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SUPREME COURT OF VIRGINIA
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RECORD NO. 740064

IN THE

SUPREME COURT OF VIRGINIA

JAMES CLYDE McILWAIN, JR.

v.

SUSAN CARY ETHERIDGE McILWAIN

From The Circuit Court of The City of Roanoke

APPENDIX

Frank N. Perkinson, Jr.
115 West Kirk Avenue
Roanoke, Virginia 24002
Counsel for Appellant

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IN THE SUPREME COURT OF VIRGINIA

JAMES CLYDE McILWAIN, JR., Appellant	:	
v.	:	RECORD NO. 740064
SUSAN CARY ETHERIDGE McILWAIN, Appellee	:	

A P P E N D I X

(1) ORDER GRANTING APPEAL AND SUPERSEDEAS, May 30, 1974

Upon the petition of James Clyde McIlwain, Jr., an appeal and supersedeas is awarded him from a decree entered by the Circuit Court of the City of Roanoke on the 28th day of September, 1973, in a certain chancery cause the- therein depending, wherein Susan Cary Etheridge McIlwain was plaintiff and the petitioner was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said court below in the penalty of $6,000, with condition as the law directs.

This appeal, however, is limited to the consideration of assignments of error Nos. 1 through 6 as follows:

The trial court erred in overruling the respondent's exceptions to the commissioner in chancery's report and erred in entering a final decree of divorce in favor of the complainant for the following reasons:

1. That the commissioner allowed evidence which was entirely hearsay to be admitted as evidence for the complainant and allowed the said evidence to be influential in the decision he reached.

2. That considering only the corroborated testimony of the complainant, the most which was established was that the complainant lived un-

happily with the respondent, which is not sufficient to establish cruelty as a grounds for divorce.

3. That eliminating the hearsay evidence, the complainant's allegations of cruelty are completely uncorroborated.

4. That the only alleged incident of cruelty for which there is any corroboration is an incident which occurred before a condonation, followed by a long period of cohabitation, with no subsequent act of cruelty having been proved by corroborated evidence.

5. That the single incident upon which the commissioner bases his finding of cruelty by the respondent toward the complainant was an incident of a display of temper which was completely justified by the consistant conduct of the complainant in ignoring her duties as a wife and mother, because of her extreme neuroticism and closeness to her own mother. The evidence clearly shows that any act of cruelty that would be found to exist here was followed by condonation.

6. That when the evidence is considered as a whole, eliminating the hearsay evidence, the complainant has not established a grounds for divorce, nor has she proved any reasonable grounds for the injunction she sought and obtained against the respondent enjoining him from their place of marital abode, and therefor the complainant is guilty of desertion and/or constructive desertion of the respondent and the respondent should be granted the relief prayed for in his cross bill of complaint.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignments of error Nos. 1 through 6, and the briefs to be filed shall be limited to such discussion as is relevant to the assignments of error upon which this appeal is

awarded.

The petition for appeal is refused as to the remaining assignments of error.

(2) BILL OF COMPLAINT, RECORD PAGE 1, January 7, 1972

Your Complainant, Susan Cary Etheridge McIlwain, respectfully showeth and represents unto the Court the following:

(1) That she and the defendant, James Clyde McIlwain, Jr., are husband and wife, and were lawfully married on the 4th day of June, 1965, in Leaksville, North Carolina; and

(2) That the parties hereto are members of the White Race, and are both over the age of twenty-one years; and

(3) That both parties hereto have been actual bona fide residents of the State of Virginia for more than one year next preceding the institution of this suit, and last lived and cohabited together as man and wife in the City of Roanoke, Virginia; and

(4) That as a result of the aforesaid union one child was born, namely James Clyde McIlwain, III, age three (3) years; and

(5) That during the marriage of the parties hereto the defendant has vexed, chided, humiliated and embarrassed your complainant; that the defendant has abused and threatened your complainant on numerous and sundry occasions, and has actually struck your complainant on and about her face and body; that on Saturday, August 28, 1971, the defendant locked your complainant out of the marital abode and did jam the lock so your complainant could not gain re-entry to the marital abode with the key she possessed; that, thereafter, the parties reconciled, the complainant having then instituted suit for divorce, but the defendant did continue his abusive and threatening acts upon the complainant and is again threatening to lock your complainant out as he had done previously

as hereinabove alleged and is further threatening her with further physical and bodily harm and injury; that the culmination of all the acts aforesaid perpetrated upon your complainant by the defendant have caused your complainant to be in a constant nervous frame of mind and in fear of her own bodily safety and mental well-being; that the said acts perpetrated upon your complainant by the defendant were without justification, nor were they caused by your complainant; and that as a result of the same, the defendant is guilty of physical and mental cruelty tantamount to constructive desertion, the date of said desertion being fixed and determined as December 30, 1971.

IN CONSIDERATION WHEREOF, and forasmuch as the complainant is remediless, save and except in a court of equity, she prays that she be granted a temporary injunction, enjoining and restraining the said James Clyde McIlwain, Jr., from coming on, near or upon the property wherein your complainant and their infant child reside, that is, 2809 Tillett Road, S. W., in the City of Roanoke, Virginia; that the defendant be enjoined and restrained from threatening, abusing, molesting, assaulting, contacting, communicating or interfering with in any manner of whatsoever nature or kind, your complainant and/or their infant child; and that since an emergency exists and no harm can be done to anyone by the enforcement of this injunction, that the injunction be granted without notice to the defendant and without bond for a period of ninety (90) days from entry.

Your complainant further prays that she be awarded a divorce decree a mensa et thoro on the ground of constructive desertion, and that she be permitted to petition the Court at the proper time and place for a merger of said decree into a divorce a vinculo matrimonii created by the aforesaid marriage; that she be awarded the permanent care, custody and

control of the infant child of the parties hereto; that she be awarded temporary alimony, support and maintenance money for the said infant child, and attorney fees and costs to aid her in the prosecution and/or defense of her suit; and that she be awarded such other relief as the nature of her cause may require or to equity may deem meet.

And your complainant will ever pray, etc.

Susan Cary Etheridge McIlwain

STATE OF VIRGINIA

CITY OF ROANOKE, to-wit:

I, the undersigned, a Notary Public in and for the City and State aforesaid, do hereby certify that Susan Cary Etheridge McIlwain, the complainant, whose name is signed to the foregoing Bill of Complaint, has this day personally appeared before me and, after being duly sworn, made oath that the foregoing charges and allegations are true and correct.

GIVEN under my hand this 5th day of January, 1972.

June Via Frazier
Notary Public

My Commission Expires: November 28, 1975

(3) INJUNCTION ORDER, RECORD PAGE 6, January 7, 1972

This day came Susan Cary Etheridge McIlwain, by counsel, and presented to the Court and asked leave to file her verified bill of complaint praying for a divorce and related relief, which the court doth grant, and the said bill of complaint is ORDERED filed.

Upon the prayer of the verified bill of complaint herein that a preliminary injunction be granted the complainant, Susan Cary Etheridge McIlwain, enjoining and restraining the defendant, James Clyde McIlwain, Jr., from coming on, near or upon the property wherein the complainant and their infant child reside, that is, 2809 Tillett Road, S. W., in the City of Roanoke, Virginia; and further, that the defendant be enjlined and restrained from threatening, abusing molesting, assaulting, contacting, communicating or interfering with the complainant; and it appearing to the Court that the said complainant is entitled to the preliminary injunction prayed for, the Court doth ADJUDGE, ORDER, and DECREE that the said defendant, James Clyde McIlwain, Jr., be, and he is, hereby enjoined and restrained from coming on, near or upon the property aforesaid, and the said defendant be, and he hereby is, further enjoined and restrained from threatening, abusing molesting, assaulting, contacting, communicating or interferring with the complainant and/or their infant child in any manner of whatsoever nature or kind.

It is further ORDERED that the above injunction order shall continue for a period of ninety (90) days unless it is sooner terminated or further enlarged or extended by order of this Court, and is awarded to take effect without bond.

Let a certified copy of this order be forthwith issued and served upon the defendant herein, together with the process and copy of the bill of complaint, by the Sheriff for the City of Roanoke, Virginia, who shall make due return there of the time and manner of service.

And this cause is continued.

(4) <u>ANSWER AND CROSS BILL, RECORD PAGE 10, January 19, 1972</u>

Comes now the Defendant, JAMES CLYDE McILWAIN, JR., and for Answer to the Bill of Complaint heretofore filed against him in the above cause,

respectfully represents unto the Court as follows:-

1. THAT the allegations contained in Paragraphs 1, 2, 3 and 4 are admitted.

2. THAT the allegations contained in Paragraph 5 of the said Bill of Complaint are herein specifically denied and your Defendant calls for strict proof of the same.

WHEREFORE, the Defendant having fully answered the Bill of Complaint heretofore filed against him respectfully requests that the Bill of Complaint against him be dismissed with his reasonable costs expended herein.

CROSS-BILL

Now comes the Defendant seeking affirmative relief and files this Cross-Bill against the Complainant as follows:-

1. THAT Paragraphs 1, 2, 3 and 4 are incorporated herein by reference as if fully set forth herein.

2. THAT your Cross-Complainant will further show unto the Court that the said Cross-Defendant is subject to frequent temper tantrums without cause or justification; that the said Cross-Defendant has locked him out of the home of the parties hereto on numberous occasions; that your Cross-Complainant, by way of injunctive proces, through no fault of his own, has been denied access to his home and family, all of which is tantamount to constructive desertion.

IN CONSIDERATION WHEREOF, and FORASMUCH as your Cross-Complainant is remediless save in a Court of Equity, where such matters are properly cognizable, he prays that he be granted a divorce a mensa et thoro from the Cross-Defendant on the grounds of constructive desertion, to be merged into a decree a vinculo matrimonii at the proper time, and that your

Cross-Complainant may have all such further, general relief in the premises as the nature of his case may require or to equity shall seem meet.

And your Cross-Complainant will every pray.

(5) ANSWER TO RESPONDENT'S CROSS-BILL, RECORD PAGE 12, January 19, 1972

Comes now the complainant and in answer to a certain Cross-Bill exhibited against her answers and says:

That each and every material allegation contained in paragraph 2 of said Cross-Bill is emphatically and unequivocally denied and the complainant demands strict proof of same.

WHEREFORE, the complainant having fully answered the Cross-Bill exhibited against her prays the same be dismissed with reasonable costs in her behalf expended.

(6) DECREE SUBSTITUTING COUNSEL FOR RESPONDENT, RECORD PAGE 18, February 23 1972

Counsel of record for the Respondent in the above styled cause, pursuant to rule of Court 1:13, requesting leave of Court to withdraw as Counsel of record for the Respondent.

This day also Frank N. Perkinson, Jr., asking to substituted as Counsel of record for the Respondent, James Clyde McIlwain, Jr.

The Court does therefore order that the said Felix J. Ward is hereby granted leave to withdraw as Counsel of record for the Respondent in the above styled cause and the Court takes note that Frank N. Perkinson, Jr., will now become Counsel of Record for the Respondent.

(7) COMMISSIONER'S REPORT, RECORD PAGE 23, December 11, 1972

**** The foregoing corroborative testimony was objected to by the defendant as pure hearsay, but the Commissioner felt that the reports of these particular incidents of abuse by the complainant to the witness were sufficiently close to the alleged occurrences to have credibility as part of the res gestae and could properly be considered. Your Commissioner does not believe, however, that the testimony of the complainant of the physical abuse, rather weakly corroborated as aforesaid, would be sufficient to establish her case were it not for the following incident which was fully corroborated and which was, in fact, not denied by the defendant.

One of the sources of friction in this marriage, as above stated, was the complainant's closeness to her mother, and her frequent contact with her mother which appeared to take place on a daily basis. In the latter part of August, 1971, it appeared that the defendant arrived home and found his wife and child were not there but were visiting her mother, which had happened on other occasions. This appears to have so enraged the defendant that when the wife returned home with the child, who she testified was sick at the time, the defendant refused to allow them in the house and ordered her to return to her mother's house. After some pleading, the defendant permitted his wife to enter the house long enough to obtain some medicine for the baby, but still refused to permit them to return home, and, in effect, bannished his wife and child from the marital domicile. This act was committed by the husband in spite of pleading and remonstrance by the wife, and resulted in a separation of three weeks duration, Tr. 5, 6, 7. This incident was fully corroborated by Charlotte Ann Hanks, Tr. 51, 52, 55, 62, and in part by the testimony of Martha Hood, Tr. 66-69. The defendant, at least partially, admits this act. See Tr. 104, 105.

It is true that following this incident of being bannished from her home the complainant reconciled with the defendant, but according to her testimony, in part corroborated, his abuse and cruelty continued, and it is your Commissioner's view that the incident in August, 1971, can properly be considered as an element in a course of cruel conduct, and that it is an important factor in the complainant's case. ....

EXHIBIT A

> "I have had several conferences with Frank Vest, a minister, about the problem I have in my relations with Mama. I know that I am not a child anymore and have got to accept the responsibilities I have as a woman. This he is trying to help me to --- to make this big transition which is long overdue. I think Jim believes that I was going to run to a lawyer again, but it was only by asking for God's help, that he made me realize before I didn't want out of this marriage. I honestly want to make it a success. I am planning on calling Frank for an appointment next week. He tells me nothing different than you or Jim but having it come from an outsider you don't have to try to be so defensive. I hope you can understand because it is so hard to explain." (Complainant's Exhibit A which is filed with the Commissioner's Report rather than the Transcript)

(8) <u>EXCEPTIONS TO REPORT OF COMMISSIONER IN CHANCERY, RECORD PAGE 36, December 20, 1972</u>

COMES NOW, the Respondent, JAMES CLYDE McILWAIN, JR., by his Attorney and takes and files the following exceptions to the report of Commissioner in Chancery Allen A. Staples, to whom this case was referred by Order on July 13, 1972, which report was filed on December 11, 1972.

(1) The report is contrary to the law and evidence, and is plainly wrong and without evidence to support it.

(2) That the Commissioner allowed evidence which was entirely hearsay to be admitted as evidence for the Complainant and allowed said evidence to be influential in the decision he reached.

(3) That considering only the corroborated testimony of the Complainant, the most that was established was that the Complainant lived unhappily with the Respondent which is not sufficient to establish cruelty for a grounds of divorce.

(4) That eliminating the hearsay evidence the Complainant's allegations of cruelty are completely uncorroborated.

(5) That the only incident of alleged cruelty upon which there is any amount of corroboration is an incident of alleged cruelty which took place before a condonation by a long period of cohabitation with no subsequent act of cruelty which has been proven by corroborated evidence.

(6) That the single incident upon which the Commissioner bases his finding of cruelty by the Respondent toward the Complainant was an incident of a display of temper which was completely justified by the consistant conduct of the Complainant in ignoring her wife's mother's duties because of her extrmeme and closeness to her mother and the evidence clearly shows that any act of cruelty that would be found to exist here was followed by condonation.

(7) That when the evidence is considered as a whole, eliminating the hearsay evidence, the Complainant has not established a grounds for divorce, nor has she proved any reasonable grounds for the injunction she sought and obtained against the Respondent enjoining him from their place of marital abode, and therefore the Complainant is guilty of desertion and/or constructive desertion of the Respondent, and the Respondent should be granted the relief prayed for in his Cross Bill of Complaint.

(9) REPLY TO RESPONDENT'S EXCEPTIONS TO COMMISSIONER'S REPORT, RECORD PAGE 39, January 29, 1973

Comes now the Complainant, by Counsel, and for her reply to respondent's exceptions to the Commissioner's Report heretofore filed states:

That the findings and recommendations made by the Commissioner and set forth in his report are clearly supported by the evidence adduced ore tenus.

WHEREFORE, the Complainant prays that the report of the Commissioner, with its findings and recommendations, be approved and confirmed by this Court.

(10) OPINION LETTER, RECORD PAGE 40, September 6, 1973

***** the Court is of the opinion that the Commissioner's report is correct, should be confirmed, and that a divorce should be granted to the complainant on the grounds of cruelty, tantamount to constructive desertion, as prayed for in the bill of complaint.

While it is quite true that the situation in the instant case somewhat approaches the Supreme Court's decision in Johnson vs. Johnson, 213 Virginia 204, (1972), nevertheless, the corroboration of the complainant of the cruelty of the respondent was shown by prior acts, which, although apparently were condoned, could be considered when subsequent acts of cruelty were alleged to have been committed. It is true, as pointed out in the Commissioner's report, the e prior acts were corroborated, and the evidence objected to in the instant case was an exception to the hearsay rule as part of the res gestae. These points have been ably presented by counsel in their briefs.

In addition, see page 92, Divorce and Alimony, Phelps, Second

Edition, wherein it is stated:

> "Where cruelty is the ground for divorce the Virginia courts hold that earlier acts of cruelty which have been condoned cannot constitute the sole basis of the suit. However, according to a recent case '. . . cruelty is cumulative, admitting of degrees and augmented by additions, so that it may be condoned and even forgiven for a time and up to a certain point, without any bar to bringing it all forward when a continuance of it has rendered it no longer condonable'."

Accordingly, a decree may be prepared overruling the exceptions to the Commissioner's report, and, on the basis of the Commissioner's report and the evidence considered by the Court, awarding the complainant a divorce on the grounds of cruelty, tantamount to constructive desertion, and continuing the injunction and payments as directed in the decree of February 3, 1972. Mr. Lutins should prepare the decree and present it to Mr. Perkinson, and, if a conference is desired concerning the decree, one will be granted upon request.

(11) <u>FINAL DECREE, RECORD PAGE 42, September 28, 1973</u>

.....UPON CONSIDERATION WHEREOF, the Court having read and considered the written report of the Commissioner with his findings and recommendations, and having read and considered the evidence taken before said Commissioner, and having carefully considered the exceptions of the respondent to the said report, as well as having reviewed all of the proceedings in this cause prior to the present proceedings, and having heard oral argument by both parties, and in conformity with the Court's written opinion doth deny the respondent's exceptions, and doth hereby ratify and confirm said Commissioner's report and, accordingly, doth ADJUDGE, ORDER and DECREE that the respondent's cross-bill be, and the same hereby is, dismissed and the complainant be, and she herein is,

awarded an absolute divorce from the respondent from the bonds of matrimony on the grounds of mental and physical cruelty tantamount to constructive desertion occurring on January 7, 1972, and that the bond of matrimony created by the marriage between the parties be, and the same is hereby dissolved.

(12) NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR, RECORD PAGE 46, October 24, 1973

..... The Trial Court erred in overruling the Respondent's exceptions to the Commissioner in Chancery's report and erred in entering a Final Decree of Divorce in favor of the Complainant for the following reasons:

1. That the Commissioner allowed evidence which was entirely hearsay to be admitted as evidence for the Complainant and allowed said evidence to be influential in the decision he reached.

2. That considering only the corroborated testimony of the Complainant, the most which was established was that the Complainant lived unhappily with the Respondent, which is not sufficient to establish cruelty as a grounds for divorce.

3. That eliminating the hearsay evidence, the Complainant's allegations of cruelty are completely uncorroborated.

4. That the only alleged incident of cruelty for which there is any corroboration is an incident which occured before a condonation, followed by a long period of cohabitation, with no subsequent act of cruelty having been proved by corroborated evidence.

5. That the single incident upon which the Commissioner bases his finding of cruelty by the Respondent toward the Complainant was an incident of a display of temper which was completely justified by the

consistant conduct of the Complainant in ignoring her duties as a wife and mother, because of her extreme neuroticism and closeness to her own mother. The evidence clearly shows that any act of cruelty that would be found to exist here was followed by condonation.

6. That when the evidence is considered as a whole, eliminating the hearsay evidence, the Complainant has not established a grounds for divorce, nor has she proved any reasonable grounds for the injunction she sought and obtained against the Respondent enjoining him from their place of marital abode, and therefore the Complainant is guilty of desertion and/or constructive desertion of the Respondent and the Respondent should be granted the relief prayed for in his Cross Bill of Complaint. .....

(13) TRANSCRIPT

(All portions of transcript included in the Appendix occured during the Commissioner in Chancery hearing on September 6, 1972, and the transcript page numbers appear in the top right hand corner of the testimony.)

1 SUSAN E. McILWAIN,

2 Complainant, who after being first duly sworn,

3 deposed as follows:

4 DIRECT EXAMINATION

5 BY MR. LUTINS:

6 Q. State your full name.

7 A. Susan Cary Etheridge McIlwain.

8 Q. To whom are you married?

9 A. James Clyde McIlwain, Jr.

10 Q. He is the respondent in this suit, is

11 he not?

12 A. Yes, sir.

13 Q. When did you all get married, Susan?

14 A. June 4, 1965.

15 Q. Where did you obtain your license to

16 marry?

17 A. Leaksville, North Carolina.

18 Q. Are both you and your husband mem-

19 bers of the white race and over the age of 21 years?

20 A. Yes, sir.

21 Q. Have you both been actual bona fide

22 residents of the State of Virginia for more than one

23 year prior to instituting this divorce suit against

24 your husband?

A. Yes, sir.

Q. Where did you last live together as man and wife?

A. 2809 Tillett Road, S. W.

Q. In what City or County is that located?

A. Roanoke City and County.

THE COMMISSIONER: Wait a minute. You said both.

MR. LUTINS: What did you say?

A. Well, Roanoke City.

MR. LUTINS:

Q. Roanoke City. Susan, do you all have any children?

A. Yes, sir. One.

Q. All right. Would you state to the Commissioner his name and age.

A. He is James Clyde McIlwain, III. He is three years old.

Q. Susan, who is James Clyde McIlwain, III, presently residing with?

A. He is residing with me.

Q. Now, Susan, you have made several allegations ---

THE COMMISSIONER: How old is this

1 child?

2 MR. LUTINS: Three years.

3 Q. You have made several allegations in

4 your Bill of Complaint pertaining to treatment that

5 was perpetrated upon you by your husband which upon

6 your allegationswas the cause of the separation and

7 your ultimate suit for divorce.

8 Now, can youbriefly tell the Commissioner

9 the facts and circumstances surrounding your separa-

10 tion which you have alleged to be December 30, 1971.

11 A. I have been hit at least 23 times that

12 I know of. I have been slapped in the face. I have

13 been pushed to the floor. I have been kicked in the

14 side or something like that. The first time was

15 about two months after we were married. It has

16 continued the whole time.

17 I have been hit at least 10 times within

18 the last year prior to the time that we were locked

19 out. We were locked out in August for three weeks.

20 Q. August of what year?

21 A. 1971.

22 THE COMMISSIONER: Who is "we?"

23 A. My young son and I, who I might say

24 at the time had the flu.

1 MR. LUTINS:

2 Q. Now, do you know when in August?

3 A. August -- I think about August 28 on

4 a Saturday night. He had the flu. I asked for his

5 medicine. He would not let me go back in and get it.

6 I called him from the neighbors and asked him if he

7 would put it outside which he would not do.

8 Q. Now, you said that you had been struck

9 and beaten by your husband on numerous occasions ---

10 A. Right.

11 Q. Commencing about ten months after you

12 were married.

13 A. It started about two months after we

14 were married, the first time it ever happened.

15 Q. Right. And it culminated according to

16 your testimony December 30, 1971, by virtue of your

17 action by instituting a suit.

18 You say you were locked out August 28,

19 1971 ---

20 A. Right.

21 Q. By your husband.

22 A. Right.

23 Q. You testified that your son had the flu

24 at that time.

1 A. Yes, sir. He certainly did.

2 Q. Did you cause or justify your husband

3 in doing this particular act or any of these abusive

4 acts to you?

5 A. No, sir. Not to the degree that --

6 all right -- this time I was late getting home. It

7 was about 6:30 when I got home. And he was real

8 angry over that. Most of the time I did not have to

9 do anything. He could come home from work. He

10 could just be in a bad mood, and the least little

11 thing would set him off.

12 Q. Now, Susan, you all didn't separate

13 actually until December 30, 1971, and you have re-

14 lated to the Commissioner an incident happening

15 August 28, 1971. Would you tell the Commissioner

16 what transpired between the two of you from August

17 of '71 to December of '71.

18 A. We had a reconciliation about three

19 weeks after I was locked out. Within about three

20 months, all right, we separated about the 8th of

21 January the second time.

22 He hit me three times then and again last

23 July after we were legally separated.

24 Q. Well, now, between August '71 and

1 December of '71 ---

2 A. Right. He hit me three times in that

3 time.

4 Q. Did you at that time cause or justify

5 that treatment?

6 A. No, sir.

7 Q. What effect, if any, did this treatment

8 have on you mentally initially?

9 A. It made me very upset. I got quite

10 nervous. I got a rash on my face which I went to the

11 doctor about.

12 Q. All right. Now, that's the physical

13 results. Of course, mentally you said it made you

14 very nervous.

15 A. Right.

16 Q. Did you lose any weight or have any

17 further impairment of your physical well being?

18 A. Yes, sir. I started losing weight

19 then.

20 Q. You did?

21 A. Yes, sir.

22 Q. Do you know approximately how much

23 weight you lost during that period of August to

24 December of '71?

A. At least 10 pounds.

Q. Now, on December 30, 1971, you obtained an injunction against your husband.

A. Right.

Q. Can you tell the Commissioner what took place immediately prior to December 30, 1971, with reference to any physical abuse, any threats.

A. Right. Do you want to know about the last time that we were living together?

Q. Well, right before December 30, 1971.

A. Oh! OK. In November we had a very bad argument. He informed my Mother that she was not to come to my house for any reason.

Q. Now, did your husband say this in your presence to your Mother?

A. He wrote a letter to my Mother which I have.

Q. Did you see your husband write this letter?

A. No, sir. He got quite angry and went upstairs. He wrote the letter. He closed both checking accounts. He told me, like I said, that she was not to come into our house for any reason.

His Mother was there at the time. She got

1 real upset, and she was getting ready to leave, and I
2 wrote her a letter that night because she had already
3 gone to bed.
4 For a long time I was in a state of shock.
5 I didn't know what I was going to do. But anyway, his
6 Mother was getting ready to leave, and I didn't see
7 any point in breaking up, you know, his because he
8 had written my Mother that kind of letter, I wrote his
9 Mother a letter and told her that I hoped she stayed
10 with us and that we could work things out.
11 Q. And this, you say, was shortly prior
12 to December 30, 1971?
13 A. Right.
14 Q. Now, what threats, if any, did your
15 husband make to you at that time, or what action did
16 he engage in with reference to injuries toward you
17 or abuse toward you?
18 A. I believe it was the next day that --
19 he didn't do anything to me that night. He just sort
20 of ---
21 Q. Which night are you talking about?
22 A. This was Thanksgiving night of last
23 year. He just started yelling at me. And I was so
24 upset that I went over to my next door neighbor's

1 that night. I just -- I had to get away. I had to talk
2 to somebody.
3 Q. You made a complaint to that neighbor?
4 A. I was in a state of shock. Right. I
5 was very upset.
6 And then he hit me again on January 5th
7 which was only a couple of days before we separated
8 which was the night of Jay's birthday.
9 Q. That was a couple of nights you said
10 before you separated?
11 A. Before -- yeah.
12 Q. Now, we have alleged in the Bill of
13 Complaint December 30, 1971, as the date of physical
14 separation. Is that incorrect?
15 A. No, sir. We were legally separated
16 on -- I think he got the papers on the 8th of
17 January, on a Saturday morning, and we had a fight
18 on the 5th of January.
19 Q. Well, my point is that we get our
20 dates -- you said that desertion was -- we asked that
21 it be fixed and determined as of December 30, 1971.
22 Of course, that is the date that you actually asked
23 that he be enjoined.
24 A. Right. Right. But we were still

1 together on the eight days after that before, you know,
2 he got any legal papers.
3 Q. Well, when did you actually physically
4 separate from one another?
5 A. On -- I guess you would say on the
6 7th of January.
7 Q. All right. So, you wish to amend that
8 pleading to reflect January 7, 1972.
9 A. Right.
10 Q. And you said immediately before that
11 time -- that is, around the 5th of January, 1972 --
12 A. It was on the 5th of January.
13 Q. Your husband did what?
14 A. He -- my young son had gotten a
15 motorcycle for Christmas, I mean for his birthday --
16 a toy motorcycle, a real small one, you know, a
17 riding one. And he was riding that, and James said
18 that he was not to ride it and asked him to leave him
19 alone. Since it was his birthday that I was to take
20 it out of the house tomorrow and with that he pushed
21 me down, and he hit me. And then he got real mad
22 at me -- and, oh! and then he came back up, and I
23 said, Please leave him alone." And he said that if
24 I interfered again he was going to break every toy up

that the child had. And with that it was only about a few minutes later that he left the house. And I went over to Charlotte's. Charlotte Hanks is our next door neighbor.

Q. She is available to testify?

A. Right. Yes, sir.

Q. How would you characterize your marriage -- tumultuous or calm or how?

A. Tumultuous. It was -- I was upset the whole time because Jim has a real bad temper. The least little thing, you know, he would yell and scream over. All the neighbors or my immediate neighbors have all heard him yelling at me. It's been something! Well, the least little thing, you know ---

Q. Would you describe your husband physically. Is he a small man, a large one?

A. No, sir. He's about six feet tall. He's very large. And he slapped me at breakfast so hard that it's knocked the chair over backwards.

Q. When did that occur?

A. That occurred I would say about June a year ago.

Q. All right. Now, ---

A. And I have a neighbor that can testify -- not a neighbor, a girl friend who can testify to that.

Q. Now, you testified that the child has been residing with you. Do you desire that you be awarded the permanent care and custody and control of the infant child?

A. Yes, sir.

Q. Further, Mrs. McIlwain, you will recall that you introduced as an exhibit, the cost and expenses to you to maintain a home for you and your child which exhibit was filed with the court on January 27, 1972.

I show you this exhibit and, of course, you can identify it?

A. Yes, sir. I certainly can.

Q. It shows $417.50, the cost to you on a monthly basis. My question to you, Mrs. McIlwain, is have your expenses increased or decreased or remained the same since January 27?

A. They have increased some, not a great deal.

Q. All right. Are you working?

A. No, sir. I am not.

Q. And you were not working, I believe,

1 at the time of the hearing, January 27, 1972.

2 A. No, sir. I was not.

3 Q. Do you ask that the court make per-

4 manent its former award entered February 3, 1972,

5 of temporary alimony and temporary support and

6 maintenance money totalling $300.00 per month?

7 A. Yes, sir, I do.

8 MR. PERKINSON: Your honor, I don't

9 think it relevant what the court awarded on a tempo-

10 rary support hearing because they didn't go into the

11 merits at all of the case then.

12 A. I might add ---

13 THE COMMISSIONER: Well, he just asked

14 her if that's what she felt that she could get by on.

15 MR. LUTINS:

16 Q. Do you further wish that the court

17 award you a divorce upon the grounds of physical

18 and mental cruelty tantamount to construction

19 desertion, the date of desertion now being fixed as

20 of January 7, 1972.

21 A. Yes, sir. Can I go back to some-

22 thing?

23 Q. All right. What is it you wish to state?

24 A. I also would like to add the fact

that I have been dragged out of bed from a sound sleep feet first.

Q. What?

A. I have been dragged out of bed -- you know -- he would come --- he was working at night ---

Q. From a sound sleep?

A. From a sound sleep. He would come in, and he couldn't find something like that, and he would drag me out of bed feet first to find something. You know, you would hit your head.

Q. And to whom are you referring when you say "he?"

A. Jim, my husband, Mr. McIlwain.

Q. Mrs. McIlwain, do you further request that the injunction formerly issued continue and remain in full force and effect?

A. Yes, sir.

Q. Why do you request that?

A. Because the injunction was in effect at our home on Tillett Road, and I was advised by Judge Hoback when Jim got visiting privileges to take the child over to my Mother's, you know, since he could not come to our house. I was over there last July when Jim got mad, and I was knocked down

then, and this was after we were legally separated. And I would like to have some form of protection.

MR. LUTINS: Your witness.

THE COMMISSIONER: Is that injunction still in effect?

MR. LUTINS: The order says it is to remain in full force and effect. However, Mr. McIlwain is permitted reasonable rights of visitation.

THE COMMISSIONER: Usually these injunctions have a limit set upon them.

MR. LUTINS: 90 days unless extended.

CROSS EXAMINATION

BY MR. PERKINSON:

Q. Mrs. McIlwain, the fact is that you didn't sign the affidavit for the divorce until January 5, 1972.

A. No, sir. I signed that prior to that, but that's when they were served, and I was advised, you know, to stay with him until they were served.

Q. Mrs. McIlwain, a notary public seems to indicate that you signed that on January 5, 1972. Is that incorrect?

A. Well, I am not exactly sure of the date. It was entered in December when I went to see Mr. Lutins. We signed up the papers, and it was

1 after New Year's Eve. I mean, you know, New Year's
2 day, that I signed the papers.
3 Q. Well, then, let me ask you this. Your
4 attorney says that you alleged you all separated on
5 December 30th?
6 A. No, sir. He was served -- it was about
7 the 1st or 2nd -- it was around the 7th or the 8th of
8 January, the day he was served his eviction papers.
9 And we were together to the day prior to that.
10 Q. All right. Then you were living there
11 in the same house until he was served with the papers?
12 A. Right because that was my understanding.
13 Q. Right. And yet you had already been to
14 the lawyer saying that you were afraid for your safety?
15 A. Yes, sir. Yes, sir.
16 Q. But you continued to live there from the
17 30th up until he was finally served with the papers?
18 A. Right. And I was scared the whole
19 time. I was ---
20 Q. Now, how ---
21 A. Afraid that ---
22 Q. When ---
23 MR. LUTINS: Let her explain.
24 A. I was afraid that he was going to find
out I was filing for those divorce papers, and I was
afraid that he would get real violent if he did find out.

1 MR. PERKINSON:

2 Q. So, you were afraid of the anger of

3 the serving of those papers might create on his part?

4 A. Yes, sir. And I would not have been

5 there when he got them.

6 Q. So, then, your plan was to move out,

7 to be away, when he got the papers?

8 A. Yes, sir.

9 Q. But up until that time you continued to

10 live there, trying to guess when the papers would be

11 served?

12 A. Yes, sir.

13 Q. Now, when was it that you decided --

14 how long ago was it that you decided Jim should live

15 in another bedroom other than yours?

16 A. I did not decide that. Jim decided

17 that himself. He moved out on the side porch, and

18 then he moved into the back bedroom.

19 Q. You don't recall the suggestion that

20 you all get a king-size bed because you said the bed

21 was too small, the one that you all had?

22 A. No, sir. He said that.

23 Q. And you had nothing to do with him

24 moving to the second floor of the house?

1 A. Yes. I would say that that was his
2 hobby. He went in with a friend of his.
3 Q. And he would go over there at night
4 and do all the bookkeeping, etc., in connection with
5 this business.
6 A. Yes, sir.
7 Q. I believe it was known as Todwin's?
8 A. Yes, sir.
9 Q. And they sold what -- sewing machines
10 and ?
11 A. Fabric.
12 Q. Now was this a -- the fact that he was
13 holding down two jobs -- was this a source of
14 irritation to you?
15 A. No, sir, except for the fact that he
16 was never at home.
17 Q. Never at home?
18 A. No, sir. He spent so much time
19 away from home.
20 Q. Would he normally come home for the
21 evening meal from Green Hill ---
22 A. Yes, sir.
23 Q. And then go back to the other job over
24 at Todwin's?

A. Yes, sir.

Q. And work over there?

A. Yes, sir.

Q. Now, at the time of this hearing for temporary support, was that just shortly after he had sold his interest in this other business?

A. I had heard that it was either, I guess sometime early in January, that he had decided to sell out his interest in Todwin's. Yes, sir.

Q. Well, wasn't that a factor in the court in setting up this tremendous amount of alimony and child support?

A. No, sir.

Q. Well, let me ask you this, then. Did that come out in the hearing for temporary support and alimony?

A. That he had -- was selling out his interest in Todwin's. Yes, sir.

Q. And did not the amount of money being somewhere in the neighborhood of $6000.00 come out in the temporary hearing?

A. Yes, sir.

Q. Now, you are roughly aware of what your husband's take-home pay is, aren't you?

1 Q. Now, you want him to continue to pay
2 the Blue Cross on you and your son?
3 A. No, sir. He may drop that. I would
4 prefer not to have to have any connection with him
5 in that respect. I'll carry Blue Cross on my own.
6 Q. How long did you work after you all
7 purchased the home?
8 A. I worked until about September 5,
9 1969, when Jay was born.
10 Q. When did you all buy the house?
11 A. We rented that house -- it was in
12 March -- '68 maybe. I'm just guessing now because
13 like I said, we lived there since June and some-
14 where in between we bought it.
15 I might add that I worked for three and
16 one-half years. I turned over my entire salary to
17 Jim.
18 Q. Well, let me ask you -- was your
19 relationship with your Mother a source of trouble,
20 or was it a source of irritation to Mr. McIlwain?
21 A. My. McIlwain was very jealous of my
22 family. He did not have a great deal of contact with
23 his own family other than his Mother because he and
24 his brother did not get along. He resented the fact

1 that I got along with my Mother. Yes, I did go up
2 to see my Mother, but it was mainly to get away into
3 a peaceful environment. There was so much tension
4 at home. I hated to be home. I hate to say it.
5 Q. Well, now, wasn't it a source of
6 irritation to the point that very often when he would
7 come home for dinner in between the two jobs that
8 you would be gone over at your Mother's?
9 A. No, sir.
10 Q. Was it a regular practice by you and
11 your Mother to join each other for cocktails every
12 evening or early afternoon?
13 A. Yes, we did that for a while.
14 Q. Well, how for a while -- like a year?
15 A. All right. Maybe for a year. She
16 would leave when he came home. I could not see how
17 it bothered him.
18 Q. Well, now, wouldn't bt be very often
19 that you would go over there instead of your Mother
20 coming over to your place?
21 A. I went over there some when he forbid
22 my Mother to come to my house for any reason.
23 Q. Did you yourself consider that your
24 relationship with your Mother was somewhat unusual

and strange?

A. No, sir, I did not. Had I had ---

Q. Let me ask you, is this your handwriting?

MR. LUTINS: Wait a moment. Let her finish -- had I what?

A. I was just going to say -- had I had -- I'm not real sure what I was going to say -- a normal environment in which to live, I would not have spent that much time with my Mother. And that is what I was explaining. Would you like to see the letter that he wrote my Mother, and I just wrote that in response to her. She was very upset. I did not see any point in him breaking up a relationship with his Mother. I wanted -- I tried to make her feel better. She is very sensitive.

MR. PERKINSON:

Q. Do you mind just answering the question -- is all this in your handwriting?

A. Yes, sir, that's my handwriting.

Q. All right.

A. But she has got to remember that I was in a state of shock that night. I never should have written it that night anyway.

Q. And does this say "I had several

1 conferences with Frank Vest, our minister ---

2 A. Yes, sir.

3 Q. "About the problem I have in my relations

4 with Mama. I know that I am not a child any more and

5 have got to accept the responsibilities I have as a

6 woman." Now ---

7 THE COMMISSIONER: What is this docu-

8 ment you are reading?

9 MR. PERKINSON: All right. You tell him.

10 A. It is a letter that I wrote about 1:30

11 or 2:00 o'clock in the morning after a very shocking

12 evening.

13 THE COMMISSIONER: A letter to who?

14 A. To Jim's Mother. And if he wants,

15 I will present the letter that he wrote to my Mother.

16 At least I did not tell his Mother that she was not

17 welcomed in our household, and I did not want him to

18 have -- her to have any contacts with him. This

19 is what he brought up.

20 MR. PERKINSON: I would like you to

21 look at it. I would like to introduce it.

22 (Mr. Lutins and the Commissioner read

23 letter given them by Mr. Perkinson.)

24 THE COMMISSIONER: Letter from

1 Complainant to husband's mother dated November 25,
2 1971, admitted in evidence as Respondent's Exhibit A.
3 MR. LUTINS: I might impose an objection
4 to the introduction of this exhibit. I don't see the
5 relevancy as it pertains to the allegations that the
6 Complainant has made in her testimony.
7 THE COMMISSIONER: I think it is pertinent
8 enough to be admissible. How much weight it has, I
9 just can't say.
10 MR. PERKINSON
11 Q. Now, would you tell us -- was your
12 relationship with your Mother a source of constant
13 irritation to the marriage?
14 A. As far as Mr. McIlwain went, my re-
15 lationship with my Mother, my relationship with my
16 whole family, my relationship with every friend was
17 a constant source of irritation to him. He did not like
18 for me to have girl friends over even after he started
19 working at Todwin's. He got really disgusted if any-
20 body came over to see me. I have a girl friend who
21 is with me today. She would come over sometimes on
22 Friday evenings. Jim would get so disgusted when
23 I told him that she was coming over. He wasn't
24 even there. It should not have bothered him.

1 Q. Well, letme ask you this. Would very
2 often Mr. McIlwain complaim because when he would
3 come home for his evening meal in between his two
4 jobs, you weren't there -- that you were over at your
5 Mother's?
6 A. I was sometimes. Yes, sir. But Mr.
7 McIlwain complained about everything.
8 Q. I'm not asking what ---
9 MR. LUTINS: She answered.
10 MR. PERKINSON: She answered vaguely.
11 A. He never did like my Mother. And that
12 is why you keep bringing my Mother up because that's
13 all he could ever talk about.
14 MR. PERKINSON:
15 Q. I'm justasking you, did this -- was
16 this a source of irritation to him? It would ob-
17 viously irritate him when you so often were over at
18 your Mother's as opposed to being home when he came
19 home for the evening meal between his jobs.
20 A. All right. But that -- he never hit
21 me over me being over at my Mother's.
22 Q. Was anyone ever present when Mr.
23 McIlwain allegedly beat you this way?
24 A. No, sir, with the exception of last

A. When I was over there -- ah -- I went over there right much the December before we separated in the afternoons.

Q. Did you ever get up and fix his breakfast before he went to work?

A. Yes, sir. I certainly did.

Q. Very often?

A. Yes, sir. Maybe I didn't maybe once or twice a month. The rest of the time his breakfast was on the table in the morning.

MR. PERKINSON: That's all the questions I have.

RE-DIRECT EXAMINATION

BY MR. LUTINS:

Q. Mrs. McIlwain, did your Mother cause your husband to abuse you?

A. No, sir, she did not.

Q. Did your Mother cause your husband to threaten you?

A. No, sir.

Q. Did she cause him to be indifferent to your friends and acquaintances?

A. No, sir, she did not.

1 Q. Did she cause the breaking up of this
2 marriage?
3 A. No, sir.
4 Q. Who caused it?
5 A. This was caused by Mr. McIlwain him-
6 self. The only fault that my Mother had was to re-
7 ceive me when I went over there, and I would be
8 real upset.
9 Q. All right. Incidentally, the exhibit
10 that has been introduced as Respondent's Exhibit 1 --
11 THE COMMISSIONER: Exhibit A.
12 MR. LUTINS:
13 Q. Exhibit A you say was written when
14 you were in shock and upset.
15 A. Yes, sir. And very early in the
16 morning.
17 Q. Right. And the exhibit speaks for
18 itself. What caused this shock or upsetness that
19 you were experiencing at 2:00 o'clock in the morning
20 while writing this letter or immediately prior to
21 writing this letter?
22 A. Well, the letter that Jim wrote to my
23 Mother on Thanksgiving night. He closed, like I said,
24 he closed both the checking and savings accounts and --

1 oh -- I don't -- everything just sort of went sky
2 high all of a sudden. I was -- I was just in a state
3 of shock. Like I said, I should not have written
4 that letter to her, but I knew she was leaving in the
5 morning. She had gone to bed. There was not time
6 to talk with her to ask her to stay, so I wrote her
7 that letter just trying to make her feel better.
8 Q. Lastly, you have been asked questions
9 on cross examination pertaining to the previous
10 award of the court of $300.00 plus other payments
11 that the court has set out in its decree. Do you
12 need this award, the amount stated, to maintain
13 yourself and child?
14 A. Yes, sir, I do. Yes, sir.
15 MR. LUTINS: I have no further questions.
16
17 RE-CROSS EXAMINATION
18 BY MR. PERKINSON:
19 Q. Did Mr. McIlwain suggest that you all
20 start attending church in an effort to resolve some
21 of the problems in the marriage?
22 A. Mr. McIlwain would suggest about
23 2:00 or 2:30 Saturday morning that perhaps we go to
24 church the next day. If he had asked me earlier or

1 possible, I would like to stay with Jay until he is
2 school age. That is a personal thing in that my
3 Father died very early, and Mother had to leave us.
4 And I know what it's like, you know, not to have your
5 Mother at home. I feel like he would be better off
6 if I could be at home with him.
7 THE COMMISSIONER: All right.
8
9
10 RE-RE-DIRECT EXAMINATION
11 BY MR. LUTINS:
12 Q. With paying a baby sitter, would you
13 actually realize any substantial amount of money
14 from employment if you abandoned your child or
15 left him with ---
16 A. No, sir. Honestly, I don't think ---
17 I think I would just break even, paying a baby sitter,
18 you know. and getting to work and all that. I mean
19 it's not a very high paying job.
20 MR. LUTINS: All right.
21 Now, may we have just a short break?
22 MR. PERKINSON: Can I just before we
23 do that ask her one, in fact, two questions?
24

1 RE-RE-CROSS EXAMINATION

2 BY MR. PERKINSON:

3 Q. What was your attitude with regard

4 to keeping the home and doing housework?

5 A. I cleaned up every week. I took

6 care -- I was the one that worked outside, too. I

7 did all the yard work. I take that back. Jim cut

8 the grass about three times a year. I was the one

9 that clipped bushes; I shoveled the snow and all that.

10 Did any weeding or anything like that, any gardening,

11 you know, flower gardening that was done.

12 Q. Didn't you have a pretty strong atti-

13 tude in women's liberation and things relating to

14 your duties?

15 A. No, sir. No, sir.

16 Q. Do you recall -- do you recall getting

17 a statue ---

18 A. Oh, that was a joke! You shouldn't

19 bring that up even.

20 MR. LUTINS: Let him finish his question.

21 MR. PERKINSON:

22 Q. All right. Did you get a statue which

23 made fun of housework? Did someone give you one?

24 A. Yes, sir.

Q. And as a result of that, did you go out and buy a larger one?

A. No, sir.

Q. You didn't get a larger one?

A. No. We only have that one, and Marty gave that to me as a joke. I didn't ask her. She just said she saw it and thought it was cute.

THE COMMISSIONER: What statue?

A. You know, one of those ---

(Mr. Perkinson pulls out small white statue of funny man.)

THE COMMISSIONER: Well, I don't want to see it now. You are probably going to keep it available.

MR. PERKINSON:

Q. Is this the type statue?

A. Yeah. Sure.

Q. And it says under it, it says "To hell with housework."

A. Mr. Perkinson, that's not fair. Now, I didn't buy that. That was just given to me.

Q. Did you go out though and buy a larger one after this ---

A. No, sir. I haven't but one on my

1 whole house, sir, and I will show you. Excuse me
2 for getting upset. But Marty just gave that to me.
3 I mean it was just a remembrance. Just a little
4 Christmas present as sort of a joke.
5 Q. Is Marty, Marty Hood?
6 A. Yes, sir. She is here today, and she
7 can explain that.
8 Q. She had quite an influence on your
9 married life, didn't she?
10 A. Marty came back into my life. We
11 have been friends since elementary school. I have
12 always talked with Marty about my problems, yes.
13 Q. Did you discuss your marriage, etc.?
14 A. Yes, sir, I did.
15 Q. I believe she's a single girl.
16 A. Yes, sir. She's engaged.
17 Q. She has never been married?
18 A. No, sir.
19 Q. Never had any children in other
20 words?
21 A. No, sir.
22 MR. PERKINSON: That's all I have.
23
24

1 RE-RE-RE-DIRECT EXAMINATION

2 BY MR. LUTINS:

3 Q. Did Marty Hood cause your husband

4 to treat you the way he did?

5 A. No, sir. She had nothing to do with

6 that.

7 Q. Did she in any wise affect the relation-

8 ship or the structure of your marriage?

9 A. No, sir. Mr. Lutins, when you've

10 got problems, you can't keep them bottled up. I think

11 you would really crack up. I talked to Marty, and I

12 talked to Charlotte about my problems. That's true.

13 And they mainly just listened to me. They didn't

14 advise me.

15 MR. LUTINS: I have no further questions.

16 I assume Mr. Perkinson doesn't either.

17 MR. PERKINSON: No, I don't.

18 And further this deponent saith not.

19 SUSAN E. McILWAIN

20

21 By _____
COMMISSIONER IN CHANCERY

22 - - - - - - - -

23

24

1 CHARLOTTE ANN HANKS,

2 a witness called on behalf of the Complainant, who

3 after being first duly sworn, deposed as follows:

4 DIRECT EXAMINATION

5 BY MR. LUTINS:

6 Q. State your full name.

7 A. Charlotte Ann Hanks.

8 Q. Where do you reside, Mrss Hanks?

9 A. 2813 Tillett Road, S. W.

10 THE COMMISSIONER: Is that Mrs.?

11 A. Yes.

12 MR. LUTINS:

13 Q. I'm sorry. What was that address

14 again?

15 A. 2813 Tillett Road, S. W.

16 Q. Is that immediately next to the

17 residence of Susan Cary Etheridge McIlwain, the

18 Complainant in this suit?

19 A. Yes, sir.

20 Q. Do you know the parties to this suit,

21 Susan and James?

22 A. Yes, sir.

23 Q. How long have you known them?

24 A. Approximately six years.

Q. Both an equal length of time?

A. Yes, sir.

Q. Do you know when they were married?

A. In '65. In June of '65.

Q. Do you know where they obtained their license to marry?

A. I believe in North Carolina.

Q. Are both Susan and James over the age of 21 years and members of the white race?

A. Yes, sir.

Q. Have they been actual bona fide residents of the State of Virginia for more than one year before Susan instituted this suit for divorce?

A. Yes, sir.

Q. In what City or County did they last live together as man and wife?

A. In Roanoke City.

Q. Do they have any children?

A. Yes. They have one son. Jay. Age three.

Q. Jay -- that's James Clyde McIlwain, III?

A. That's right. Yes, sir.

Q. Do you know when they last lived

1 together as man and wife?

2 A. In January of '72.

3 Q. Now, Mrs. Hanks, have you had an

4 occasion to visit the McIlwain home during the time

5 that both of them were living together?

6 A. Yes, sir.

7 Q. How often did you visit them?

8 A. Well, after -- the first two years we

9 were just more or less speaking acquaintances, but ---

10 Q. The first two years after the six years

11 you have known them?

12 A. Yes. '65 and '66. But for the last

13 three years I visited quite often, about once a week.

14 Q. From '69 on?

15 A. From '69 on, yes.

16 Q. You visited how often?

17 A. Oh, it's really hard to say. Some-

18 times once a week. The last couple of years Susan

19 and I saw each other every day.

20 Q. Now, did you have an occasion to

21 observe Mr. McIlwain's treatment toward his wife,

22 Mrs. McIlwain?

23 A. Yes. On several occasions.

24 Q. Did you ever have dinner over there?

A. Yes. My husband and I at times and myself alone.

Q. Do you recall anything that might stand out in your mind during your dinner evenings that the four of you all would get together?

A. Yes. A couple of times I noticed he used a very -- a tone of voice which -- I'm trying to think exactly how I want to say this -- trying to down her, make her seem inferior to him.

Q. When you refer to "him" ---

A. Mr. McIlwain.

Q. Mr. McIlwain would down her?

A. Yes. He would say things such as, "Well, Susie can't do anything right." Or, "I wish she could do things like that." and that type of thing.

Q. Well, any incident over any chicken or fowl at dinner?

A. At one night when I was having dinner alone. My husband wasn't along at that particular time. He was working. Susan invited me -- Mrs. McIlwain invited me to have dinner with she and her husband. And she had chicken and dumplings. She asked him to carve the chicken, and he refused.

He said, "I don't know how to cut this." And he just proceeded to become very angry at the table. She finally said, "Jim, will you please stop acting like a child?" After that he didn't say anything else.

Q. Did this have any effect on Mrs. McIlwain?

A. She was very embarrassed; very upset.

Q. Have you heard any recent complaints from Mrs. McIlwain?

MR. PERKINSON: I object. It would be hearsay.

MR. LUTINS: What do you mean? Recent complaints are permissible.

MR. PERKINSON: Well, not certainly what Mrs. McIlwain has told her. It would be simply hearsay. What else could it be?

MR. LUTINS: Res gestae.

THE COMMISSIONER: What do you mean by "recent?"

MR. LUTINS:

Q. Can you state to the court any instance that Mrs. McIlwain had made a complaint of as far as treatment by Mr. McIlwain of her, and if so, when did this occur.

MR. PERKINSON: I object.

1 MR. LUTINS:

2 Q. If she came running next door ---

3 THE COMMISSIONER: Find out when it

4 was first.

5 MR. LUTINS:

6 Q. Approximately when did it occur?

7 A. In the summer of 1970, I heard a lot

8 of yelling one morning coming from their house. It

9 wakened me. I -- later on in the day I talked to

10 Susan outside. A couple of hours later we took our

11 dogs out for a walk, and she told me that he struck her.

12 MR. PERKINSON: I object, your honor,

13 that is strictly hearsay.

14 THE COMMISSIONER: I am going to let

15 that in. I think that's close enough to the occurrence.

16 She heard a lot of disturbance over there.

17 MR. PERKINSON: May I state my reason

18 for the objection?

19 THE COMMISSIONER: All right. Go ahead.

20 MR. PERKINSON: If you cannot corrobo-

21 rate grounds for divorce frpm either of the parties

22 themselves, how then can you attempt to corroborate

23 evidence in a divorce case from hearsay evidence

24 which comes from one of the parties? And that;s the

1 reason for my objection.

2 THE COMMISSIONER: She stated that this

3 was immediately or shortly after -- followed shortly

4 after the disturbance that she had heard, and I think

5 it is admissible. Your objection is noted in the

6 record. It is overruled, but it is in the record.

7 MR. LUTINS:

8 Q. All right. Did you hear or can you

9 relate or testify as to any other complaints?

10 THE COMMISSIONER: Well, let's see.

11 She didn't say what she said yet.

12 A. I don't think I've quite finished.

13 MR. LUTINS: Oh! I'm sorry.

14 A. She said -- she told me that he had

15 knocked her backwards from the table at the break-

16 fast table that morning. And she was, you know,

17 very upset about it when she was telling me.

18 MR. LUTINS:

19 Q. He had knocked her backwards?

20 A. He had knocked her backwards from

21 the breakfast table when he struck her at the table.

22 Q. All right. Can you relate any other

23 instances of the same nature?

24 A. Then in August, the 28th of 1971, I

1 heard her car pulling in in front of the house, and I
2 heard Mr. McIlwain start yelling immediately before
3 the car motor had even stopped. And he was telling
4 her that he was going to lock the door, that she
5 couldn't come into the house, which he proceeded
6 to do because she was begging him to be allowed in
7 the house.
8 And he finally let her in the house to get
9 some things for Jay, and I heard him say, "You have
10 five minutes, and if you're not out of the house, I'm
11 going to sock you." Then she came immediately to
12 my house after she left the house. And she tried to
13 call him. She was very shaken. She was very upset,
14 and so was the child. He was just like a -- white as
15 a ghost -- that's not a very good word to say, but he
16 was very upset, too.
17 And she tried to call him from my, using
18 my telephone, and he hung up. And so then the next
19 day she came to my house again. She tried to get
20 in at that time, and he wouldn't let her in.
21 Q. Do you recall aside from the inci-
22 dences that you have testified to that Mrs. McIlwain
23 might come to your house bruised, disheveled or
24 red blotches or anything of that sort on her or about

1 her?

2 A. No. She did come another time.

3 Q. Would you testify to that, please.

4 A. This was January 5th of 1972, her

5 son's -- their son's -- birthday. She called me

6 and asked me to come to her house, but my little

7 baby was asleep, so I asked her to come over to my

8 house. She was very upset at that particular time.

9 She said that her husband had struck her and that he

10 wouldn't stay to celebrate Jay's birthday. And she

11 asked me if I would celebrate it with her and her

12 little boy which I did.

13 Q. As to what you observed ---

14 MR. PERKINSON: I object to that again.

15 It is blatant hearsay. It has no substantiation from

16 any surrounding facts whatsoever. It is just a

17 statement made by the Complainant to her.

18 A. She -- she had been crying that time.

19 I could see her eyes were very red.

20 MR. LUTINS:

21 Q. As to what you observed, did Mrs.

22 McIlwain cause this treatment having been perpe-

23 trated upon her by Mr. McIlwain?

24 A. At this particular time she said that

she had told him that she had purchased a coat for their son, and that he became very angry because she had purchased this particular coat.

Q. At any time did you see anything she had done that caused or justified Mr. McIlwain treating her this way?

A. No.

Q. Now, Mrs. Hanks, what kind of mother is Susan McIlwain to her child?

A. From what I have observed, she is very conscientious, very concerned. She always has her child dressed nicely and well fed, and I have observed her with him many times, and I have never observed anything that I felt would be wrong in her manner of carrying for him.

Q. Do you believe she would be a fit and proper person for the permanent care and custody and control of the infant child?

A. Yes, sir.

MR. LUTINS: Your witness.

CROSS EXAMINATION

BY MR. PERKINSON:

Q. Other than hearing the situation or

1 hearing Mr. McIlwain denying Mrs. McIlwain entrance
2 into the house and one time, I believe you said, you
3 heard some loud shouting or talking early one morn-
4 ing ---
5 A. Well, I might add I heard it many
6 times, not just those particular times. Quite often
7 I just closed my windows, so I couldn't hear them.
8 Q. And I take it you never heard her
9 shout back?
10 A. I heard her scream a few times, "Jim,
11 please don't do that."
12 Q. Now, the time that he locked her out
13 of the house, do you have any idea what it was all
14 about -- what caused this incident at all of your own
15 personal knowledge?
16 A. Just what he said. It was just his
17 yelling, "Go -- go back to your Mother."
18 Q. "Go back to your Mother?"
19 A. Yes, sir. And "You can't come in
20 the house."
21 Q. Now, would almost every afternoon
22 or fairly late afternoon Mrs. McIlwain leave and go
23 away from her home?
24 A. Some afternonns.

these cuttings remarks you are talking about, Sometimes what you are referring to, wouldn't they be kidding?

A. They weren't made in a tone of voice as kidding. They were very serious, very sarcastic, that type of thing. They weren't kidding. Or if they were kidding, they weren't made in that tone of voice that I consider kidding.

Q. You have lived next door to them for how long?

A. For six years.

Q. Did you ever personally see Mr. McIlwain lay a hand on Mrs. McIlwain?

A. No, I did not.

MR. PERKINSON: That's all I have.

RE-DIRECT EXAMINATION

BY MR. LUTINS:

Q. Mrs. Hanks, incidntally, what effect, if any, did this treatment of Mr. McIlwain toward Mrs. McIlwain have on her?

A. Ob her?

Q. Yes.

A. At the times she came to me and talked

1 to me about it, she was always very upset.

2 Q. She was nervous?

3 A. She was nervous.

4 Q. Did she lose weight to your knowledge?

5 A. Yes, she did.

6 Q. Was she under the treatment of a

7 physician to your knowledge?

8 A. She did for a nervous condition -- she

9 did see a doctor for this, for whelps that were

10 breaking out on her skin.

11 Q. Now, let me ask you this last

12 question. Do you recall whether or not Mrs.

13 McIlwain made supper for Mr. McIlwain, and he just

14 didn't show up or would he show up?

15 A. Yes. A number of times she has

16 told me. She has called me and asked me to come

17 over and eat with her because he didn't show up. He

18 would call and say he wouldn't be home when she had

19 already prepared dinner, and most of the time I had

20 already eaten.

21 MR. LUTINS: No further questions. Do

22 you have any questions, Mr. Commissioner?

23 THE COMMISSIONER: Mrs. Hanks, this

24 occasion, I believe you stated was August 28, 1971,

1 when Mrs. McIlwain was locked out of the house and
2 came over to your house?
3 A. Yes.
4 THE COMMISSIONER: You testified that
5 she called her husband or tried to, and he would not
6 answer the phone, would not talk to her.
7 A. Right. Yes, sir.
8 THE COMMISSIONER: And how long was
9 she at your house?
10 A. She stayed at my house approximately
11 from the time this happened which was around 7:00
12 o'clock -- I'm just making an approximation of that --
13 until about 10:30 or 11:00 o'clock that night.
14 THE COMMISSIONER: Did she then go
15 home?
16 A. She then went to her Mother's. He
17 would still not let her in the house. She tried again
18 to get into the house on Monday, and it was still --
19 she was unable to get into the house.
20 THE COMMISSIONER: So, she spent that
21 night at her Mother's?
22 A. That's right.
23 THE COMMISSIONER: Then how much more
24 after that?

A. I think she was at her Mother's for about a month, I believe.

THE COMMISSIONER: That was the time they were separated?

A. Yes, sir.

THE COMMISSIONER: And then reconciled later?

A. Yes. That's right.

THE COMMISSIONER: That's all I have.

MR. LUTINS: This date of August 28, 1971, was a Saturday?

A. Yes, sir.

And further this deponent saith not.

CHARLOTTE ANN HANKS

By _____
COMMISSIONER IN CHANCERY

- - - - - - - - -

1 MARTHA LUCILLE HOOD,

2 a witness, who after being first duly sworn, deposed

3 as follows:

4 DIRECT EXAMINATION

5 BY MR. LUTINS:

6 Q. State your full name.

7 A. Martha Lucille Hood.

8 Q. Now, Marty, you are going to have to

9 speak up. Is that Miss or Mrs.?

10 A. Miss.

11 Q. Where do you reside?

12 A. Townside Road in the County.

13 Q. Do you know the parties to this suit?

14 A. Yes, I do.

15 Q. How long have you known them?

16 A. I have known Sue all my life. I have

17 known Jim since about four or five months before

18 they were married.

19 Q. Do you know when they were married?

20 A. June 4th of '65.

21 Q. Do you know where they obtained the

22 license to marry?

23 A. Leaksville, North Carolina.

24 Q. Are they both members of the white

1 race and over the age of 21 years?

2 A. Yes, sir.

3 Q. Have they both been actual bona fide

4 residents of the State of Virginia for more than one

5 year before Mrs. McIlwain instituted this divorce

6 suit?

7 A. Yes, sir.

8 Q. Where did they last live together as

9 man and wife?

10 A. Tillett Road.

11 Q. In what City or County is that

12 located?

13 A. Roanoke City.

14 Q. Do they have any children?

15 A. One child.

16 Q. Would you state his name and age.

17 A. Jay; he's three. James, III.

18 Q. When did the parties last live together?

19 A. January of this year, I believe.

20 Q. Now, Miss Hood, did you have an

21 opportunity to visit the McIlwain home during their

22 marriage?

23 A. Yes, sir.

24 Q. Will you tell the court what you might

1 have observed as to Mr. McIlwain's treatment toward
2 Mrs. McIlwain of any unusual nature or his behavior.
3 A. Well, sometimes when I would go over
4 there like on a Friday night or something, he would
5 come in late from work, and then leave and go out
6 to Todwin's or somewhere. He wasn't home a whole
7 lot.
8 She has talked with me on the phone
9 several times about his hitting her and things like
10 that.
11 Q. Well, now, did she seem to be upset
12 at the time?
13 A. Oh, yes!
14 Q. Did she indicate that he had just
15 recently struck her?
16 A. Sometimes.
17 Q. During the times that she indicated --
18 MR. PERKINSON: I object to allthis as
19 being hearsay.
20 MR. LUTINS:
21 Q. During the times that she indicated
22 this, can you relate this to the court?
23 A. Yes, sir. I remember one time when
24 she called me and told me that he had dragged her

1 out of the bed one night. I don't know why, but it
2 was in the middle of the night. And she called me
3 the next day.
4 MR. PERKINSON: I don't want to keep
5 interrupting, but my objection to the hearsay stands
6 throughout, and you will note my standing objection.
7 which I would like rather than reiterating it every
8 time.
9 THE COMMISSIONER: Well, we will let
10 it in, and the court can discard it if it wants to.
11 MR. LUTINS:
12 Q. You say this conversation was the
13 following morning?
14 A. Uh, huh.
15 Q. Did she sound upset?
16 A. Yes, sir.
17 Q. Did you ever see her in person when
18 she made a complaint that her husband had abused
19 her shortly before the complaint?
20 A. No. Not in person.
21 Q. Did you ever have dinner over there
22 and observed Mr. McIlwain's conduct toward his wife
23 in any unusual manner?
24 A. I have had dinner with them before --

1 nothing unusual -- just kind of not interested or
2 something. I don't know.
3 Q. Now, who has not been interested?
4 A. Well, I got the impression that Jim was
5 just eating and then he would just leave. He just ate
6 because the food was there. No conversation much at
7 all at the table.
8 Q. Did he ever humiliate or embarrass
9 Mrs. McIlwain in your presence?
10 A. I don't remember that he has.
11 Q. Are you familiar with any incident
12 that occurred on August 28, 1971, on a Saturday?
13 A. Yes, sir.
14 Q. What do you know of that of your own
15 knowledge?
16 A. She called me that day and told me
17 that he had ---
18 MR. PERKINSON: I -- I object. It is
19 blatant, absolute hearsay. She hasn't said that she
20 was there.
21 THE COMMISSIONER: Yes, I think so.
22 I think that's getting a little bit ---
23 MR. LUTINS: Well, I would like to
24 establish that maybe she called not with relation

1 to the complaint or maybe it was immediately after ---

2 THE COMMISSIONER: She said that day.

3 I don't know what day it was.

4 MR. LUTINS:

5 Q. What day was it?

6 A. Saturday.

7 Q. She called you Saturday? What time

8 Saturday?

9 A. In the afternoon. About 5:00 or so.

10 Q. Well, now, did she say anything about

11 any activity that happened immediately before the

12 time that she called you?

13 A. She said that that day he had locked

14 her out of the house.

15 Q. How much before she called you had

16 he done this?

17 A. I don't know.

18 THE COMMISSIONER: Where did she call

19 you from?

20 A. I think from her Mother's.

21 MR. LUTINS:

22 Q. Did she sound upset?

23 A. Yes. Very.

24 Q. Very upset?

1 A. Uh, huh.

2 Q. Now, do you know whether or not Mr.

3 McIlwain when you would come over would be in-

4 different to you in the presence of his wife, or would

5 he act natural?

6 A. He would speak to me, but -- sometimes

7 we would have conversation; sometimes not -- general

8 conversation.

9 Q. Well, in other words, Miss Hood, was

10 Mr. McIlwain indifferent toward his wife because

11 you were present?

12 A. Oh, yes! I felt like he was. Maybe

13 because I was there.

14 Q. What did he say or do that indicated

15 this?

16 A. Well, he usually left when I came over.

17 Q. When you would come over, he would

18 leave?

19 A. Yes.

20 Q. Would he kiss his wife good-bye or

21 leave without saying anything?

22 A. No. He would usually just say, "I'm

23 going." or something like that.

24 Q. And he did this very often when you

1 were in the home?

2 A. Quite a few times. Not every time.

3 Q. Does he dislike you? Do you know?

4 A. I suspect so.

5 Q. Are you a close personal friend of

6 Mrs. McIlwain's?

7 A. Yes, sir.

8 Q. Do you know if Mr. McIlwain is aware

9 of this fact?

10 A. I am sure he is.

11 Q. Was he aware of it at that time?

12 A. I am sure he was.

13 Q. And yet he behaved in this manner?

14 A. Yes, sir.

15 Q. What kind of mother does Mrs. McIlwain

16 make, Miss Hood?

17 A. I think she is very good.

18 Q. Do you believe she should be awarded

19 the permanent care and custody and control of this

20 child?

21 A. Definitely.

22 Q. Did she ever provoke Mr. McIlwain

23 to this treatment that you are aware of? that is

24 perpetrated toward her by him?

1 A. If she did, it wasn't when I was there.

2 Q. Would you describe the household as

3 a happy and friendly one or one with tension?

4 A. I would say it was one with tension.

5 Q. Do you know what effect, if any, this

6 treatment had on Mrs. McIlwain that you observed?

7 A. Well, she was very upset by it. I

8 don't think she knew how to handle it.

9 Q. Did she become nervous or remain

10 calm?

11 A. She has become nervous over it.

12 Q. Do you know if she lost weight or it

13 had any effect on her physical well-being?

14 A. She has lost a good deal of weight

15 since the separation.

16 Q. Well, prior to the separation, do you

17 know if she lost any weight or it had any effect

18 on her physical well-being -- the treatment of her

19 husband toward her?

20 A. She has lost weight since she got

21 married, before the separations.

22 Q. Do you know if she was under the

23 care and treatment of a physician during her marriage

24 prior to separation with reference to lack of family

harmony?

A. Not that I know of.

MR. LUTINS: Your witness.

CROSS EXAMINATION

BY MR. PERKINSON:

Q. I suppose that probably you and Mrs. McIlwain are each other's best friends?

A. I would say so.

Q. On an average month's time, how many times would you probably be over to the house--to her house?

A. I would say an average of twice.

THE COMMISSIONER: Twice a month?

A. Yes, sir.

MR. PERKINSON:

Q. And you never observed Mr. McIlwain physically strike, mishandle or abuse his wife?

A. No, sir.

Q. And you said he would leave very often when you came in to go to Todwin's. Are you familiar with his connection with Todwin's?

A. Yes.

Q. He had an interest in it?

A. Uh, huh.

Q. A financial interest in it.

A. Yes.

Q. This was in addition to his job at Green Hill?

A. That's right.

Q. He sold out his interest in that shortly before they separated, did he not?

A. Yes, sir.

MR. PERKINSON: I believe that's all, Mr. Commissioner.

MR. LUTINS: Do you have any questions, Mr. Commissioner?

THE COMMISSIONER: No.

And further this deponent saith not.

MARTHA LUCILLE HOOD

By _____
COMMISSIONER IN CHANCERY

- - - -

MR. LUTINS: The Complainant rests.

1 JAMES CLYDE McILWAIN, JR.,

2 Respondent, who after being first duly sworn, deposed

3 as follows:

4 DIRECT EXAMINATION

5 BY MR. PERKINSON:

6 Q. State your name, please.

7 A. James Clyde McIlwain, Jr.

8 Q. You are the wife -- I mean the husband

9 of the Complainant here?

10 A. Yes, sir.

11 Q. When did you all move to Tillett Road,

12 approximately?

13 A. I would say it was in 1967, approxi-

14 mately 1967.

15 Q. Then did you all rent the house a

16 couple of years before you all bought it?

17 A. Yes, sir.

18 Q. And I believe before that the two of

19 you lived in an apartment?

20 A. Yes. Uh, huh. We lived in an apart-

21 ment about a year and a half or two years.

22 Q. Then, your son is approximately how

23 old now?

24 A. He was born in January, so it would

1 three years eight months -- three years nine months.
2 Q. Did your wife work any after the
3 child was born?
4 A. No, sir.
5 Q. Now, did you work at two jobs in
6 recent years?
7 A. Yes, sir.
8 Q. How long have you worked at Green Hill?
9 A. Almost four years.
10 Q. Then when did you become connected
11 with Todwin's?
12 A. I would say it was about 16 months
13 prior to her -- prior to filing divorce on me.
14 Q. I see. Did you have an interest in
15 the business?
16 A. Yes.
17 Q. What was your relationship?
18 A. I was Treasurer -- Secretary-Treasu-
19 rer of the business. I owned stock in the business.
20 I was the originator of the business. I started the
21 business. My name is on the articles of incorpora-
22 tion. I worked real hard to get the business started.
23 I was hoping to -- that the business would grow to a
24 point where I could leave Green Hill and go with the

1 business full time.

2 Q. Did you sell your interest out of the

3 business?

4 A. Yes.

5 Q. And why was this?

6 A. Well, I was there about sixteen months,

7 and the time I was staying over there -- my wife

8 didn't like the amount of time -- and I quit on two

9 occasions, before this to spend more time at home.

10 Q. Did you have to go back to protect

11 your interest?

12 A. Yes. I had to stay there to protect

13 my interests. Right.

14 Q. Then did you finally sell your interest?

15 A. Yes. I was able to sell it.

16 Q. And how much money did you get for

17 it?

18 A. $6300.00.

19 Q. $6300.00. All right. Had this

20 happened shortly before this hearing for temporary

21 support?

22 A. Yes. Yes.

23 Q. And in that hearing, did the issue

24 come up as to the fact that you had just received

1 MR. LUTINS: Well, we assume that it is.
2 I don't know.
3 THE COMMISSIONER: Well, all right.
4 MR. PERKINSON: Right.
5 Q. Your wife has stated in her testimony
6 that you have on numerous occasions physically
7 struck and beaten her. Have you on any occasion
8 struck or beaten your wife?
9 A. No.
10 Q. Have you ever shoved her?
11 A. I pushed her on one occasion. Yes,
12 sir, I did.
13 Q. Will you explain that circumstance.
14 A. This was the January 5th occasion.
15 Q. Of this year?
16 A. Of this year. This is shortly before
17 she filed divorce on me. I came home from work
18 and sat down in my chair. My wife informed me
19 that my birthday party and my son's birthday party
20 was going to be held that evening. No previous talk
21 had been made on this, and she said that her Mother
22 had purchased a toy -- I don't know whether it was --
23 I thought it was a car -- with a big loud horn on
24 it. I had asked my wife previously not to buy any

1 more toys of this nature because we already had a
2 car with it. And my wife ---
3 Q. You are talking about a horn?
4 A. We had a car for the child that did not
5 have a horn. My wife had to have a car that had a
6 horn on it because it would make more noise. She
7 convinced her Mother to buy this car for her -- for
8 my son. She had the child all psyched up. She was
9 running around -- she had the horn blowing -- she
10 was running around the house making noise, getting
11 the child excited, and this was at the end of the
12 physical year at Green Hill, and my financial state-
13 ment had just been completed. All the year end work
14 was heavy, and I was very tired. I asked her to
15 please if she wanted to play with the child, to please take
16 the child to his room. And I asked this same thing,
17 and she refused. I asked the same thing at least
18 five times. She refused on each occasion. So, I --
19 I went and got the -- helped my child into his room
20 and asked my wife if she would go in there and play
21 with him. She refused again and consistently refused.
22 One of her tricks was to just completely ignore any-
23 thing I said, and so I pushed her into the room. And
24 I left there -- I went upstairs and shortly after left

1 because dinner obviously wasn't anywhere close to
2 being prepared and wasn't going to be prepared that
3 evening as had been on many occasions in the past.
4 So, I left. I was going to have to eat out again. There
5 was no doubt about that.
6 Q. How often would your wife prepare
7 dinner for you during an average week?
8 A. Well, it would vary really. When she
9 would come home from her Mother's, she was most of
10 the time a little high, and she would come home late.
11 And she would ask me what to prepare for dinner.
12 And, of course, I was tired, and I didn't know what
13 she had out there and what to have for dinner.
14 And this got worse and worse, consistently
15 worse. And the result was many times for me to get
16 anything I would have to go out and get something
17 to eat.
18 Q. Would she prepare your breakfast
19 when you went to work?
20 A. No. She would not get up in the
21 morning for me. I would -- I would usually go with-
22 out any breakfast at all. Many times I would get up,
23 my son was up, and she would be in bed, and I on
24 many occasions would get cereal for him or something

1 like that. She got him trained where to the point
2 that the child would not get up until she got up. This
3 was her ultimate aim -- to get the child to sleep
4 late with her. So, gradually as she trained the
5 child more and more to sleep late, I didn't get into
6 this feeding the child. I went usually without break-
7 fast.
8 Q. During the time that you were working
9 at Todwin's, was it your plan to come home and have
10 dinner and then go back?
11 A. Yes. I would come home at 5:30 or
12 quarter to six; then leave for Todwin's at quarter
13 to nine or thereabouts.
14 Q. During an average week, how many
15 occasions would you come home that she would be
16 over at her Mother's?
17 A. Oh, again there, it was -- oh, lord,
18 four or five times a week. I mean it was just
19 every, every day. I would say that at the last
20 three months, her and her Mother had this sherry
21 every night of the week, the work week, a five day
22 week. And on Saturdays and Sundays they would have
23 them, too. But again, this would vary. There
24 would be occasions when she didn't have her sherry,

her evening sherry with her Mother.

Q. Now, your wife has testified that you never had friends, or she was never allowed to have her friends come in. Can you name some people who visited in the home?

MR. LUTINS: I don't know that she testified to that. I think that is misquoting testimony.

MR. PERKINSON: My impressinn was that people hardly ever ---

THE COMMISSIONER: She indicated that he strongly discouraged any of her friends coming in.

MR. LUTINS: Well, there's a difference in rebuttal.

A. What was the question again? I'm sorry.

MR. PERKINSON:

Q. Well, your wife had said that you discouraged her friends from coming in.

A. No. I did not do that. At no time did I do that. I never have.

Now, when this Marty Hood would come in -- my wife told me on many occasions -- it was almost a blanket rule that if I wanted to I could leave. Miss Hood was a personal friend of hers, and there was no

MRS. RUTH P. NICHOLS
Notary Public
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1 necessity for me staying in the home with her girl
2 friend there.
3 Q. Now, when -- did the two of you live
4 in the same bedroom?
5 A. No.
6 Q. When did it come about that you ---
7 A. She -- I would say shortly after the
8 child was born as best I can remember or probably
9 before. She had her Mother's bed in the bedroom,
10 and she was very sentimental towards this Mother's
11 bed. I -- I wanted to get a king size bed so that we
12 both could be comfortable. She refused this. I asked
13 her many times. She had a list a mile long as to the
14 reasons why we couldn't sleep together.
15 Q. Did you in fact sleep in another room?
16 A. Yes. I slept upstairs. She slept on
17 the first floor. I slept on the second floor.
18 Q. Was this your idea?
19 A. No. No. I wanted to sleep with my
20 wife. I felt this was part of the marriage. I thought
21 this was very important.
22 Q. In an effort to straighten out some of
23 the problems you were having, did you encourage the
24 attendance at church for both of you?

A. Yes. After we were at Tillett Road, I would say the first few months we were there, we both recognized the fact that a marriage must have Christ or God in it to succeed. We both saw the need of God in the marriage.

And after talking about this, we decided to go to church together for ourselves and have joint spiritual progress together. We did this for over two months, and at the end of each -- when we would come home from the Sunday church, we would discuss the sermon, what we thought was important in the sermon as to our lives. How we could grow ourselves together, the main thing being together. This was the thing.

Q. What finally happened to interfere with that?

THE COMMISSIONER: When was this?

A. I would say it was shortly after we got our home on Tillett Road.

THE COMMISSIONER: Before the child was born?

A. Yes, sir.

MR. PERKINSON:

Q. Well, what happened in that relationship?

A. Well, we were both growing spiritually. Her Mother -- she told her Mother about this. And her Mother decided or wanted to go to church with us, and I was very strong against this because this is a personal thing in marriage. We needed to go to church together to make this marriage work.

And I pleaded with her, and I begged her to keep her Mother out of the picture. But her Mother had to go to church with us. She had to.

Q. Did this then sort of do away with this after church conversation?

A. That's right. Her Mother would dominate the conversation. It was a social event. She would talk about inconsequential things, and the spiritual progress ended with her in the picture. I would say shortly after her Mother entered the picture, I would say three or four weeks, I went along with her. There was no use going to church with the Mother in the picture.

Q. There has been some testimony to the effect that you wrote finally -- you wrote her Mother a letter asking her to stay out of the marriage. Is this true?

A. Yes, sir.

1 Q. And what finally brought you to that
2 point? Tell us.
3 A. This was on November 25, 1971.
4 Q. What was the background, the whole
5 background, that led up to finally your doing this?
6 A. Well, the situation was getting worse
7 and worse obviously, and my Mother was visiting for
8 Thanksgiving. And my wife played this scheme, a
9 pre-conceived plan that she enjoyed so much planning,
10 was this broccoli-spinach deal where she would in-
11 sist that I would say either one or the other. Now,
12 if I said broccoli, she would serve spinach. And this
13 was done in front of my Mother, in front of her
14 Mother who came to this Thanksgiving dinner.
15 Q. Was it just this thing alone that
16 finally caused you to write this letter to her Mother?
17 A. No! Oh, Lord, no! This letter is a
18 culmination of six years -- I mean really six years
19 of this marriage thing where her Mother was getting
20 more and more into the marriage picture. And the
21 result was, I didn't even have a wife. I -- I married
22 two women, not just one.
23 Q. Was there hardly ever a day went
24 by that your wife and her Mother didn't get together

1 CROSS EXAMINATION

2 BY MR. LUTINS:

3 Q. Mr. McIlwain, how old are you?

4 A. 34.

5 Q. How tall are you?

6 A. 6 ft.

7 Q. How much do you weigh?

8 A. About 250 -- somewhere in there.

9 Q. Does your wife have a temper?

10 A. Yes.

11 Q. She's on the phone a lot?

12 A. Yes.

13 Q. Your wife was. Her Mother inter-

14 fered with your marriage?

15 A. Right.

16 Q. All this irritated you?

17 A. Yes.

18 Q. She would pounce on you, your wife

19 did, when you would come home and ask you to pay

20 attention to the child, you not having eaten and things

21 of that sort ---

22 A. Yes.

23 Q. And you were again likewise irritated.

24 She gave a lot of reasons for you to strike her

1 apparently.

2 A. I did not strike her, Mr. Lutins.

3 Q. You didn't?

4 A. I did not.

5 Q. You deny that you ever struck her

6 or ---

7 A. I said I pushed her.

8 Q. One pushing occasion -- that's all you

9 admit to, sir?

10 A. I believe I testified to that, Mr.

11 Lutins.

12 Q. Do you recall aside from pushing that

13 you threatened to do her harm, like, you know --

14 "If you don't leave in five minutes, I'm going to

15 shoot you?" Do you deny that, sir?

16 A. That I'm going to shoot her?

17 Q. Yes.

18 A. No. I deny that I ever said I was

19 going to shoot her.

20 Q. What do you admit to then?

21 A. I don't admit to anything, sir.

22 Q. You don't admit to anything. Why ---

23 A. Along these lines that you are

24 suggesting.

Q. Mrs. Hanks. Do you get along with Mrs. Hanks?

A. I beg your pardon?

Q. Mrs. Hanks, the woman who has testified here previously, do you get along with her?

A. Yes.

Q. Do you admit that you embarrassed your wife in front of Mrs. Hanks, or do you deny that, sir?

A. There was an occasions that I think that Mrs. Hanks was referring to that was in jest.

Q. What was in jest?

A. The occasion that Mrs. Hanks was referring to.

Q. How about when Susan came over and made complaints about you threatening to strike her? Do you deny that, too?

A. Do I deny what part of that? I don't understand your question.

Q. Any part of it. You heard the testimony just like I have and the Commissioner has.

A. Well, would you repeat the question then. I don't understand what you are saying.

Q. You say you deny doing anything other

1 than shoving her ---

2 A. Yes.

3 Q. On one occasion ---

4 A. Yes.

5 Q. Can you recall any time you mistreated

6 your wife aside from shoving her?

7 A. Not that I can recall to the best of my

8 knowledge right at this moment.

9 Q. You just can't recall any incident

10 during your marriage that you did anything toward

11 her other than shove her that was of any violent

12 nature or indifferent nature?

13 A. Well, we have had plenty of arguments.

14 Now, I don't know what you you can make out of that,

15 I guess. I don't ---

16 Q. Did you just calmly walk away during

17 your arguments?

18 A. Yes. I would have to leave.

19 Q. You would leave?

20 A. I couldn't take it.

21 Q. Did you ever chase your wife out of

22 the house during these arguments?

23 A. At one time -- she was consistently

24 coming home from her Mother's and when she came

1 in, I insisted that she go back to her Mother's where
2 she had been spending so many evenings or times with
3 her and was not at home when I was there.
4 Q. Now, so in addition to shoving her,
5 you chased her out of the house. Is that what you
6 admitted?
7 A. I insisted that she live with her Mother.
8 Yes. For a short period of time.
9 Q. Did she leave when you insisted that
10 she leave?
11 A. Yeah. Yes.
12 Q. And how did you insist, sir? Did you
13 threaten her?
14 A. No.
15 Q. Well, how did you insist?
16 A. What do you mean "How did I insist?"
17 Q. What did you do to make her leave?
18 Did you say, "Honey, please leave."
19 A. I asked her to go over to her Mother's
20 house.
21 Q. Just said, "Please leave." and she
22 left just like that?
23 A. I don't recall our conversations.
24 Q. Did she indicate that she wasn't going

1 to leave?

2 A. She didn't -- she didn't like going back

3 to her Mother's. No.

4 Q. Uh, huh. What did you say to her if

5 she didn't go back? What would you do?

6 A. Nothing. Nothing.

7 Q. Oh, you just wouldn't do anything.

8 Now, if I recall your testimony, before the child was

9 born you were trying to keep your marriage together.

10 You asked your Mother-in-law not to attend church

11 with the two of you ---

12 A. Yes.

13 Q. So, you all were having difficulty at

14 the inception of your marriage.

15 A. This was -- this was approximately

16 two and [illegible] years after we had married -- we

17 were married.

18 Q. Well, how many years [illegible] you been

19 married?

20 A. June 4th, 1965 or '64.

21 Q. You have been married a little over

22 [illegible]?

23 A. Uh, huh.

24 Q. [illegible]

1 years old?

2 THE COMMISSIONER: Seven years.

3 A. Seven years.

4 MR. LUTINS: June of '66.

5 THE COMMISSIONER: '65.

6 MR. LUTINS: '65. I'm sorry. A little

7 over seven years, and your child is three and one-

8 half years.

9 And when did you start having trouble

10 during your marriage?

11 A. I was talking about spiritual progress,

12 Mr. Lutins.

13 Q. Well, now, I'm talking about problems.

14 You testified to keep your marriage together you

15 didn't want your Mother-in-law going to church with

16 you.

17 A. I was referring to spiritual problems.

18 in the marriage. I -- I feel unless there is

19 spiritual help in a marriage, the marriage will fail.

20 Q. Were you having marital difficulties

21 prior to the birth of your child?

22 A. We would get in arguments if that is

23 what you mean.

24 Q. I understood you didn't want your

1 Mother-in-law to go to church ---

2 A. That's right.

3 Q. And that this was prior to the birth of

4 your child to keep your marriage together. I made a

5 note of that on your testimony. Is that true?

6 A. Yes.

7 Q. So, you were having difficulty before

8 your child was born.

9 A. Well, what kind of difficulties are

10 you referring to?

11 Q. Marital difficulties.

12 A. I was referring to spiritual difficul-

13 ties that I thought could be resolved by going to

14 church.

15 Q. And that's in no wise related to your

16 marital difficulties?

17 A. Spiritual and marital -- or one and

18 the other, yes.

19 Q. Were you having trouble with your

20 wife?

21 A. Sir?

22 Q. Were you having trouble with your

23 wife prior to the birth of your son?

24 A. Spiritual and marital.

1 Q. Spiritual and marital?

2 A. Yes.

3 Q. Your Mother-in-law was destroying

4 your marriage?

5 A. Yes.

6 Q. You asked her not to go to church?

7 A. Yes.

8 Q. She refused. This provoked you,

9 aggravated you, did it not?

10 A. Yes. I was greatly disappointed.

11 That is all, sir.

12 Q. It didn't irritate you or upset you?

13 A. I -- I -- sure it did, to a degree.

14 But I certainly didn't let it overcome me to any

15 degree, sir.

16 Q. Well, now, how did you treat your

17 wife by virtue of what her Mother was doing as you

18 testified to to you?

19 A. Sir?

20 Q. Didn't it bring you all closer together

21 or did you become far apart?

22 A. No, sir. After this incident, the

23 marriage just went on. It went on. Just on.

24 Q. Just went on?

1 A. Yeah.

2 Q. Now, with reference to any abuse to

3 your wife, and you understand you are under oath,

4 of course, do you deny that you stated to Charlie

5 Winters that you did strike your wife? Do you deny

6 it or admit it now?

7 A. I deny it.

8 Q. You deny it. If Charlie Winters

9 testifies that you admitted striking your wife, you

10 will say Charlie is not testifying truthfully.

11 A. I admitted to Charlie that I pushed my

12 wife.

13 Q. You pushed your wife. And that's all

14 you said to Charlie Winters?

15 A. Correct.

16 Q. Now this admission was pertaining to

17 when did you push her?

18 A. This was approximately January 5th or

19 January 4th.

20 Q. And do you deny knocking her off the

21 chair?

22 A. I don't recall what you are talking

23 about.

24 Q. Do you deny knocking your wife off

1 the chair unless you've done something?

2 A. When? When was this?

3 Q. When the witness testified to it.

4 A. I don't understand.

5 MR. PERKINSON: No witness testified to

6 it. The witness testified that Mrs. McIlwain told her

7 that she had been knocked off the chair.

8 MR. LUTINS: It's in evidence on res gestae

9 that he knocked her off the chair. Whether we accept

10 or not is something else. Do you admit or deny that,

11 sir?

12 A. I don't recall this, so I don't think so.

13 Q. You don't recall this sort of thing?

14 A. No. I don't recall it ever happening.

15 Q. Now, with reference to your income,

16 your previous exhibit introduced in January of 1972,

17 showed a net income of $168.00, yet you testified

18 that you net now $163.00.

19 A. The difference being the Blue Cross,

20 Mr. Lutins, as we pointed out.

21 Q. Did you have any increase in your

22 income since then?

23 A. No. No, sir.

24 Q. When do you expect an increase?

A. I don't know, sir.

Q. You have no idea when you will get a raise?

A. I have no idea when I will get a raise, sir.

Q. What's the nature of your employment?

A. Sir?

Q. What is the nature of your employment?

A. I'm an accountant.

Q. With Green Hill?

A. Yes, sir.

Q. Do you have any fringe benefits with Green Hill?

A. I have a retirement plan.

Q. Do you have a pay scale -- a fixed pay scale?

A. No, sir.

Q. And you have no idea when you will get a raise?

A. No, sir.

Q. Do you know if you will be fired soon?

A. I have been there four years, sir. I don't think I will be fired.

1 Q. Have you gotten a raise since you were
2 there -- ever?
3 A. Yes, sir.
4 Q. When was your last raise?
5 A. Over two years ago.
6 Q. Was that your first raise?
7 A. No, sir.
8 Q. You got several before that?
9 A. No. Not several. I think I had one
10 or two as I recall. They were small ones.
11 Q. Have you had any discussion about
12 increasing your salary, it having been two years
13 since you got a raise?
14 A. Sir?
15 MR. LUTINS: Read the question.
16 COURT REPORTER: Have you had any
17 discussion about increasing your salary, it having
18 been two years since you got a raise?
19 A. With who, sir?
20 MR. LUTINS:
21 Q. With your employer.
22 A. No, sir.
23 Q. Now, you told your wife that you were
24 making $710.00 a month.

1 A. I did not say that.

2 Q. You deny that?

3 A. Yes.

4 Q. You deny that. What happened to the

5 Todwin stock, the $6500.00? Do you still have it?

6 A. It was sold -- it was sold back to

7 the corporation.

8 Q. You received $6500.00 in cash?

9 A. No. I did not receive $6500.00.

10 Q. What did you get?

11 A. Approximately $6300.00.

12 Q. $6300.00. All right. What did you do

13 with that money?

14 A. I -- my Mother has it now.

15 Q. Your Mother?

16 A. My Mother, uh huh.

17 Q. Was it invested, or did you just give

18 it to her?

19 A. No. It's in a savings account.

20 Q. On whose name?

21 A. My Mother's.

22 Q. You put it in your Mother's name?

23 A. It's a joint savings account if that makes

24 a big difference to you.

1 Q. Yes, it does. It's in both your names?
2 A. Right.
3 Q. Now, you have inherited some money
4 recently from your brother's estate.
5 A. That's not correct.
6 Q. You didn't?
7 A. That is not correct, sir.
8 Q. Well, what is correct?
9 A. I have not inherited any money.
10 Q. Well, has your brother recently
11 passed away?
12 A. My brother has not recently passed
13 away.
14 Q. Oh, I'm sorry! It was your father's
15 estate. Has your father passed away recently?
16 A. No, sir. Not recently. It has been
17 six years or so, seven years back.
18 Q. Are you a beneficiary of his estate?
19 A. Of a small portion, yes.
20 Q. Well, how big?
21 A. I think we're talking about $2600.00,
22 in that vicinity.
23 Q. What? Your share?
24 A. Yes.

Q. You are sure it is not $4000.00 per devisee?

A. No, sir.

Q. Now, you have mentioned about a car. Your wife has hidden a car away from you?

A. My car, yes, sir.

Q. And you have recovered the car, I believe you said?

A. No, sir. I have not, sir.

Q. Do you know if the car has any tags on it?

A. I don't know. I did not sign the registration. My wife has the registration.

Q. Well, have you asked her for it?

A. Yes. Yes. I asked her for the registration on the car.

Q. When did you ask for it?

A. When did I ask?

Q. Yes, sir.

A. When this registration thing came out. I wanted my car.

Q. What registration thing?

A. When the tickets were mailed in the mail.

1 Q. You contacted her, and you were under
2 an injunction?
3 A. Pardon?
4 Q. You were under an injunction, and you
5 contacted her?
6 A. Yes, this was during one of my
7 visitation rights, sir.
8 Q. You talked to your wife during the
9 visitation rights?
10 A. Yes.
11 Q. Do you realize what the order says
12 about the injunction?
13 MR. PERKINSON: Your honor, what's that
14 got ---
15 MR. LUTINS: Because we are going to
16 ask it to be continued.
17 MR. PERKINSON: We don't care if you
18 continue the injunction. Just let him see his child.
19 Let him get his child to take it for a visit.
20 MR. LUTINS:
21 Q. Now, what did your wife tell you when
22 you asked for the registration card?
23 A. She wouldn't give it to me.
24 Q. Why?

1 A. I don't know why. She just didn't --
2 she didn't give me why -- any reason why.
3 Q. She didn't tell you why. We will have
4 her testify to why.
5 I'm not too certain about the broccoli-
6 spinach incident of November 25, 1971. What in the
7 world are you talking about?
8 A. One of my wife's schemes or tricks
9 was when she did not know what to serve for dinner,
10 and she would have frozen broccoli or frozen spinach
11 in the freezer. She would insist that I give her an
12 answer as to which one I wanted. I told her either
13 one would be sufficient.
14 I'm not sure -- this happened so many
15 times -- to pinpoint it as to November 25th, I can't
16 know exactly how she put it then, but whatever I
17 would say, I think it was broccoli, she served
18 spinach. And this has happened so many times be-
19 fore that, well as I said, I just -- this is what the
20 story was. Whatever I wanted, she would serve the
21 exact opposite.
22 Q. This aggravated you?
23 A. Yes.
24 Q. Got you mad?

A. I would say it disturbed me, yes.

Q. Did you consider this one of the difficulties in your marriage -- broccoli-spinach?

A. One of the things, yes.

Q. Do you have a temper?

A. I get angry sometimes, yes.

Q. Have you ever used your temper towards your wife?

A. We have had arguments. She has a tremendous temper, too.

Q. Have you used it towards the broccoli-spinach incidents?

A. This irritated me, sir.

Q. Now, just let me ask you with reference to visitation. Now, you know how your wife feels about visitation with your child.

A. No, I don't know how.

Q. She has never told you this. Well, have you been informed through your attorney about her feelings?

A. About what?

Q. About your taking this child away for an extended length of time, the child being as young as he is. You are totally unaware of that?

A. I think you mentioned it sometime, Frank, something about that.

Q. Well, answer my question.

A. Vaguely, to some degree. Now, I don't know what degree you are referring to, sir.

Q. Well, you know she has maintained that the child is much too young to be taken where you want to take the child, overnight for extended lengths of time.

A. Ah ---

Q. Don't you know that, sir?

A. I don't understand -- you're saying that she's so testified this? I don't understand what you are saying.

Q. No. You have been told this by your wife either directly or indirectly.

MR. PERKINSON: Let's see if we can make this simpler. You were requesting to have the child one week end a month, Friday evening 'til Sunday evening at 6:00; and she opposed, this is what I told you about it, she opppsed you having the child overnight. Isn't that what you're saying?

MR. LUTINS:

Q. I asked you did you know the reason

1 that she opposed it? You know that, don't you, be-
2 cause of what you were told by your attorney?
3 A. Well ---
4 MR. PERKINSON: I never told him any
5 reason because I am not aware of the reason myself.
6 MR. LUTINS: You just recited it.
7 MR. PERKINSON: Well, I don't know the
8 reason.
9 MR. LUTINS:
10 Q. Let me ask you this. Mr. McIlwain,
11 do you belong to a church?
12 A. No. I believe in the Bible, the
13 teachings of the Bible. I feel very strongly that the
14 teachings of the Bible are the teachings that a man
15 should live by.
16 Q. Your wife has sked you to go to
17 church ---
18 A. I beg your pardon, sir?
19 Q. Your wife has asked you to go to
20 church on numerous occasions, but you don't believe
21 in the church, you believe in the Bible.
22 A. No. I -- I -- Mr. Lutins, yes, sir,
23 I believe in the Bible. Yes, sir, I believe in the
24 Bible. Is that what your question is?

1 Q. No. My question was, do you go to
2 church? That's all I asked.
3 A. Do I go to church?
4 THE COMMISSIONER: He doesn't belong
5 to a church. Let's not get into a lot of bickering.
6 MR. LUTINS: All right. I have no
7 further questions.
8
9 RE-DIRECT EXAMINATION
10 BY MR. PERKINSON:
11 Q. Mr. McIlwain, with regard to the
12 broccoli-spinach incident were you relating that as
13 only a typical ---
14 MR. LUTINS: Now, that's leading --
15 I didn't bring that out.
16 A. Yes. Typical. Yes, this is typical.
17 MR. LUTINS: I object.
18 MR. PERKINSON: That's all the questions
19 I have.
20 THE COMMISSIONER: Mr. McIlwain, on
21 your statement of expenses here, you have a company
22 Christmas loan of $100.00. What is that item?
23 A. That's been paid off, sir.
24 THE COMMISSIONER: It has been paid off?

car now?

A. I beg your pardon?

THE COMMISSIONER: Does she drive a car?

A. She drives her Mother's car, now. It doesn't have license plates on it -- my car doesn't have license plates on it.

THE COMMISSIONER: Laundry and dry cleaning, $25.00.

A. I would say it's sloser to $30.00, sir.

THE COMMISSIONER: Medical and drugs, $10.00.

A. Yes, sir.

THE COMMISSIONER: All right.

RE-CROSS EXAMINATION

BY MR. LUTINS:

Q. Let me just ask this one question. You are netting $100.00 a month more now than the date of the hearing for temporary alimony and support maintenance money. That's true, isn't it, sir?

A. Say that again, sir.

MR. LUTINS: Read it back for him.

COURT REPORTER: "You are netting $100.00 a month more now than the date of the hearing for temporary alimony and support maintenance money. That's true, isn't it?"

A. Yes. I said that. It was paid. That loan was paid, yes, sir.

MR. LUTINS: That's all.

And further this deponent saith not.

JAMES CLYDE McILWAIN, JR.

By _____
COMMISSIONER In CHANCERY

- - - - - - - - - - -

Hearing adjourned for lunch at 1:30 P. M.; continued again at 2:00 P.M.

ROGER D. SINK,

a witness, who after being first duly sworn, deposed as follows:

DIRECT EXAMINATION

BY MR. PERKINSON:

Q. Would you state your name, please.

A. Roger D. Sink.

Q. Mr. Sink, do you know James Clyde McIlwain, Jr.?

A. I do. Yes, sir.

Q. Do you know his wife?

A. Yes, I do.

Q. How long have you known Mr. McIlwain?

A. Approximately two and one-half years.

Q. Do you work with him?

A. Yes, I do.

Q. Where?

A. Green Hill.

Q. Green Hill. Have you ever had an occasion to visit in his home?

A. Yes, on several occasions.

Q. Do you recall where the home is located -- just what road it is on?

A. On Tillett Road, S. W.

Q. Is that in the City of Roanoke?

A. Yes, sir.

Q. When you visited there, was his wife at home?

A. Most of the time, yes, sir.

Q. Was his child there?

A. Yes.

Q. Would you say that the furnishings of the house -- is it adequately furnished?

A. I would say so.

Q. Knowing the couple, did Mrs. McIlwain work during the period of time that you knew her?

A. No, she did not.

Q. When you were there, were you ever there during a meal, for example?

A. Yes, I was.

Q. Did you have an opportunity to observe both Mr. and Mrs. McIlwain together in the home?

A. Yes.

Q. During the times of your presence in the home, did you ever see Mr. McIlwain in any way assault or abuse his wife?

A. No.

Q. During the time that you were in the

1 home, did there seem to be harmony there -- while
2 you were there in the home?
3 A. While I was there, I would say yes.
4 Q. Did you ever have any occasion to
5 observe Mr. McIlwain and his son together?
6 A. Yes, I did.
7 Q. What seemed to be the relationship
8 there?
9 A. Well, it seemed to me that it is the
10 normal father-son relationship.
11 Q. I believe you have a child of your own?
12 A. Yes, sir, I do.
13 Q. Did you see the little boy display any
14 affection towards his father?
15 A. Yes. He looked like to me as if the
16 child loved his father.
17 Q. You work with Mr. McIlwain.
18 A. Yes.
19 Q. As a person, would you say he is a
20 person of good moral character?
21 MR. LUTINS: Is his character at issue?
22 MR. PERKINSON: Well, he's asking for
23 visitation rights of his child, and the Mother doesn't
24 want him to take the child overnight.

1 MR. LUTINS: Who's denying visitation
2 rights?
3 MR. PERKINSON: You want -- there's
4 some opposition to having the child with him at night.
5 THE COMMISSIONER: That's not on the
6 basis of his bad moral character. She just thought
7 the child was too young to be away from home or at
8 least that's what I understood her to say, nothing
9 personal.
10 MR. PERKINSON:
11 Q. During your periods of knowing Mr.
12 McIlwain and seeing him at work, does he appear to
13 be a person of responsibility?
14 A. I would say so, yes.
15 Q. Have you ever seen anything in his
16 conduct that would indicate that he would not be a
17 person to take care of his child while he had him in
18 his possession?
19 A. I don't see anything -- to me he would
20 take good care of the child to me, because like I
21 say I have observed him with the child, and since
22 the separation, him and the child, they come by to
23 see me once in aawhile; and he looks after the child
24 very capably.

1 MR. PERKINSON: Answer any questions that
2 Mr. Lutins may ask.
3 A. OK.
4
5 CROSS EXAMINATION
6 BY MR. LUTINS:
7 Q. Mr. Sink, how many times have you
8 been over to the home before it was broken up?
9 A. I would say maybe 20 times.
10 Q. Over a period of how many years?
11 A. I would say, well I have known him
12 for two and one-half years, but I would say approxi-
13 mately a year passed before I ever visited that home.
14 Roughly ---
15 Q. Well, how many years are we talking
16 about from the time you first went over to the time
17 you last went over to the house?
18 A. Oh, I would say maybe nine months to
19 a year possibly.
20 Q. You mean the 20 times covered nine
21 months to a year?
22 A. I would say so, yes.
23 Q. Would you be over at the house maybe
24 twice a month?

1 A. Something like that.

2 Q. I would say in 30 days, maybe two days

3 a month?

4 A. Something like that.

5 Q. Well, something like that. What do

6 you mean? I am not testifying. Is that accurate?

7 A. Well, see, sometimes I might come

8 over maybe once a week and then it would go for

9 awhile, and I wouldn't visit in the home. I mean

10 there was no regular pattern. I mean I didn't come

11 over just on Wednesday night or Friday night or

12 Sunday night. I mean we didn't have any set date for

13 me to come over.

14 Q. When you would come over to visit

15 Mr. McIlwain, you wouldn't consider yourself a

16 constant visitor, would you, or a frequent visitor?

17 A. Well, I wouldn't say constant. I

18 would say frequent.

19 Q. This covers nine to eleven months

20 you visited about 20 times?

21 A. I would say so.

22 Q. Did you ever see Mrs. McIlwain

23 misbehave?

24 A. No.

1 Q. Did the home appear a harmonious
2 home?
3 A. To me it did.
4 Q. Are you a close personal friend of
5 Mr. McIlwain?
6 A. No. We are just business associates.
7 Q. Then you know him as a business
8 associate?
9 A. Correct.
10 Q. And you are saying he is a good busi-
11 nessman and a good accountant?
12 A. I would say he is a very honest man.
13 Q. And an honest accountant?
14 A. I didn't say honest accountant. I said
15 an honest man, and I think there's a ---
16 Q. Well, you are evaluating that on the
17 basis of your business relationship.
18 A. I would say so, yes.
19 Q. You don't know what kind of father
20 he actually makes except what you have observed in
21 the few times you have seen him and his son.
22 A. Well, they visit me just about every
23 Saturday.
24 Q. But you have done that since the

1 separation?

2 A. Since the separation -- that's correct.

3 Q. I am talking about prior to that time.

4 You don't know what kind of father he was during those

5 times.

6 A. Well, when I visited in the home, he

7 appeared to me he was a good father.

8 Q. Well, you didn't see him doing anything

9 wrong toward the child. That's what you are actually

10 testifying to, isn't it?

11 A. Well, he -- he showed an interest. I

12 think he showed an interest in the child.---

13 Q. What did he do?

14 A. From my observation. Well, when I

15 was there, he played with the child. He showed the

16 child a lot of affection and a lot of attention.

17 Q. While you were visiting?

18 A. Yes.

19 Q. Now, how many meals have you taken

20 at their home?

21 A. One.

22 Q. One meal?

23 A. One meal.

24 Q. All right, sir, since you have known

Mr. McIlwain which is about two and one-half years?

A. Right.

Q. Are you married, sir?

A. Sir?

Q. Are you married?

A. No.

Q. Over the two and one-half years, you have had one meal and been there maybe at the best 20 times?

A. Yes, sir.

MR. LUTINS: All right. I have no further questions. Mr. Commissioner?

THE COMMISSIONER: No.

RE-DIRECT EXAMINATION

BY MR. PERKINSON:

Q. Mr, Sink, you are not married, but you are divorced?

A. Correct.

Q. And you have a two year old child of your own?

A. Right.

Q. And I believe you have custody of the child?

A. Right. I do have custody of the child.

Q. And so when Mr. McIlwain comes over with his little boy ---

MR. LUTINS: This has got to be a leading question even though he hasn't finished it.

A. Well, the kids go out in the backyard and play and play on the swing set, and Jim and I usually go out in the backyard. My little girl has a brand new swing set.

MR. LUTINS: Mr. Commissioner, I just asked a question for the purpose of showing whether or not his wife attended the dinner. That's all. So, I don't think it's particularly relevant.

THE COMMISSIONER: Well ---

MR. PERKINSON: That's all.

And further this deponent saith not.

ROGER D. SINK

By _____
COMMISSIONER IN CHANCERY

- - - - - - -

1 MR. LUTINS: I object.

2 MR. PERKINSON:

3 Q. During the period that you were there,

4 how frequent was it?

5 A. Every day.

6 Q. Would this go into what would nor-

7 mally be Jim's coming home time from work?

8 A. Sometimes, yes. Usually, yes, in

9 the evening.

10 MR. PERKINSON: That's all the questions

11 I have.

12

13 CROSS EXAMINATION

14 BY MR. LUTINS:

15 Q. You didn't visit your children, that

16 is your son, and your daughter-in-law, the first

17 year of their marriage?

18 A. No, I didn't, because they were

19 living in an apartment, one bedroom, and there was

20 no room for me to visit.

21 Q. So, you just don't know what -- they

22 were married about a year and a half?

23 A. Yes. Something like that. I can't

24 tell you exact date.

Q. I understand. But you didn't see them at all during the first year of their marriage?

A. Oh, yes! They came to see me.

Q. I see. And if I understand, after they moved in the house, which was about a year and a half after their marriage, or thereabouts, how often were you there?

A. Well, I would say between three and four times a year. And maybe they would come to see me once or maybe twice a year. I couldn't sit down and count it out for you.

Q. Well, actually since '66, the last six years, would it be fair to say that you visited them, in your child's home, 18 or 24 times?

A. Yes. That's including their visits to my home and my visits to their home.

Q. Well, I am more particularly concerned about your visits to their home.

A. Well, four times a year times ---

Q. Six.

A. Yes, six. I would say between 18 and 20 times. That would be about right.

Q. These are the times that you visited at the Tillett Road residence?

1 A. That's right.

2 Q. I got the impression that it was your

3 habit to visit say Thanksgiving and Christmas at their

4 home on Tillett Road.

5 A. And sometimes in between if I felt

6 I needed a little change from my routine, and they

7 were willing to let me come, I came.

8 Q. How many children do you have, by the

9 way?

10 A. I have James and a son, David, who

11 lives in Pittsburgh.

12 Q. You have never seen James mistreat

13 Susan?

14 A. Never.

15 Q. You have never seen Susan mistreat

16 James?

17 A. Never.

18 Q. Of course, you having raised James,

19 if he had mistreated her, he wouldn't do it in your

20 presence, would he?

21 A. I doubt it.

22 Q. One other thing, about a late meal

23 you have testified to when you and Susan came home.

24 A. Yes. This ---

1 Q. When was that?

2 A. That was the Monday after Christmas.

3 Q. What year?

4 A. '72. '71.

5 Q. You said that the meal wasn't very

6 pleasant after you all had hurriedly prepared it.

7 A. Well, it wasn't half cooked. And I

8 felt badly about this because I trusted Susan as I

9 would a personal friend. And I feel that she be-

10 trayed that trust as a friend because she involved

11 me in something that I would never have considered

12 had I known what was going on.

13 Q. How did your son react to this meal

14 that you all hurriedly cooked?

15 A. Well, he didn't take much notice of

16 it because I expect many meals were not very well

17 prepared.

18 Q. Well, that's your suspicion.

19 A. That's my suspicion.

20 Q. I am asking you on this occasion how

21 your ---

22 A. Well, he didn't make any fuss about

23 it.

24 Q. What did he do? You're telling me

1 what he didn't do. Tell me what he did do.

2 A. He ate the meal, such as it was.

3 Q. Without any reflection or reaction or

4 any comment ate it happily?

5 A. Well, we were in the home when he

6 came home, and we were cooking dinner. We had a

7 half hour start which wasn't enough to properly pre-

8 pare a meal.

9 Q. Well, did he get mad or angry or ---

10 A. No. He didn't get mad or angry.

11 Q. Well, then, what was -- there was

12 nothing difficult about the situation then?

13 A. Very well. But I feel that I was

14 betrayed into this.

15 Q. Oh, I see! You were betrayed.

16 A. I was betrayed. Yes!

17 MR. LUTINS: I have no further questions.

18 A. And I am not willing to trust Susan

19 any more.

20 MR. LUTINS: That is not a response to

21 my question, and I ask the court to disregard it.

22 THE COMMISSIONER: Mrs. McIlwain,

23 when you made these visits at the Tillett Road

24 home, how long would you generally stay there?

1 SUSAN E. McILWAIN,

2 Complainant, called for rebuttal, deposed as follows:

3 DIRECT EXAMINATION

4 BY MR. LUTINS:

5 Q. Susan, what in the world is your

6 husband talking about when he speaks of the broccoli-

7 spinach incident?

8 A. Thanksgiving night, 1971, we -- his

9 mother and my mother were coming over -- well, his

10 mother was there and my mother was coming over

11 for dinner, and I asked him which vegetables he

12 wanted for dinner. And he said, "Peas."

13 I got to thinking about it, and I thought

14 if I fixed broccoli with cheese sauce it would be more

15 of a dressy dinner. Jim came to the table, and he

16 started screaming about it -- "What did I ask him

17 for?" and, I know, he said that he just felt like

18 screaming. That was his words. And Mama said,

19 "Why don't you'?" And that's what the broccoli

20 incident was.

21 Q. When did this take place?

22 A. Thanksgiving of '71.

23 Q. Now, with reference to the car. He

24

1 says that you hid a car out?

2 A. I was driving the Falcon, and he would

3 not sign for the tags. The tags were in his name.

4 On the 15th of April I was informed that I had to get

5 it off the street which I did. I parked it in my

6 aunt's back yard.

7 Q. Did you hide the car?

8 A. Sir?

9 Q. Did you hide the car?

10 A. I didn't hide it. No. They just said

11 to get it -- I understood the law was that it was not

12 to be on the street untagged, so I put it in her

13 back yard.

14 Q. I see. Whose name is that car titled

15 in?

16 A. It's in my husband -- in Jim's name.

17 Q. Now, is your husband a recipient

18 or a beneficiary of an estate?

19 A. Yes, sir.

20 Q. Whose estate?

21 A. His father's, James Clyde McIlwain,

22 Sr.

23 Q. And what has your husband told you

24 would be his share, if he has so stated to you?

1 A. All right. At one time there were
2 three children. There was an older sister, Diane.
3 The estate was to be divided three ways. One-third --
4 it -- I think it was settled at $12,000.00. One-third
5 to go to his mother and the other two-thirds to be
6 divided between the three children. And then before
7 the estate was settled, Diane passed away, so I
8 understand it was divided three ways.
9 Q. And what did you find from your
10 husband would be his share, approximately in money?
11 A. Ah -- I assumed it would be $4,000.00.
12 Q. Based on what your husband told you?
13 A. Right. And his brother also told me
14 that the estate has now been settled.
15 Q. Now, did your husband tell you what
16 his income was monthly?
17 A. Yes, sir. He told me in October he
18 was making $710.00 a month.
19 Q. October of what year?
20 A. October of '71. We were -- it was
21 during that reconciliation, and we were working out a
22 budget.
23 Q. Now, let me ask you this with reference
24 to going to church. Before you even gave birth to

1 your child, do you recall that your husband was
2 having difficulty in his mind, or however it existed,
3 with your mother, and that there were conversations
4 about her attendance with you all in church?
5 A. Yes, sir.
6 Q. Well, would you tell the court briefly
7 something of that.
8 A. The main thing was my mother was
9 by herself, and we go to Christ Episcopal Church
10 which is on the corner of Franklin Road and
11 Washington ---
12 Q. By we, whom do you mean?
13 A. I belong to it, and my mother belongs
14 to it. Jim does not belong to that church. And it
15 was just the thing, you know, instead of driving
16 separate cars that we just drive one car because
17 parking is a problem over there.
18 Q. Then did Jim say that he didn't want
19 your mother to accompany you to church?
20 A. Yes, sir. He did.
21 Q. What effect did this have on Jim, the
22 fact that your mother did accompany you all to
23 church on, I assume, several occasions?
24 A. It would make him very angry, and he

1 would start yelling and all that.

2 Q. Did you ever ask your mother not to

3 go to church with you all? Or could you bring your-

4 self to ask your mother not to?

5 A. Well, sure I could of. Uh, huh.

6 Q. Did you?

7 A. Yes, sir.

8 Q. Did she cease?

9 A. Yes, sir.

10 Q. After you both insisted?

11 A. Well, really, Jim stopped going, so

12 Mama and I usually went together.

13 Q. Do you know why Jim stopped going?

14 A. He started playing golf on Sunday

15 mornings with Rocky and that got to be a weekly thing.

16 Q. And Roger is the witness who just ---

17 A. Roger Sink, right.

18 Q. Would you characterize Roger as Jim's

19 closest personal friend, or how would you so

20 characterize him?

21 A. No, sir. I would say that Rocky is

22 more of a business acquaintance. I would say Jim's

23 personal friend is Charlie Winterss

24

MR. LUTINS: All right. I have no further questions.

CROSS EXAMINATION

BY MR. PERKINSON:

Q. Do you recall what he was saying that you all would go to church, the two of your together, and have discussions afterwards?

A. I think we did that a couple of times, yes. I don't think it was any more than that.

Q. Was it after this had started then that your mother started going to church with you and accompanying you after church?

A. Like I told you before, I don't remember -- really, it was more in the first year that we were married that I remember Jim -- Jim and I going to church and going over this thing.

MR. PERKINSON: Thank you. That's all.

RE-DIRECT EXAMINATION

BY MR. LUTINS:

Q. One thing more. Your husband testified on Direct Examination prior to the birth of your son you all were having spiritual and marital

1 difficulties. Is that true?

2 A. We have had marital problems all

3 along. Yeah! That's true.

4 Q. What about the spiritual difficulty?

5 Were you aware of this prior to the birth of your

6 son?

7 A. No, sir.

8 Q. Did he ever mention these things to

9 you during the course of your marriage?

10 A. No, sir.

11 Q. This is the first you have heard of it

12 during this testimony?

13 A. Yes, sir.

14 MR. LUTINS: That's all.

15

16 RE-CROSS EXAMINATION

17 BY MR. PERKINSON:

18 Q. Let me just ask you -- do you feel

19 like that any of the difficulties of your marriage

20 were brought on by any of your own conduct?

21 A. No, sir, I really don't. Jim and I

22 never had anything in common. We didn't have any

23 mutual grounds to come together on.

24 Q. Well then, the letter exhibit which

1 RE-RE-DIRECT EXAMINATION

2 BY MR. LUTINS:

3 Q. With reference to your mother-in-law

4 who has just testified, this meal incident, was any-

5 thing made of that -- the fact that you all had

6 prepared a meal hurriedly for your husband?

7 A. Prior to this letter that Jim wrote

8 my mother, you know that I showed you, Jim and my

9 mother were good friends. She liked him and he

10 enjoyed seeing her. And she had brought Mama a

11 Christmas present, and I thought that she wanted

12 to give it to her, so I took her over after we had

13 gone shopping that day to give it to her. And a

14 girl friend of mine and her husband, who were my

15 friends that live next door to Mama, came over, and

16 I didn't feel like I could leave because they were my

17 company.

18 Q. And when you returned home, did you

19 and your Mother-in-law arrive before your husband?

20 A. Yes, sir. And I might add, you all --

21 everybody has brought up that I had cocktails, and

22 Jim had the every night, too.

23 Q. Well, let's not go into all that.

24 A. I mean, but anyway, so when he came

1 home, he still had time because he wanted to have his
2 drink. So, there was no -- he didn't like dinner on
3 the table as sonn as he walked in.
4 MR. LUTINS: Thank you.
5 A. Is that all?
6 MR. LUTINS: Yeah!
7 And further this deponent saith not.
8 SUSAN E. McILWAIN
9
10 By _____
COMMISSIONER IN
11 CHANCERY
12
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