

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00920 COA

OPAL GREENE ARNOLD

APPELLANT

v.

JOHNNIE LEE ARNOLD, JR. AND CECELIA ARNOLD, IN HER OFFICIAL CAPACITY

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. FRANKLIN C. MCKENZIE, JR.

COURT FROM WHICH APPEALED: WAYNE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WILLIAM B. JACOB

ATTORNEY FOR APPELLEE:

BILLIE J. GRAHAM

NATURE OF THE CASE: DIVORCE

TRIAL COURT DISPOSITION: COURT CONCLUDED APPELLANT FAILED TO ESTABLISH SHE WAS ENTITLED TO DIVORCE ON GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT, AND DENIED REQUEST FOR SEPARATE MAINTENANCE.

MANDATE ISSUED: 6/24/97

BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

KING, J., FOR THE COURT:

Opal Greene Arnold appeals from the judgment of the Chancery Court of Wayne County denying her

a divorce on the grounds of habitual cruel and inhuman treatment from her husband, Johnnie Lee Arnold, Jr. The Appellant timely filed a notice of appeal framing her issues for appeal as:

A. The chancellor erred in not granting her a divorce on the grounds of habitual cruel and inhuman treatment and/or constructive desertion.

B. The chancellor erred in not granting her separate maintenance.

Finding no error in the chancery court's judgment, we affirm.

FACTS

Opal Greene Arnold and Johnnie Lee (Red) Arnold, Jr., were married on August 26, 1950. There were two children born to this union, both of whom are emancipated.

During the first years of the marriage, both Red and Opal worked at the Lamont factory in Waynesboro. Red was employed there until his retirement in 1992, but Opal left in 1992 to open a commercial poultry business on the couple's property. Although Opal had primary responsibility for the operation of the business, Red assisted at least two days per week.

Initially, Red and Opal combined their earnings and accumulated a home, land, and other assets. In 1977, Red withdrew the couple's funds from the joint account and opened separate bank accounts. Around this same time, the couple separated for the first time, and Opal left the marital home. Before Opal returned home, at Red's insistence, she signed a deed conveying all of her rights, title, and interests in the marital home and property to Red. Then, shortly after Opal returned home, Red executed a will leaving his entire estate to his son, who was then eleven years of age. This convinced Opal that Red was attempting to systematically exclude her from sharing in the marital assets.

The turbulence in the couple's marriage did not begin in 1977. Beginning in the 1960's and continuing through the final separation, incidents occurred sporadically between the two. Both Opal and Red cited various incidents that contributed to the breakdown of their marriage. One of the first incidents occurred when Opal informed Red that she was pregnant with their second child. According to Opal, Red became very upset and suggested that she not have the child. Red denies this allegation. Sometime after this, in 1968, Red had a brief affair with another woman that ended after Opal confronted him. Red's indiscretion did not result in a separation between the couple.

In the next few years, other incidents occurred. Opal alleged that in the late 1970's Red choked her and left her bruised for several days. A similar incident occurred when Red shoved Opal to the floor and put his foot on her face.

Opal and Red continued to have confrontations in their marriage in the 1980's, some involving violence and others involving name calling between the couple. On one occasion, when Opal was helping Red to move some sheet metal on their property, she moved the truck and almost caused Red to be hit by sheet metal. Upset with Opal, Red pulled her from the truck by her arm and left her bruised. Ultimately, Opal complains of at least fourteen different incidents of violence and mental abuse during the course of their forty-four year marriage to Red.

Red also complains of being treated with scornfulness by Opal. This scorn reached its zenith in 1992 when Red executed a durable power of attorney naming his sister Cecelia Arnold attorney in fact. The power of attorney was recorded in 1993, two months following Red's open heart surgery and eight days following surgery for a ruptured appendix. According to Red, Opal treated him with spite during his medical incapacity. Red complains that Opal refused to prepare his meals on various occasions and reluctantly provided him with physical assistance during his recovery.

Opal left the marital home in June of 1994 and filed for divorce on the grounds of habitual cruel and inhuman treatment and/or constructive desertion or, in the alternative, an award of separate maintenance. During the trial, Opal testified that she would not have left if Red had revoked the power of attorney. She also testified that she would return home if he would "change the deeds, the will, and everything that consists of [their] home."

The chancellor denied both the divorce and the request for separate maintenance. Aggrieved, Opal now appeals to this Court.

A.

THE CHANCELLOR ERRED IN NOT GRANTING OPAL GREENE ARNOLD A DIVORCE ON THE GROUNDS OF HABITUAL CRUEL AND INHUMAN TREATMENT AND/OR CONSTRUCTIVE DESERTION.

Opal contends that the chancellor erred by not granting her a divorce on the grounds of habitual cruel and inhuman treatment and/or constructive desertion. She contends that beginning in the 1970's, Red habitually and continuously assaulted the marriage, her person, self esteem, free thought and all vestiges of self worth she may have had. She further claims that Red systematically precluded her access to all marital assets, interests and income which contributed to the break down of their marriage.

This Court views the facts of a divorce decree in the light most favorable to the appellee, and may not disturb the chancery decision unless we find it manifestly wrong or unsupported by substantial evidence. *Rawson v. Buta*, 609 So. 2d 426, 429 (Miss. 1992). The Appellant in this action sought a divorce on the grounds of habitual cruel and inhuman treatment. That conduct which will justify a divorce on this ground must be a course of conduct that is severe and beyond everyday quarrels. *Gallaspy v. Gallaspy*, 459 So. 2d 283, 285 (Miss. 1984). "[A] party alleging cruel and inhuman treatment must prove systematic and continuous behavior on the part of the offending spouse that goes beyond mere incompatibility, or no divorce may be granted on such grounds." *Day v. Day*, 501 So. 2d 353, 355 (Miss. 1987).

The chancellor denied the divorce on the grounds of habitual cruel and inhuman treatment, having determined that the true controversy between Opal and Red was (1) Red's money and property, and (2) the power of attorney given his sister. Opal testified that she demanded Red revoke the power of attorney and moved out of the marital home upon his refusal. Opal further testified that if Red would place her name back on the property deeds she would resume the marital relationship. As a result of this testimony, we are inclined to agree with the chancellor's findings that Opal's desire for a divorce on grounds of habitual cruel and inhuman treatment was but a smoke screen for the true controversy-

-money and control. Although Opal opined various incidents of violence and mental abuse, the chancellor failed to find a course of conduct that was so severe, systematic, and continuous on the part of Red as to substantiate habitual cruel and inhuman treatment. The incidents related to the court seem to be of a sporadic nature. Further, the fact that Opal would return home on the contingency of a revoked power attorney and sharing of assets suggests that concern for her safety and health was not an immediate concern or priority.

Based on the evidence, the chancellor determined that Opal failed to establish an entitlement to divorce on the grounds alleged. 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. *Rainey v. Rainey*, 205 So. 2d 514, 515 (Miss. 1967). Viewing the chancellor's findings in the light most favorable to Red, we do not find any overriding evidence requiring this Court to disturb that opinion. Pursuant to the recorded testimony of Opal and Red, we do not find the chancellor's opinion manifestly wrong or unsupported by substantial evidence.

As to Opal's allegation of constructive desertion, we find that Opal left the marital home voluntarily and materially contributed to the separation. *Marble v. Marble*, 457 So. 2d 1342, 1343 (Miss. 1984).

B.

THE CHANCELLOR ERRED IN NOT GRANTING OPAL GREEN ARNOLD SEPARATE MAINTENANCE.

In the alternative, Opal asked the chancellor to grant her separate maintenance and support. A decree for separate maintenance is a judicial command to the husband to resume cohabitation with his wife or, in default, to provide maintenance until they may become reconciled. *Thompson v. Thompson*, 527 So. 2d 617, 621 (1988) (citing *Amis, Divorce and Separation in Mississippi*, 189 (1st ed. 1935)). In this state, the chancellors may permit maintenance and support in cases where the wife leaves the marital home with just cause. *Bridges v. Bridges*, 330 So. 2d 260, 262-63 (Miss. 1976). In such cases, the chancellor may determine the amount of maintenance required by the abandoned spouse. *Thompson*, 527 So. 2d at 621.

In the case at bar, the chancellor found that Opal left the marital home when Red refused to revoke the power of attorney given to his sister, Cecelia Arnold. Red did not ask Opal to leave nor did he take any action, which caused her to leave out of fear for her safety. There was no misconduct on Red's behalf; Opal left of her own accord. "While the law does not require a wife who leaves her husband to be blameless, misconduct on her part which materially contributes to the separation, so that it may be said that the fault of the wife is equal to or greater than that of the husband, or that his fault was not sufficient to justify her leaving the domicile, is a defense to her suit for separate maintenance." *King v. King*, 152 So. 2d 889, 891 (Miss. 1963).

The chancellor determined that the proof in this case was clear and convincing that Opal voluntarily separated herself from Red because of his refusal to revoke the power of attorney given to his sister. Therefore, Opal was not entitled to separate maintenance or support. This Court will reverse the chancellor only where his findings of fact are not supported by substantial credible evidence in the record. *Norris v. Norris*, 498 So. 2d 809, 814 (Miss. 1986). We find that the chancellor's findings are

supported by the record and therefore, we affirm the denial of separate maintenance and support.

**THE JUDGMENT OF THE CHANCERY COURT OF WAYNE COUNTY IS AFFIRMED.
COSTS ARE ASSESSED AGAINST THE APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING,
HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**