

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00203 COA

NELLIE LOU MILLER SMITH

APPELLANT

v.

JOHN WILLIAM SMITH

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN C. ROSS JR.

COURT FROM WHICH APPEALED: MONROE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

ROBERT H. FAULKS

ATTORNEY FOR APPELLEE:

MICHAEL MALSKI

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: DENIAL OF DIVORCE AND SEPARATE MAINTENANCE

MANDATE ISSUED: 6/24/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

Nellie Smith has appealed from a judgment rendered in the Chancery Court of Monroe County on her counter-claim against her husband, John Smith. Mrs. Smith had sought a divorce on the ground of habitual cruel and inhuman treatment, or, in the alternative, a claim for separate maintenance. The

chancellor denied her any relief. We affirm.

I.

The Facts

The parties were married and resided together as husband and wife in Monroe County for approximately thirty-three years. There were no children born of the marriage; however, Mr. Smith adopted Mrs. Smith's two children from a prior marriage, and the couple also adopted a grandchild. All three children were emancipated at the time of trial.

Mr. Smith left the marital home in the summer of 1995 and filed a complaint for divorce on the ground of habitual cruel and inhuman treatment. Mrs. Smith filed her counterclaim seeking the relief mentioned above. Mr. Smith subsequently withdrew his original complaint, and the case was tried solely on Mrs. Smith's counterclaim.

Mrs. Smith presented evidence that her husband had repeatedly accused her of adulterous behavior, that he had called her a "devil worshiper," and that on at least two occasions he had used physical violence against her by pushing or hitting her. She also presented evidence that he often cursed her and had threatened to commit suicide on at least one occasion. She claimed that the combination of all of these events had so upset her that she had sought medical attention for depression.

The evidence presented by Mr. Smith indicated that the parties began to experience severe marital difficulties some months prior to their separation. According to him, the problems arose out of Mrs. Smith's involvement in a religious organization known as the Assembly of Jahvah. This organization was headed by an individual by the name of Bud Funk, and Mrs. Smith apparently began to spend a great deal of her time in the company of Funk or involved in activities related to the organization. She began to refer to Funk as a "prophet," spent time fasting, and spent extended periods in what she referred to as her "prayer closet," which was a hall closet at the marital home. Mr. Smith testified that his wife told him that she would be a "whore" if she continued to have sexual relations with him. Mr. Smith's niece testified that Mrs. Smith had made a similar statement to her. Mr. Smith admitted to cursing his wife, accusing her of adulterous activity, and calling her a "devil worshiper," but claimed that these episodes arose out of his concern over what he sensed to be his wife's unhealthy involvement with Funk and the Assembly of Jahvah. He admitted to threatening suicide on one occasion, but denied ever using violence against his wife except on occasions to protect himself and their adopted daughter from Mrs. Smith's assaults. The daughter's testimony tended to corroborate Mr. Smith's assertions regarding acts of physical violence against his wife.

It was on this conflicting evidence that the chancellor was called upon to resolve the issues before him. He determined that the proof was insufficient to establish Mrs. Smith's entitlement to a divorce. He further found that Mrs. Smith was not without fault in the separation, even though Mr. Smith was the party who physically left the marital domicile, and on that finding, concluded that Mrs. Smith was not entitled to an award of separate maintenance.

Mrs. Smith's post-trial motion to reconsider was denied, and this appeal ensued.

II.

Scope of Review

This Court has very limited authority to disturb the ruling of the chancellor in a case such as this. The chancellor is best situated to assess the credibility of the witnesses and to place the proper interpretation on facts capable of more than one reasonable interpretation. *Chamblee v. Chamblee*, 637 So. 2d 850, 860 (Miss. 1994). Because of this deference properly due to the chancellor's findings, this Court may not disturb the chancellor's ruling unless we conclude that it was clearly erroneous, manifestly wrong, or the result of applying an incorrect legal standard. *Steen v. Steen*, 641 So. 2d 1167, 1169-70 (Miss. 1994).

III.

The Denial of a Divorce

Normally, in order to be entitled to a divorce on the ground of habitual cruel and inhuman treatment, the complaining party must prove "a continuing course of conduct on the part of the offending spouse which was so unkind, unfeeling or brutal as to endanger, or put one in reasonable apprehension of danger to life, limb or health" *Steen v. Steen*, 641 So. 2d at 1170. There is an alternative basis recognized by the court for individual or isolated incidents of unnatural or infamous behavior so revolting as to make continuation of the marriage unthinkable (*see Daigle v. Daigle*, 626 So. 2d 140 (Miss. 1993)); however, this aspect of the case law on cruel and inhuman treatment has no application here.

The chancellor, in this case, evidently felt that Mr. Smith's conduct toward his wife was, to some extent, provoked by her own behavior towards him and by her apparent obstinate persistence in devoting an inordinate amount of time to activities outside the home that were clearly promoting conflict in the marriage. As in *Chamblee*, Mr. Smith's use of profanity and accusations of marital infidelity were capable of more than one interpretation, *i.e.*, as unfeeling accusations made with no basis in fact, or, alternatively, as the essentially natural, though perhaps unfortunate, reaction of one pushed past the limits of his tolerance by the conduct of the now-complaining spouse.

Based on the proof in the record, we cannot determine that the chancellor was manifestly wrong in concluding that Mrs. Smith, by her own actions, may have caused Mr. Smith to behave in ways that, in another situation, might be considered cruel and inhuman, but which, in this case, did not demonstrate that "unkind, unfeeling or brutal" behavior that would entitle her to a divorce. There is no basis upon which to disturb the chancellor's findings and we affirm the denial of divorce.

III.

Separate Maintenance

If the wife's behavior has "materially contributed to the separation," it is within the chancellor's

authority to deny her claim for separate maintenance. *Lynch v. Lynch*, 616 So. 2d 294, 296 (Miss. 1993). Based upon our review of the record, we determine that there was ample evidence to support a conclusion by the chancellor that Mrs. Smith's behavior, including her preoccupation with activities associated with Bud Funk and the Assembly of Jahvah organization, was a major contributing cause of the separation.

As we observed earlier, the chancellor was particularly well-placed to assess the conflicting evidence, weigh the relative credibility of the witnesses, and place the proper interpretation on the evidence he determined to be worthy of belief. *See Steen*, 641 So. 2d at 1169-70. Mrs. Smith's dogged determination to spend excessive time in activities relating to the Assembly despite Mr. Smith's protestations, her rather bizarre conclusions regarding the propriety of future sexual relations with her husband, and her apparent propensity for violent behavior on occasion, could properly form the basis for a finding that she materially contributed to the separation within the meaning of the *Lynch* case.

The chancellor apparently so concluded and we cannot determine this finding to be manifestly in error. On our limited scope of review, therefore, our duty is to affirm.

**THE JUDGMENT OF THE MONROE COUNTY CHANCERY COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND
SOUTHWICK, JJ., CONCUR. PAYNE, J., NOT PARTICIPATING.**