. "The chancellor, as the trier of fact, evaluates the sufficiency of the proof based *on the credibility of witnesses and the weight of their testimony.*" *Rawson v. Buta*, 609 So.2d 426, 431 (Miss.1992) (emphasis added) (citing *Rainey v. Rainey*, 205 So.2d 514, 515 (Miss.1967)). Robert's testimony was uncontroverted. At no time did Stephanie contradict the purpose for the \$11,000.00 in credit card debt.

Appellant is correct that where there are no specific findings of fact provided by the Chancellor, the appellate court is charged with looking at the evidence and seeing what state of facts will justify the decree. *Boatright v. Horton*, 102 So.2d 373 (1958). However, "when there are no specific findings of fact," the appellate court may "assume the trial judge made determinations of fact sufficient to support the judgment." *Microtek Medical, Inc. v. 3M Co.*, 942 So.2d 122, 133 (Miss. 2006) (citing *Rives v. Peterson*, 493 So.2d 316, 317 (Miss.1986)). In such circumstances this Court must look to the evidence and see *what state of facts, if any*, will justify the decree. *Id.* at 133, citing *Boatright v. Horton*, 102 So.2d 373, 374 (1958).

The facts as found by the Chancellor in the instant case were derived from Robert's testimony at trial. "[I]n order to justify the Supreme Court in reversing a decision of a Chancellor on a *finding of facts* where the Chancellor has had the *opportunity of observing the witnesses his conclusion must be manifestly wrong.*" *Continental Southern Lines, Inc. v. Robertson*, 241 Miss. 796, 801; 133 So.2d 543, 545 (Miss. 1961).

The Chancellor observed Robert during his testimony. As stated above, Robert testified that the credit card debt he accrued was for the "expenses, clothing for the

children, school expenses and things like that for the children or for myself . . . and also for their medical care as well.” A.R.E. 40. Stephanie did not attempt to contradict this testimony at trial. Robert’s testimony on the matter, as a matter of law, is a set of facts sufficient to justify the decree. There is no evidence that the Chancellor made a poor decision, much less one that is manifestly wrong.

The credit card debt was clearly marital debt. In *Fitzgerald*, the court held that “[a]ny and all assets acquired or accumulated during the marriage are marital property and are subject to equitable division unless it is shown that such assets are attributable to either party's separate estate prior to or outside the marriage. *Fitzgerald v. Fitzgerald*, 914 So.2d 193 (Miss. App. 2005). Although the court has not had occasion to discuss the delineation of non-marital and marital debt, there is no logical reason not to apply the *Fitzgerald* definition for assets to that of debt. It is undisputed that the credit card debt was accrued prior to the Final Judgment of Divorce. As such, this issue is without merit, and the Chancellor’s judgment on this matter should not be disturbed.

CONCLUSION

Based on the undisputed facts of this case, Robert Bounds clearly knew about Stephanie Bounds’ criminal activity prior to filing his Counter-Complaint and/or his Amended Counter-Complaint for Divorce. Robert Bounds’ testimony clearly shows that this aforementioned criminal behavior was causally related to and/or proximately caused the separation. As a question of fact, this finding was subject to the chancellor’s discretion.

Furthermore, the continuing criminal activity and subsequent indictment and conviction of Stephanie Bounds, under Miss. Code Ann. § 97-5-39(1)(c) for permitting

sexual abuse of a child, is clearly sufficient to award Robert Bounds a divorce on the grounds of habitual cruel and inhuman treatment. However, the awarding of separate maintenance, if the fault-based divorce is overturned on appeal, is still a matter of discretion for the Chancellor based on the facts presented and the parties' testimony.

Lastly, the Chancellor was correct in her division of marital debt, as Robert Bounds' undisputed testimony was that the credit card debt was incurred in order to raise the children. Because it is also Stephanie Bounds' responsibility to support the children, offsetting the credit card debt against her share of Robert Bounds' retirement account was imminently fair and reasonable.

Respectfully submitted,
ROBERT EARL BOUNDS, APPELLEE

By: 
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CERTIFICATE OF SERVICE

I, John D. Fike, do hereby certify that I have this date mailed by United States Mail, first class, postage prepaid, a true and correct copy of the above and foregoing to the persons listed below, as well as the filing of the original and three copies to Kathy Gillis, Clerk of the Mississippi Supreme Court, P.O. Box 249, Jackson, Mississippi 39205-0249.

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This the 4th day of October, 2010.



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