

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2010-CA-01193

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WILLIE JOHNSON, JR.  
*Appellant*

v.

HAZEL GWENDOLYN JOHNSON  
*Appellee*

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**BRIEF OF APPELLANT**

On Appeal from the Chancery Court of Hinds County, Mississippi

---

**ORAL ARGUMENT REQUESTED**

**FELECIA PERKINS, ESQ.**  
Mississippi Bar Number [REDACTED]  
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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 this Court may evaluate possible disqualifications or recusal.

Dr. Willie Johnson  
*Appellant/Defendant*


Felecia Perkins  
*Appellate Attorney for Willie Johnson*

Hazel Gwendolyn Johnson  
*Appellee/Plaintiff*

Sharon Patterson Thibodeaux  
*Attorney for Hazel Johnson*

Honorable Patricia Wise  
*Chancery Court Judge, Hinds County, Mississippi*

SO CERTIFIED, this the 4<sup>th</sup> day of November, 2010.

  
\_\_\_\_\_  
Felecia Perkins

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## **STATEMENT OF THE ISSUES**

I. DID THE TRIAL COURT COMMIT MANIFEST ERROR IN FINDING SUFFICIENT EVIDENCE TO AWARD THE PLAINTIFF A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT?

II. DID THE TRIAL COURT COMMIT MANIFEST ERROR IN ITS ASSESSMENT OF ALIMONY UNDER *ARMSTRONG V. ARMSTRONG*?

## STATEMENT OF THE CASE

The Chancery Court for the First Judicial District of Hinds County, Mississippi granted Hazel Johnson a divorce from Willie C. Johnson on the sole ground of habitual cruel and inhuman treatment. Alimony was granted to Mrs. Johnson in the amount of \$900.00 a month and set to continue each consecutive month until further order of the Court.

The lower Court's analysis is driven by condoned adulterous behavior and an allegation that Dr. Johnson transmitted a venereal disease to Mrs. Johnson during the marriage. The latter allegation, however, is baseless as the record is bereft of any mention of a venereal disease. Indeed, a thorough reading of the record reveals a divorce granted on innuendo and slanderous accusation. Accordingly, Dr. Johnson appeals on the following grounds.

## FACTS

Hazel and Willie were lawfully married on September 4, 1982, in Hinds County, Mississippi. *Complaint p. 1*. From this marriage a female child was born November 12, 1987. *Id. at 2*. Additionally, Willie adopted a second, older child Hazel brought into the marriage. T. 135. Both Hazel and Willie hold advanced degrees and in turn contributed to the marriage financially.

On or about October 15, 2001, while both residents of Hinds County, Hazel and Willie separated. *Complaint p. 1*. Hazel filed for separate maintenance on November 15, 2001, on

the grounds of willful, continued, and obstinate desertion. *Court's Opinion p. 1*. On September 11, 2006, Hazel filed her Amended Complaint for Divorce on the grounds of adultery, desertion, and habitual cruel and inhuman treatment and in the alternative, irreconcilable differences. *Id.* On October 16, 2008, Willie filed his Amended Answer and Counterclaim for Divorce also on the grounds of habitual cruel and inhuman treatment, and alternatively, irreconcilable differences. *Id.*

Prior to the filing of her motion for separate maintenance, Hazel discovered that Willie had fathered a child outside of their marriage. T. 307. Despite this discovery, Hazel and Willie continued to live as husband and wife. *Id.*

This infidelity, coupled with an allegation that Willie transmitted a venereal disease to Hazel during their marriage, defines the January, 28, 2010, divorce decree. On or about February 8, 2010, Willie filed a Motion for Reconsideration of the Court's Divorce Judgment noting, among other things, that the record was silent as to whether Willie ever had a venereal disease. *Motion to Reconsider p. 2*. A hearing on the Motion for Reconsideration was conducted on May 21, 2010, wherein the trial judge refused to reconsider the granting of the divorce on the grounds of habitual cruel and inhuman treatment. T. 355.

#### STANDARD OF REVIEW

On appeal, a Chancellor's factual findings may not be set aside unless manifestly wrong. *Moses v. Moses*, 879 So.2d 1043 (Miss. App. 2004). "This is so whether the finding relates to an evidentiary fact question ... or an ultimate fact question." *Id.* at 1046. An



appellate court will not disturb the findings of a chancellor when supported by substantial evidence in the record. *Smith v. Jones*, 654 So.2d 480 (Miss. 1995).

## ANALYSIS

### I. DID THE TRIAL COURT COMMIT MANIFEST ERROR IN FINDING SUFFICIENT EVIDENCE TO AWARD THE PLAINTIFF A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT?

There is simply no evidence to sustain a divorce on the grounds of habitual cruel and inhuman treatment. The lower court based its findings on Willie Johnson's adulterous behavior and on the alleged transmission of a venereal disease to Hazel Johnson by Willie. Neither Willie's admission of adultery nor allegations rooted in innuendo rise to the level of habitual cruel and inhuman treatment.

In order to establish a divorce on the basis of habitual cruel and inhuman treatment the claimant need produce evidence to demonstrate conduct that:

"either 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 non-offending spouse and render it impossible for that spouse to discharge the duties of marriage, thus destroying the basis for its continuance."

*Moses* at 1047 (citing *Gardner v. Gardner*, 618 So.2d 108, 113-14 (Miss. 1993)). Further, a causal connection between the treatment and the separation must exist. *Moses* at 1047.

Habitual cruel and inhuman treatment must be proven by a preponderance of the evidence and must be more than simple unkindness and/or lack of affection. *Snoddy v. Snoddy*, 791 So.2d 333, 344 (Miss. App. 2001). To this point, habitual cruel and inhuman treatment as a basis for divorce, must be corroborated. *Holladay v. Holladay*, 776 So.2d 662, 676 (Miss. 2000). The chancellor, as the trier of fact, evaluates the sufficiency of the evidence based on the credibility of the witnesses and the weight of their testimony. *Id.* (citing *Rawson v. Buta*, 609 So.2d 426 (Miss. 1992)). Accordingly, in the present case, the chancellor was required to find that Hazel met the evidentiary elements necessary to establish a divorce on the grounds of habitual cruel and inhuman treatment.

The evidence Hazel presented to support the finding that Willie fathered a child outside the marriage was through Willie's admission during cross-examination. T. 194. He admitted that a DNA test proved his paternity; and this admission, in turn, partially shapes the lower court's judgment. Indeed, the lower court found that Willie's "blatant routine of continuous impropriety is not only immoral and lewd but is also unnatural and infamous behavior." *Court's Opinion p. 4*. At the same time, however, the lower court acknowledges that Hazel and Willie continued to live together as husband and wife after Hazel discovered Willie fathered a child outside the marriage. *Id. at 3*.

The Mississippi Supreme Court has found "it judicially unsound to apply law governing divorce upon cruel and inhuman treatment to an issue of adultery, because of the nature of these very different grounds for divorce." *Talbert v. Talbert*, 759 So.2d 1105, 1110

(Miss. 1999). To this point, only an extreme set of facts will sustain a divorce based upon habitual cruel and inhuman treatment. *Stewart v. Stewart*, 645 So.2d 1319, 1321 (Miss. 1994). In the present case, the Chancellor makes every effort to apply the elements of habitual cruel and inhuman treatment to varying occurrences of adultery. While Willie's adulterous behavior arguably satisfies the requirements for a divorce based on adultery, his behavior does not rise to the level of extremes necessary to constitute habitual cruel and inhuman treatment. Adulterous behavior falls within an already established grounds for divorce.

The chancellor further based her findings on the alleged transmission of a venereal disease to Hazel by Willie. In fact, this allegation, coupled with Willie's infidelity, improperly justifies the lower court's holding:

"Dr. Johnson's continuous infidelity is certainly more than mere rudeness. His behavior has also created a reasonable apprehension of danger to Mrs. Johnson, thereby rendering the marriage unsafe for her. It is evidenced that Dr. Johnson transmitted an STD to Mrs. Johnson as a result of his infidelity. This is a blatant endangerment to her health and also evidence of Dr. Johnson's complete disregard for Mrs. Johnson's health and for the well being of the marriage."

*Court Opinion p. 4.* There was neither any evidence to evaluate nor any witness testimony to assess concerning a venereal disease. **The first reference to a venereal disease appears**

**in the lower court's judgment of divorce.** Indeed, the allegation seemingly stems from the lower court rather than a party to the action.

Absent this allegation, the Court is left with the question of adultery. To this end, Hazel's apparent condonation of Willie's behavior is significant. Condonation is the forgiveness of a marital wrong on the part of the wronged party; and such forgiveness may be either express or implied. *Ashburn v. Ashburn*, 970 So.2d 204 (Miss. App. 2007). The record is clear, Hazel and Willie resumed both cohabitation and sexual relations in the wake of Willie's adulterous revelations. T. 307. This fact, however, never entered into the lower court's assessment of the evidence.

The lower court, heedless of the consequences, maneuvers with nonexistent evidence to satisfy the elements of habitual cruel and inhuman treatment. "Habitual cruel and inhuman treatment is not a catch-all category ... neither party is entitled to be granted a divorce without providing the proof necessary to support the grounds that are alleged." *Moses* at 1047 (citing *Crenshaw v. Crenshaw*, 767 So.2d 272, 276 (Miss. App. 2000)). There was no credible evidence presented to sustain a finding of habitual cruel and inhuman treatment. Hazel offers only infidelity, arguably condoned. For its part, the lower court, determined to justify a divorce on habitual cruel and inhuman treatment, ignores a possible defense to divorce and substantiates a baseless allegation. Such faulty analysis cannot stand.

## II. DID THE TRIAL COURT COMMIT MANIFEST ERROR IN ITS ASSESSMENT OF ALIMONY UNDER *ARMSTRONG V. ARMSTRONG*?

The lower court's assessment of alimony is clearly erroneous as the court delves

further into the realm of uncorroborated accusation to justify its award of alimony. Allegations masquerading as fact corrupt an otherwise proper recitation of the factors enumerated in *Armstrong v. Armstrong*.

The following factors are to be considered by the chancellor in arriving at a judgment for alimony: the income and expenses of the parties; health and earning capacities of the parties; needs of the party; obligations and assets of each party; length of the marriage; presence or absence of minor children in the home; age of the parties; standard of living of the parties during the marriage and at support determination; tax consequences of the spousal support order; fault or misconduct; wasteful dissipation of assets by either party; and any other factor deemed by the court to be “just and equitable.” *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993). These factor considerations are not only essential for appellate purposes, but also for trial courts, as they provide a checklist to assist in the accuracy of their rulings. *Lowrey v. Lowrey*, 25 So.3d 274, 280 (Miss. 2009). A failure to apply the law to the available facts creates error. *Id.*

In the present case, the Court’s assessment of the health and earning capacities of the parties makes further reference to the transmission of a venereal disease despite an utter absence of evidence. *Court’s Opinion* p. 12. An appellate court will not disturb a chancellor’s findings of fact, in a divorce action, if they are supported by credible evidence in the record. *Moore v. Moore*, 803 So.2d 1214 (Miss. App. 2001). In the instant case, the record is void of a single credible reference to Willie’s transmission of a venereal disease to Hazel. Again,

the first mention of a venereal disease appears in the court's judgment of divorce.

With respect to the fault or misconduct factor, the court notes that Hazel was granted a divorce on the grounds of habitual cruel and inhuman treatment. However, weighing this factor against Willie again assumes, without a shred of corroborating evidence, Willie transmitted a venereal disease to Hazel. A divorce on the ground of habitual cruel and inhuman treatment will not be granted on the uncorroborated testimony of the complainant. *Anderson v. Anderson*, 200 So.2d 726, 727 (Miss. 1941). Again, absent this allegation, the court's assessment of fault and/or misconduct rests on Willie's adulterous behavior. Willie's degree of fault is further tempered by the fact that Hazel and Willie continued to live together, as well as resume sexual relations, after Hazel discovered Willie fathered a child outside of the marriage.

Under both the dissipation of assets and catch-all factors, the lower court found that Willie wasted marital assets to indulge his adulterous affairs. Specifically, the court concluded that Willie "dissipated marital assets by taking his mistress and her children on out-of-town trips." *Court's Opinion p. 14*. To bolster this allegation, Hazel offered a series of photographs allegedly taken at the Grand Casino. The photos depict Willie, a woman, and a female child standing before a parked vehicle. The photos in no way credibly establish that Willie took his mistress and her child on out of town trips. The lower court, however, leaned heavily on the photos to corroborate Hazel's allegations and ultimately weigh the dissipation of assets factor against Willie. Further, and with respect to the 2001 Separate Maintenance

Order, the lower court heard undisputed testimony that from January 2002 through July 2006, Willie overpaid Hazel some \$44,486.21. T. 315. This fact, however, was not even a consideration in the court's analysis.

The chancellor's application of the law to the available facts reveals a clear disconnect. An inexplicable reliance on uncorroborated allegations coupled with an outright refusal to acknowledge evidence bolstering the Defendant's position shape the court's analysis. The factors enumerated in *Armstrong* should serve as legal guidelines to define an award of alimony as the relevant facts deem appropriate. While the lower court employed the necessary factors, it applied the law to unfounded allegations and misplaced conclusions.

#### CONCLUSION

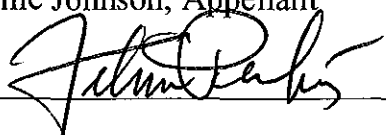
Only an extreme set of corroborated facts will sustain a divorce on the grounds of habitual cruel and inhuman treatment. Here, the chancellor made every effort to apply the elements of habitual cruel and inhuman treatment to instances of nonexistent testimony. An exhaustive reading of the record indicates an utter absence of evidence supporting the chancellor's findings. Therefore, the appellant respectfully requests this Court REVERSE the judgment of the lower court.

This 28<sup>th</sup> day of December, 2010.

Respectfully submitted,

Dr. Willie Johnson, Appellant

BY: \_\_\_\_\_

A handwritten signature in black ink, appearing to read "Felecia Perkins", written over a horizontal line.

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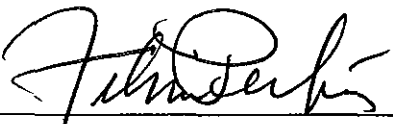
**CERTIFICATE OF SERVICE**

I, FELECIA PERKINS, do hereby certify that I have this day caused to be mailed, United States mail, postage prepaid, a true and correct copy of the above and foregoing instrument to the following counsel of record:

Sharon Patterson Thibodeaux, Esq.  
P. O. Box 5367  
Brandon, Mississippi 39047  
*Counsel for Plaintiff*

Honorable Patricia Wise  
P.O. Box 686  
Jackson, Mississippi 39205  
*Hinds County Chancellor*

This 28<sup>th</sup> day of December, 2010.

  
\_\_\_\_\_  
FELECIA PERKINS