BRIEF OF APPELLANT

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 justices of this Court may evaluate possible disqualification or refusal:

1. Stephanie Elaina Bounds, Plaintiff-Appellant;
2. Robert Earl Bounds; Appellee;
3. E. Michael Marks and Julie Ann Epps, counsel for Appellant on appeal;
4. E. Michael Marks, counsel for Appellant at trial;
5. John D. Fike, counsel for Appellee at trial and on appeal;
6. Denise Owens, Chancellor

This, the 2nd day of August, 2010.

E. Michael Marks
COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

(i) Course of the Proceedings and Dispositions in the Court Below:

Stephanie Elaina Bounds and Robert Earl Bounds were married on or about November 10, 1984. On or about April 14, 2006, Robert left Stephanie. R.1-2. The couple had three children: Michael, who was emancipated, Victoria (DOB 12/15/93), and Sydney (DOB 10/19/2000). R.6. On April 25, 2008, Stephanie filed a suit for separate maintenance. She asked for custody of Victoria and Sydney and support and an equitable division of the property. She alleged that Robert had deserted her and was subject to ungovernable rages. R.7-8.

Robert answered and counter-claimed for divorce alleging habitual cruel and inhuman treatment, adultery, insanity and irreconcilable differences. He too requested custody of the minor children. R.14-18.

After a trial, the Chancellor, Denise Owens, granted a divorce to Robert on the ground of habitual cruel and inhuman treatment. She awarded full physical legal custody of Victoria and Sydney to Robert. She reserved the question of visitation because of a pending proceeding in

Youth Court that was scheduled for March of 2010.[1] She likewise reserved ruling on the question of child support until a later time because Stephanie was not employed at the time of the hearing and had not been for some time. In addition, she left open the division of any equity in the marital home. She directed Robert to pay $11,000 in marital credit card debt and gave him an offset of half from the money she awarded to Stephanie from Robert's retirement fund. RE 5-8.

Stephanie timely appealed the judgment. R.80.

(ii) Statement of the Facts:

Robert moved out of the marital home in April of 2006. Tr.3. Stephanie subsequently filed for a divorce on the ground of adultery. That case proceeded to trial with the Chancellor ruling that Stephanie had failed to prove adultery. Stephanie then filed the instant suit for separate maintenance on April 25, 2008. R.1-6. Thereafter on May 30, 2008, Robert filed an answer and also counter-claimed for divorce, alleging among other grounds, habitual cruel and inhuman treatment. R.9-20.

After Robert filed his counter-claim, he learned that Victoria was having sex with her boyfriend Chico in the marital home on Daniel Lake Boulevard that Stephanie and the children were occupying. Exhibit 5 [sealed youth court records]. As a result, Stephanie was indicted for neglect of a child in violation of 97-53-39(1)(C). On August 3, 2009, she pled guilty and received ten years suspended on supervised probation. *See,* sentencing order at Exhibit 2.

The Chancellor granted Robert a divorce based on the ground of habitual cruel and inhuman treatment because Robert testified "that he was affected by that [Stephanie's neglect of Victoria] in such a way that it would constitute habitual cruel and inhuman treatment towards

[1] The youth court had previously acquired jurisdiction because Stephanie had been convicted of allowing the then 14-year-old Victoria to have sex with her boyfriend. At the youth court proceeding, the youth court judge had awarded custody of the children to Robert with supervised visitation to Stephanie. R.69-70. Although the youth court had allowed Stephanie to have

him." RE 10. She denied the divorce based on Robert's other grounds of insanity and adultery because of his failure to prove either. RE 10.

SUMMARY OF THE ARGUMENT

Stephanie argues on appeal that the Chancellor erred in granting Robert a divorce based on grounds which arose after he filed his counter-complaint for divorce was filed. She also claims that the Chancellor erred in not granting her support or alimony and erred in giving Robert credit from her equity in the house for his credit card debt.

ARGUMENT

I. THE CHANCELLOR ERRED IN GRANTING ROBERT A DIVORCE BASED ON GROUNDS UNKNOWN TO ROBERT AND/OR WHICH DID NOT EXIST AT THE TIME HE FILED HIS COUNTER-COMPLAINT FOR DIVORCE.

A. Standard of Review:

On appeal, the Supreme Court must consider the entire record before it and accept all those facts and reasonable inferences which support the Chancellor's ruling. *Madden v. Rhodes,* 626 So.2d 608, 616 (Miss. 1993). The Chancellor's findings will not be disturbed, be they on evidentiary facts or ultimate facts, unless the Chancellor abused her discretion, was manifestly wrong, clearly erroneous, or unless she applied the wrong legal standard. *Id.* A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.,* 525 So.2d 746, 754 (Miss.1987)).

In summary, findings of fact are entitled to deference when reviewed on appeal but will be reversed where they are not supported by substantial evidence. Rulings of law, however, are subject to *de novo* review. *Dorr v. Dorr,* 797 So.2d 1008 (Miss.App. 2001).

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supervised visition, Robert refused to allow her to see the children unless they stayed within his earshot. Tr.114.

B. The Merits:

At the time Robert filed his counter complaint for divorce, Stephanie had not been indicted for child neglect. Moreover, there is no evidence that Robert was aware of the underlying facts constituting the neglect when he filed for divorce. Consequently, at the time he sued for divorce, he had no basis for claiming habitual cruel and inhuman treatment.

The general rule has long been that acts of misconduct committed after the original complaint for divorce is filed cannot serve as the sole basis for granting a divorce on the original complaint. *Hilley v. Hiley,* 275 Ala. 617, 157 So.2d 215 (1963); *Sterling v. Sterling,* 145 Md 631, 125 A. 809 (1924).

Moreover,

> [t]here 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,* 637 So.2d 850, 859-860 (Miss. 1994),

Here the grounds for divorce arose after Robert filed his counter complaint. Moreover, there is no causal connection between the separation and Robert's subsequent counter-claim and the habitual cruel and inhuman treatment on which he obtained the divorce. Therefore, it was error for the Chancellor to grant Robert a divorce because of Stephanie's alleged ill-treatment of Victoria.

II. THE CHANCELLOR COMMITTED REVERSIBLE ERROR IN GRANTING ROBERT A DIVORCE BECAUSE STEPHANIE ALLEGEDLY ALLOWED VICTORIA TO SLEEP WITH CHICO.

A. Standard of Review:

See, Standard in Proposition I.

B. The Merits:

As a matter of law, Robert is not entitled to a divorce on the ground of habitual cruel and inhuman treatment because of Stephanie's conviction or the underlying conduct of child neglect. Although a chancellor may grant a divorce on the grounds of "habitual, cruel and inhuman treatment." Miss.Code Ann. § 93-5-1 (1972), the testimony of the plaintiff must be substantially corroborated. Furthermore, evidence sufficient to establish habitual, cruel and inhuman treatment should prove conduct that:

> either endanger[s] life, limb or health, or create[s] a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief or, in the alternative, be so unnatural and infamous as to make the marriage revolting to the offending spouse and render it impossible for that spouse to discharge the duties of the marriage, thus destroying the basis for its continuance [citations omitted].

Rawson v. Buta, 609 So.2d 426, 430-31 (Miss. 1992). A causal connection between the treatment and separation must exist. *Fournet v. Fournet*, 481 So.2d 326, 328 (Miss.1985).

Before punishment, neglect or abuse of a child can constitute grounds of a divorce for habitual cruel and inhuman treatment, the treatment must be "solely for the purpose of giving him [the offended spouse] grief, and to affect his health [internal citations omitted]." *Romero v. Dautrielle*, 163 La.597, 112 So. 498 (1927). Here there is no evidence whatsoever that the conduct was for the purpose of giving Robert grief or affecting his health. Indeed, there is no evidence whatsoever that the conduct had any effect on Robert's health.

Moreover,"*[t]his Court has explained that the cruelty required must be "so gross, unfeeling and brutal as to render further cohabitation impossible except at the risk of life, limb or health on the part of the unoffending spouse* [emphasis in original]." *Jones v. Jones,* 2009 WL 4808216, 26-27 (Miss.App. 2009) [internal citations omitted and emphasis in

original]. The only evidence presented by Robert as to the effect of Stephanie's conviction and/or the underlying conduct was Robert's testimony:

> 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.[2] 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.

Tr.74.

This testimony fails to rise to the level of ill treatment so severe as to cause the risk to life, limb or the health of the offended spouse required to justify granting a divorce. For example, in the case of *Fournet v. Fournet,* 481 So.2d at 329, Mrs. Fournet testified that a lack of communication was the problem. "I am sure that I was some of the problem, but not all of the problem. . . . John has never endangered my life. . . . He has endangered my health and emotional state . . . this was both of our problem. . . . I did not consider continuing to live in my home unsafe . . . . He intimidated me many times over many different issues . . . . I was afraid to spend much money." The Court found Mrs. Fournet's conclusory allegations that her health and emotional state were "endangered" were insufficient to constitute habitual cruel and inhuman treatment. *Id.* Additionally, Mrs. Fournet offered no proof as to a causal connection between the cruel treatment of which she complained and her separation from the household.

The same is true here. Not wanting to go to the house is plainly insufficient proof of danger to health and emotional well being to warrant a divorce. Therefore, the Chancellor committed legal error in granting the divorce.

III. THE TRIAL COURT ERRED IN FAILING TO AWARD STEPHANIE SEPARATE MAINTENANCE AND/OR ALIMONY.

A. Standard of Review:

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[2] Because the alleged cruelty did not occur prior to the last trial for divorce, Robert is referring there to Stephanie's alleged adultery which took place there. The Chancellor, however, found insufficient evidence of adultery.

See, Proposition I.

B. The Merits:

The trial court failed to award Stephanie separate maintenance or alimony despite overwhelming evidence that Stephanie was unable to support herself and required spousal support.

Miss. Code Ann. § 93-5-23 provides that "[w]hen a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, . . . make all orders . . . touching the maintenance and alimony of the wife or the husband." To assist the chancellor in making the determination as to whether an award of alimony is appropriate, the chancellor is required to consider the factors set out in *Armstrong v. Armstrong,* 618 So.2d 1278, 1280 (Miss.1993). These factors include: (1) The income and expenses of the parties; (2) The health and earning capacities of the parties; (3) The needs of each party; (4) The obligations and assets of each party; (5) The length of the marriage; (6) The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care; (7) The age of the parties; (8) The standard of living of the parties, both during the marriage and at the time of the support determination; (9) The tax consequences of the spousal support order; (10) Fault or misconduct; (11) Wasteful dissipation of assets by either party; or (12) Any other factor deemed by the court to be "just and equitable" in connection with the setting of spousal support.

The Chancellor made no findings regarding these factors and never even discussed the issue of alimony or spousal support for Stephanie. The testimony established that since Robert quit paying support to Stephanie after he left the marital home,[3] Stephanie had been unable to work and was relying on her parents to provide her with a place to stay, a car and other support.

Robert argued as one of the grounds for divorce that Stephanie was insane. He testified that he began to notice "a very noticeable effect of her being troubled around 1997-98." Tr.115. She was treated at St. Dominic's and University Medical Center in Robert's words, "multiple times," for mental health treatment. Tr.96. According to him, he was "not sure help is going to help,"and that Stephanie was "totally lost" and psychologically damaged in some form. Tr. 96-97. Notwithstanding, he testified that she was able to work and support herself.

Stephanie testified that she had been diagnosed and treated for depression, bipolar disorder and post-traumatic stress disorder. Tr. 17-18.Stephanie testified that she had only a high school education. Although she had been employed as a salesperson and secretary at times during the marriage when Robert was laid off, she had no training and been unable to find work since the separation. Tr. 7-9. Moreover, early in the marriage, Robert asked that she stay home and take are of the family. Tr.8.

The parties were married for 25 years. Tr. 98. Robert, who is an architectural designer/draftsman, has an income of $3779 a month after taxes. Tr.88.Stephanie testified that while married Robert wanted her to stay at home and raise the children, which is what she did, even home schooling the children at once point. Stephanie, therefore, was entitled to separate maintenance (if the divorce was improperly granted). Alternatively, she was entitled to spousal support. *Blalack v. Blalack,* 938 So.2d 909 (Miss.App. 2006). [wife of 16 years was entitled to alimony of $500.00 a month where both were disabled, husband received $4,291 per month in benefits, whereas wife received $739 per month].

[3] Notwithstanding his failure to support Stephanie, he continued to claim her as a dependent on his income tax. Tr.104.

IV. THE EVIDENCE DOES NOT SUPPORT THE CHANCELLOR'S AWARD OF HALF OF THE CREDIT CARD DEBT OF ROBERT AGAINST ANY EQUITY STEPHANIE MIGHT HAVE IN THE MARITAL HOME.

A. Standard of Review:

See, Proposition I.

C. The Merits:

The Chancellor found that "[t]he parties have accrued $11,000.00 in marital credit card debt. The Court required Robert to pay the credit card debt because he was the only one employed; however, she gave him an "offset of $5,500.00 towards any equity owed to Stephanie" from her share of Robert's retirement account.[4] RE 7. The Chancellor erred because there is no evidence that the $11,000.00 was marital debt. The testimony at trial was that Robert, and Robert alone, accrued the debt after the parties separated. He testified that the charges were for "expenses, clothing for the children, school expenses and things like that for the children **or** for myself [emphasis]." Tr. 84. He presented no documentary evidence in support of any of the charges.

Where, as here, there are no specific findings of fact provided by the chancellor, this Court must look to the evidence and see what state of facts will justify the decree. *Boatright v. Horton,* 233 Miss. 444, 102 So.2d 373, 374 (1958). This Court, however, "may not credit unspoken findings not fairly inferable from the trial court's action." *Riddle v. State,* 580 So.2d 1195, 1200 (Miss.1991); *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So.2d 359, 367 (Miss.1992). *Accord, United States v. Castaneda,* 162 F.3d 832, 835 (5th Cir. 1998) [where the trial court fails to make written findings of facts, the appellate court will review the claim de novo to ascertain if the facts support the holding].

Robert presented no evidence that the $11,000 in credit card debt was marital debt other than his usubstantiated testimony that some of it was for the children. Marital debt is defined as debt which benefits the marriage. *Fitzgerald v. Fitzgerald,* 914 So.2d 193, 197 (Miss.App. 2005). Robert presented no evidence of a marital debt through his financial disclosure statement or his testimony. He presented no testimony at all that incurring the expenses was necessary. Consequently, the Court erred in awarding him half of the credit card debt. *McLemore v. McLemore*, 762 So.2d 316, 321 (Miss. 2000)

CONCLUSION

The Chancellor's decision to award Robert a divorce is not supported by the record. Moreover, assuming for the sake of argument only that a divorce was warranted, Stephanie should have been granted alimony, and she should not have been required to pay half of Robert's credit card debt.

Respectfully submitted,
STEPHANIE ELAINA BOUNDS, APPELLANT

By: E. Michael Marks
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, 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 John D. Fike, Attorney for Appellee, at PO Drawer 89, Raymond, Mississippi 39154-0089 and the original and three copies to Kathy Gillis, Clerk, PO Box 249, Jackson, Mississippi 39205-0249.

This the 2nd day of August, 2010.

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[4] Robert had a $41,637.00 retirement account which the Chancellor divided. She gave Stephanie a lien for $15,318.50 which was Stephanie's share less the $5,500.00 for the credit card debt. RE 7.

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