

**ORIGINAL**

SUPREME COURT AND COURT OF APPEALS  
STATE OF MISSISSIPPI

No. 2019-CP-01152  
Consolidated with 2017-CP-00828

**FILED**

**OCT 22 2019**

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SUPREME COURT  
COURT OF APPEALS

MICHAEL T. GERTY  
APPELLANT

VERSUS

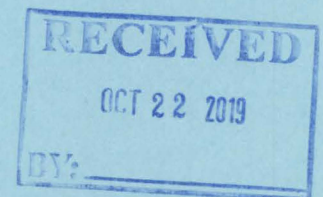
JOESIE R. GERTY, APPELLEE

APPEAL FROM

THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT

HONORABLE JENNIFER SCHLOEGEL, PRESIDING TRIAL JUDGE

**APPELLANT'S BRIEF**



MICHAEL T. GERTY  
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Telephone: (224)428-3889

IN THE SUPREME COURT AND COURT OF APPEALS  
STATE OF MISSISSIPPI

No. 2019-CP-01152  
Consolidated with 2017-CP-00828

MICHAEL T. GERTY

APPELLANT

VS.

JOESIE R. GERTY

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Court may evaluate possible disqualification or recusal.

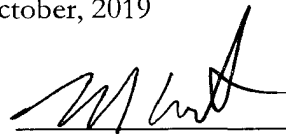
1. Michael T. Gerty, Appellant.
2. Joesie R. Gerty, Appellee.
3. Michael Channing. Powell, 1915 23<sup>rd</sup> Ave.

Gulfport, Mississippi, Attorney for Appellee

4. Honorable Jennifer Schloegel, Chancellor of Place One, Post Office Box 986

Gulfport, Mississippi

Respectfully submitted, this the 21<sup>st</sup> day of October, 2019



\_\_\_\_\_  
MICHAEL T. GERTY, APPELLANT

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## STATEMENT OF THE ISSUES

The Chancery Court was manifestly wrong, employed the wrong legal standard, and abused its power when it declared that it would no longer abide by the parties' *Property Settlement Agreement* [Dkt. 3] (hereinafter "PSA"). The Chancery Court was manifestly wrong, employed the wrong legal standard, and erred by awarding Joesie a percentage of Michael's military retirement pay. The Chancery Court was manifestly wrong for significantly limiting the father's summer visitation. The Chancery Court was manifestly wrong and abused its power by allowing a clear and unmistakable bias to determine its child custody decision.

## STATEMENT OF ASSIGNMENT

Michael Gerty, Appellant, requests that the Supreme Court of Mississippi be assigned this case numbered 2019-TS-01152 due to this being an appeal of a *Final Judgment of Divorce on Remand from Mississippi Supreme Court Opinion of December 13, 2018* (2017-CP-00828).

## STATEMENT OF THE CASE

In this case the parties, Michael and Joesie Gerty, married on May 7, 2005 and separated in September 2013, in Harrison County, Mississippi. The parties had one child, age 3, at the time of separation. The parties signed a *Joint Complaint for Divorce (Irreconcilable Differences)* [Dkt. 2] which included a *Separation and Child Custody and Property Settlement Agreement* [Dkt. 3] on September 18, 2013, in Harrison County, Mississippi. On June 10, 2015 Appellee, Joesie R. Gerty (hereinafter "Joesie"), filed her *Withdrawal of Consent to Divorce on Irreconcilable Differences* [Dkt. 6] and subsequently on June 17, 2015 Joesie filed her *Complaint for Divorce* [Dkt. 8] and *Motion for Temporary Relief* [Dkt. 11] against the Appellant, Michael T. Gerty (hereinafter "Michael"). On July 10, 2015 Michael filed his *Affirmative Defenses, Answer to Complaint and Counter Complaint* [Dkt. 16]. Prior to answers and discovery, a temporary hearing was held on July 14, 2015.

## **Court's Temporary Order**

On August 6, 2015, the Chancery Court of Harrison County, First Judicial District, entered its *Temporary Order* [Dkt. 19] awarding temporary custody of Jayden Gerty to his mother, Joesie Gerty.

## **Motion to Reconsider the Temporary Order**

On August 10, 2015 Michael filed his *Motion for Reconsideration of Court's Ruling on Temporary Relief* [Dkt. 20]. The Chancery Court denied this motion. (*Transcript of Proceedings* (hereinafter "T.") Page 382 – 383; Michael's Record Excerpts (hereinafter "R.E." Page 232 - 233):

Yes, except – well, okay, but I'm not reading Mr. Teel's motion. He filed a written Motion for Reconsideration, and so, in any event, I would make no findings. I just simply deny the Motion for Reconsideration, and that – and I would just say to the parties, I wouldn't normally reconsider a temporary order if there was not some pressing need to do so.

## **Post Initial Judgment Motions**

On November 15, 2016 the Chancery Court of Harrison County, First Judicial District, entered its *Final Judgment of Divorce and Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as Amended* [Dkt. 33] (hereinafter "*Judgment of Divorce*"). On November 22, 2016 Michael filed his *Motion for Reconsideration of Court's Judgment under MRCP 59 and 60* [Dkt. 34]. On November 23, 2016 Joesie filed her *Motion to Reconsider Final Judgment of Divorce* [Dkt. 35]. On December 06, 2016 the State of Mississippi *ex rel.* Jim Hood, Attorney General (the "State") filed its *Motion to Alter or Amend, or for Other Relief from, "Final Judgment of Divorce and Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as Amended"* [Dkt. 40].

## **Post Reconsideration Hearing Briefs**

On March 23, 2017, a reconsideration hearing was held. On April 7, 2017 Michael filed his *Brief of Michael Gerty in Support of his Post Judgment Motion under MRCP 59 and 60* [Dkt. 43]. Also on April 7, 2017 Joesie filed her *Brief of Plaintiff Joesie R. Gerty in Support of her Motion to Reconsider Final Judgment of Divorce* [Dkt. 44].

## **Court's Amended and Restated Judgment of Divorce**

On June 8, 2016 the Chancery Court denied Michael's *Motion for Reconsideration of Court's Judgment*, denied the Attorney General's *Motion to Alter or Amend*, and denied in part and granted in part Joesie's *Motion to Reconsider* and entered its *Amended and Restated Judgment of Divorce* [Dkt. 45] (hereinafter "*Amended Judgment of Divorce*").

### **Notice of Appeal**

On June 14, 2017 Michael filed his *Notice of Appeal* [Dkt. 46] alleging that the Court erred in the grounds upon which the divorce was granted, custody, alimony and other matters. On June 20, 2017 the State of Mississippi ex rel. Jim Hood, Attorney General filed its *Notice of Appeal from the Amended and Restated Judgment of Divorce entered in this case on June 8, 2017* [Dkt. 45], and from all rulings and orders precedent thereto and merged therein [Dkt. 55].

### **Mississippi Supreme Court's Opinion**

On December 13, 2018 the Mississippi Supreme Court issued its *Mississippi Supreme Court Opinion of December 13, 2018* (hereinafter "*Supreme Court Opinion*") in which it affirmed in part, reversed in part, and remanded in part [Dkt. 96]. The Mississippi Supreme Court affirmed the Chancery Court's judgment on child custody and child support, reversed on the grounds for divorce granting Michael a divorce on the grounds of adultery, and remanding on visitation and equitable distribution of marital assets.

### **Motion for Rehearing**

Michael's *Motion for a Rehearing* was filed on December 27<sup>th</sup>, 2018 and subsequently denied by the Mississippi Supreme Court on March 14, 2019.

### **Chancery Court's Final Judgment on Remand**

The Chancery Court found that a new trial was not necessary and that the evidence presented at the original trial was sufficient to render a decision on remand. The Chancery Court filed its *Final*

(hereinafter “*Judgment on Remand*”) on May 3<sup>rd</sup>, 2019 as follows:

ORDERED AND ADJUDGED that the Defendant, MICHAEL T. GERTY, shall be and is hereby awarded a full, complete, and absolute divorce of and from the Plaintiff, JOESIE R. GERTY, on the ground of ADULTERY, and that the bonds of matrimony heretofore existing by and between the parties are hereby canceled and held naught, and that the parties are hereby fully, finally, and completely divorced from the other; It is further

ORDERED AND ADJUDGED that the parties are granted joint legal custody of the minor child, Jayden Gerty, with primary physical custody granted to Joesie, subject to Michael’s visitation as set forth herein; It is further

ORDERED AND ADJUDGED that Michael Gerty shall pay child support on the first (1<sup>st</sup>) of every month in the amount of \$764.00 until the minor child reaches the age of twenty-one (21) or is otherwise emancipated; It is further

ORDERED AND ADJUDGED that Michael Gerty shall maintain health insurance for the child either privately or through government benefits. Both parties shall fully and completely cooperate with the filing of any and all insurance claims for the benefit of the child. Should health insurance become available to Joesie for the child through her employment, the child shall be insured through this employment if financially feasible and more beneficial with the father bearing the cost to insure the child. The parents shall equally pay all uncovered health-related costs (i.e., medical, dental, orthodontic, optical, pharmaceutical, etc. which shall include but not be limited to dental exams and procedures, orthodontics [including retainers], x-rays, MRI’s, psychological exams and counseling, hospital expenses, medications, physical therapy, eye exams, glasses, and contact lenses). It is further

ORDERED AND ADJUDGED that pursuant to Uniform Chancery Court Rule 8.06, both parties shall keep the other informed of his/her full address, including state, city, street, house number, and telephone number, if available, unless excused in writing by the Court, Further, within five (5) days of a party changing his/her address, he/she shall, so long as the child remains a minor, notify in writing the Clerk of Court who has entered the order providing for custody and visitation, of his/her full new address and shall furnish the other party a copy of such notice. The notice shall include the Court file number. Additionally, in the event of a threat, disaster, or other emergency, such as a hurricane, which causes an emergency evacuation, any party who has custody of the minor child (physical custody or while exercising visitation) has a duty to notify the other parent of the location and well-being of the minor as soon as reasonably possible; It is further

ORDERED AND ADJUDGED that Michael Gerty is awarded the Gulfport residence located at 10578 Steeplechase Drive, Gulfport, Mississippi, and both parties shall be equally responsible for all debts associated thereto; It is further

ORDERED AND ADJUDGED that Joesie Gerty is awarded the exclusive use and possession of the real property located on Blue Meadows Road, Pass Christian, Mississippi, and shall be financially responsible for all upkeep and repairs to the property, while Michael Gerty shall be bear responsibility for the mortgage, insurance, taxes, and liens associated thereto. Title shall be vested in both parties as tenants in common, with each party sharing equally in the proceeds of the sale after expenses and satisfaction of debts; It is further

ORDERED AND ADJUDGED that each party is awarded fifty percent (50%) of the marital (204 months) (sic)<sup>3</sup> portion of Michael's military retirement. Therefore, Joesie Gerty is hereby awarded 102 months of Michael's total military retirement. Michael shall execute the necessary military forms to effectuate this award to Joesie. It is further

ORDERED AND ADJUDGED that fifty percent (50%) of the marital portion of Joesie's 401(k) is awarded to each party, totaling \$11,500.00 for each party. Joesie shall assign this amount of her retirement to Michael which shall be payable to him when it may be withdrawn without penalty. If the benefit plan allows a loan to be withdrawn in this amount without penalty other than interest, Joesie shall provide Michael with \$11,500.00 in loan proceeds within ninety (90) days from the date of this judgment. It is further

ORDERED AND ADJUDGED that Michael Gerty is relieved of paying alimony unto Joesie Gerty as previously ordered by the Court.

Due to a clerical error Michael did not receive this judgment until after it was mailed to him on June 20, 2019.

### Notice of Appeal

On July 13, 2019 Michael filed his *Notice of Appeal* [Dkt. 102] alleging that the Court erred in the equitable distribution of marital assets, visitation, and other matters. On August 15, 2019 the Mississippi Supreme Court granted Michael's *Motion to Consolidate* the present case (2019-CP-01152) "with Gerty v Gerty 2017-CP-0828-SCT, only for use of the appellate record on appeal."

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<sup>3</sup> The Chancery Court made an error in this calculation. The length of time between the parties' date of marriage, May 7, 2005 and the first date of the trial, December 7, 2015 is 127 months not 204 months.

## STATEMENT OF THE FACTS

### **Facts Related to the Chancery Court's Treatment of the Parties' *Property Settlement Agreement* [Dkt. 33]**

In its original *Judgment of Divorce* [Dkt. 33] the Chancery Court found that the parties' PSA was legally binding and sufficiently addressed the distribution of **all** the parties' assets.<sup>4</sup> The Chancery Court did not include a Ferguson Analysis in its original *Judgment of Divorce* [Dkt. 33] but simply attached the parties' PSA. Following the Reconsideration Hearing, in which Michael requested that the Chancery Court reconsider its ruling on child custody and other matters, the Chancery Court modified the parties' PSA by awarding Joesie 22% of Michael's military retirement pay and additional alimony payments. In its *Judgment on Remand* the Chancery Court stated that it would no longer abide by the parties' PSA and awarded Joesie an additional 25% of Michael's military retirement pay.

### **Facts Related to the *Joint Complaint for Divorce (Irreconcilable Differences)* and the Accompanying *Separation and Child Custody and Property Settlement Agreement***

Michael Gerty and Joesie Gerty were married on May 7, 2005. The minor child, Jayden Gerty, was born on December 1, 2009. During Michael's military deployment in 2012, Joesie announced her unhappiness in the marriage. (T. Page 468, 470; R.E. Page 240, 241) Upon Michael's return from deployment in December 2012 Joesie moved out of the parties' marital bedroom. (T. Page 37, 98, 632 - 633; R.E. Page 197, 201, 260 - 261) Michael discovered Joesie's extra-marital relationship with Kyle Rebstock in August of 2013 and subsequently confronted Joesie on the subject. (T. Page 197, 566; R.E. Page 219, 255) Joesie admitted to the extra-marital relationship and the parties engaged in conversations about the future. (T. Page 123, 134, 197; R.E. Page 211, 212, 219) Michael wanted Joesie to move with him and Jayden to the Great Lakes region of Illinois and work on their marriage together. (T. Page 196, 468, 476; R.E. Page 218, 240, 246) Joesie initially agreed to the move but later decided

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<sup>4</sup> *Judgment of Divorce* [Dkt. 33] Page 27 ¶41; R.E. Page 59

that she would be happier staying in the Gulfport, Mississippi area. (T. Page 82, 197, 468; R.E. Page 200, 219, 240) The parties discussed and mutually drafted the *Joint Complaint for (Irreconcilable Differences)* [Dkt. 2] and the accompanying *Separation and Child Custody and Property Settlement Agreement*. [Dkt. 3] (T. Page 80, 109, 110, 323; R.E. Page 199, 205, 206, 224) The parties signed the *Joint Complaint for Divorce (Irreconcilable Differences)* [Dkt. 2] and the accompanying *Separation and Child Custody and Property Settlement Agreement* [Dkt. 3] on September 18, 2013 in the presence of a notary at the Gulfport courthouse. (T. Page 323; R.E. Page 224) Michael and Jayden moved to Kenosha, Wisconsin in the last week of September 2013. Joesie temporarily moved in with her friend, Robin Caldwell, and from there moved into the Pass Christian home in January 2014. The parties agreed that it was in Jayden's best interest to be in his father's care (T. Page 348; R.E. Page 230) and that they followed the mutually agreed upon *Separation and Child Custody and Property Settlement Agreement* [Dkt. 3] until the date of the temporary hearing. (T. Page 108 - 109, 323, 347; R.E. Page 204-205, 224, 229) On June 10, 2015 Joesie filed her *Withdrawal of Consent to Divorce on Irreconcilable Differences* [Dkt. 6].

### Facts Related to the Temporary Hearing and Temporary Order

On June 17, 2015 Joesie filed her *Plaintiff's Motion for Temporary Relief* [Dkt. 11]. Less than 30 days later, on July 14, 2015, a temporary hearing was conducted. At the time of the temporary hearing discovery had not been completed, the Court stated that the *Temporary Order* [Dkt. 19] was a strictly temporary matter and the Court further stated that a full Albright analysis was not conducted at the temporary hearing. (T. Page 155 - 156, 518 -519; R.E. Page 215-216, 250-251) Nevertheless, the Court completely reversed the *Child Custody Agreement* [Dkt. 3] stating, "It is in the best interest of the **MOTHER** that the mother be granted custody of the child." [emphasis added] (T. Page 159; R.E. Page 217)<sup>5</sup>

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<sup>5</sup> *Temporary Order* [Dkt. 19] Page 5; R.E. Page 28

### Facts Related to Jayden Gerty's Residence

Jayden Gerty was born on December 1, 2009. At that time, he resided with Michael and Joesie at 10578 Steeplechase Dr., Gulfport, Mississippi. In June of 2013, together with Michael and Joesie, Jayden moved to White Pine Cir., Gulfport Mississippi. As per the *Child Custody Agreement [Dkt. 3]*, in late September 2013, together with Michael, Jayden moved to 6420 53<sup>rd</sup> Ave., Kenosha, Wisconsin. (T. Page 80; R.E. 199) In December 2014, together with Michael, Jayden moved to 400 N. Patriot Drive, Hainesville, IL. As per the *Child Custody Agreement [Dkt. 3]*, Jayden visited his mother in the summer months of both 2014 and 2015. (T. Page 451, 487; R.E. Page 236, 249)

In her *Complaint for Divorce [Dkt. 8]*, Joesie falsely stated that Jayden resided with her at the Pass Christian home and had so resided since January 2014. (T. Page 317-318; R.E. Page 222-223) Joesie doubled down on her first statement by further stating that from time to time the child visited Michael in Kenosha, Wisconsin and Hainesville, Illinois. <sup>6</sup> (T. Pages 317-318; R.E. Page 222-223) Joesie testified that her attorney advised her to wait to file her *Complaint for Divorce [Dkt. 8]*, which contained the statements that were known to be false, until Jayden was living with her during the summer visitation period. (T. Page 111, 363, 391; R.E. Page 207, 231, 234)

### Facts Related to Jayden Gerty's School Attendance

On October 11, 2013 Jayden Gerty began attending preschool at La Petite Academy in Kenosha, Wisconsin. (T. Page 471; R.E. Page 242) Jayden continued to attend La Petite Academy in Kenosha, Wisconsin through January 2015 at which date Jayden transferred to the La Petite Academy preschool near Hainesville, Illinois. (T. Page 139; R.E. Page 213) In May 2015 Jayden graduated from La Petite Academy preschool in a ceremony attended by both Michael and Joesie. (T. Page 466; R.E. Page 238) In August 2015 Jayden began kindergarten at Lizana Elementary School in Gulfport, Mississippi. (T. Page 412; R.E. Page 235) Jayden recently began 4<sup>th</sup> Grade at Lizana Elementary.

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<sup>6</sup> *Joesie's Complaint for Divorce [Dkt. 8]* Page 5 ¶23a

## SUMMARY OF THE ARGUMENT

The Chancery Court was manifestly wrong, employed the wrong legal standard, and abused its power when it declared that it would no longer abide by the parties' *Property Settlement Agreement* [Dkt. 3]; specifically stating "... this Court is no longer limited by the parties' Property Settlement Agreement ..." <sup>7</sup> and "... the Court is no longer abiding by the parties' agreement ..." <sup>8</sup> The Chancery Court was manifestly wrong, employed the wrong legal standard, and erred by awarding Joesie a percentage of Michael's military retirement pay. The Chancery Court was manifestly wrong for significantly limiting the father's summer visitation. The Chancery Court was manifestly wrong and abused its power by allowing a clear and unmistakable bias to determine its child custody decision.

### SUMMARY OF ARGUMENT I:

#### **The Chancery Court Was Manifestly Wrong, Employed the Wrong Legal Standard, and Abused Its Power When It Declared that It Would No Longer Abide by the Parties' *Property Settlement Agreement* [Dkt. 3]**

The Chancery Court's original *Judgment of Divorce* [Dkt. 33] concluded that the parties' PSA sufficiently addressed the division of all the parties' marital property and alimony. In its *Amended Judgment of Divorce* [Dkt. 45], although the Chancery Court found the PSA to be enforceable, the Chancery Court significantly modified the PSA by awarding Joesie 22% of Michael's military retirement pay and extending the time that Michael was to pay alimony. Finally, in its *Judgment on Remand* [Dkt. 99], the Chancery Court stated that it would no longer be bound by the parties' PSA and would therefore be awarding Joesie an additional 25% of Michael's military retirement pay. The Chancery Court's changing opinions are not supported by the record, apply the wrong legal standard, and are an abuse of power.

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<sup>7</sup> *Judgment on Remand* [Dkt. 99] Page 11 ¶37; R.E. Page 179

<sup>8</sup> *Judgment on Remand* [Dkt. 99] Page 17 ¶51; R.E. Page 185

## SUMMARY OF ARGUMENT II:

### **The Chancery Court Was Manifestly Wrong, Applied the Wrong Legal Standard, and Erred by Awarding Joesie a Percentage of Michael's Military Retirement Pay**

Michael's military retirement pay was not an asset at the time the parties entered into the PSA. Military retirement pay becomes an asset only after a member has served 20 years of qualifying service and has been discharged from service.<sup>9</sup> Future earnings are clearly covered by the party's PSA.<sup>10</sup>

Notwithstanding the fact the PSA addresses the issue of Michael's military retirement pay, the Chancery Court lacked the authority to award Joesie a percentage of Michael's military retirement pay.<sup>11</sup> The length of time between the parties' date of marriage and the date of demarcation for the division of the parties' marital assets and the length of the marriage as established by the PSA is eight years and five months; well short of the ten years required by *The Uniform Services Former Spouses Protection Act*<sup>12</sup> before a state court is authorized to award a spouse a percentage of a member's military retirement pay.

Notwithstanding the previous arguments, the Chancery Court's decision to award Joesie a percentage of Michael's military retirement pay and subsequently increase that award by 25% is not consistent with the requirements of *Ferguson*.<sup>13</sup>

The parties' *Property Settlement Agreement* [Dkt. 3] sufficiently addresses Michael's military retirement pay, is fair and equitable, provides for Joesie's financial security, and eliminates periodic payments and sources of future friction; as such the *Property Settlement Agreement* [Dkt. 3] should be enforced without any changes or additions.

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9 U.S. Code Title 10 § 12731, *Age and Service Requirements*

10 PSA [Dkt. 3] Page 5; R.E. Page 16

11 *The Uniform Services Former Spouses Protection Act* (US Code Title 10 Part II Chapter 71 Section 1408 (d)(2))

12 *The Uniform Services Former Spouses Protection Act* (US Code Title 10 Part II Chapter 71 Section 1408 (d)(2))

13 *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994)

### SUMMARY OF ARGUMENT III:

#### **The Chancery Court was Manifestly Wrong for Significantly Limiting the Father's Summer Visitation**

The Chancery Court was manifestly wrong for not following the parties' agreed upon summer visitation schedule. A child's natural parents "are infinitely more capable of devising a workable custody plan than are the judges of this state."<sup>14</sup> Michael and Joesie detailed a visitation schedule for the non-custodial parent in their *Child Custody Agreement* [Dkt. 3]. Nothing in the Chancery Court's *Albright* analysis indicated that it would be in Jayden's best interest to severely limit the time Jayden spent with his father. Neither Joesie nor Michael requested a modification of the visitation arrangement that was established by their *Child Custody Agreement* [Dkt. 3].

### SUMMARY OF ARGUMENT IV:

#### **The Chancery Court was Manifestly Wrong and Abused Its Power by Allowing a Clear and Unmistakable Bias to Determine Its Child Custody Decision**

The Chancery Court's rulings have consistently been made as if Michael was guilty of marital fault and Joesie was an innocent victim. Despite the Chancery Court's statement "subject to the evidence to be presented later"<sup>15</sup> the Chancery Court never let go of the belief that Michael must be guilty of adultery. No amount of evidence or testimony to the contrary was able to remove this unfounded opinion from the mind of the Chancery Court. Michael raised Jayden in the absence of Joesie while Joesie lived with her boyfriend's family. An unbiased review of the *Albright* factors will, without doubt, lead to the conclusion that the best interests of Jayden will be served by returning Jayden to his father's primary care.

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<sup>14</sup> *Cheek v Ricker*, 431 So. 3d 1139 (Miss. 1983)

<sup>15</sup> *Temporary Order* [Dkt. 19] Page 3 ¶5g; R.E. Page 26

## ARGUMENT I:

### **The Chancery Court Was Manifestly Wrong, Employed the Wrong Legal Standard, and Abused Its Power When It Declared that It Would No Longer Abide by the Parties' *Property Settlement Agreement* [Dkt. 3]**

The Chancery Court's treatment of the parties' PSA has morphed throughout its various judgments. The Chancery Court's original *Judgment of Divorce* [Dkt. 33] concluded that the parties' PSA sufficiently addressed the division of **all** the parties' marital property and alimony. The Chancery Court so strongly felt that the PSA adequately divided the parties' marital assets that it did not include a *Ferguson* analysis in its original Judgment but simply attached the PSA. (*Dkt. 33* Page 27 ¶41; R.E. Page 59):

Therefore, the Court incorporates the Agreement (attached hereto as Exhibit "A") of the parties as a part of this Judgment **governing all the issues of equitable division of marital property and alimony.** [emphasis added]

The Chancery Court began to modify its view of the PSA following Michael's request for the Chancery Court to reconsider its child custody decision. The Chancery Court's *Amended Judgment of Divorce* [Dkt. 45] concluded that the PSA was indeed fair and enforceable, regardless of why or even if a divorce was granted.

(*Dkt. 45* Page 8 ¶11; R.E. Page 86):

Nothing in the record indicates that the Agreement was patently unfair regarding the property division and alimony actually set out therein.

(*Dkt. 45* Page 38 ¶61; R.E. Page 116):

Pointing out that it did not intend to limit parties' right to contract, the Court concluded as follows: "However, the contract should specify, with particularity, within its four corners, whether it is limited to an irreconcilable differences divorce or whether it is intended to be binding in a divorce granted on other grounds." *Id.* The Agreement at issue does precisely as the Supreme Court advises. **It specifies with particularity, within its four corners, that it is "not contingent on any divorce being granted". Further it contemplates its incorporation into a judgment of divorce on "any grounds"** with the exception of whatever terms the Court may disprove, in

which case, the parties agreed to submit themselves to the jurisdiction of the Chancery Court for its adjudication of "... any and all matters concerning the dissolution of the parties' marriage ...." [emphasis added]

The Chancery Court concluded (*Dkt. 45* Page 38 ¶61; R.E. Page 116):

Therefore, the "foundation of the bargain" of the Agreement between the Gertys **was not limited to an irreconcilable divorce**. *Id.* at 340 [emphasis added]

The Chancery Court continued to provide support to the validity of the PSA (*Dkt. 45* Page 39 ¶62; R.E. Page 117):

Settlement of disputes is favored in the law and, generally, contractual agreements will be enforced, absent any fraud, mistake, or overreaching.<sup>16</sup> Because they are contracts, this general principle applies to agreements made in the process of divorce just like all other negotiated settlements and **they will be enforced**.<sup>17</sup> This is especially true with regard to the property of the parties with few, if any, exceptions.<sup>18</sup> [emphasis added]

(*Dkt. 45* Page 37 ¶60; R.E. Page 115):

The Court finds and concludes Joesie's withdrawal of consent to the Agreement and the Joint Complaint for Divorce did not work to nullify the agreement between the parties.

Although the Chancery Court found the PSA to be enforceable, the Chancery Court significantly modified the PSA by awarding Joesie 22% of Michael's military retirement pay and extending the time that Michael was to pay alimony. The Chancery Court supported this modification by performing a *Ferguson* analysis.<sup>19</sup> The Chancery Court's *Ferguson* analysis, however, indicated that the unadulterated PSA was written to Joesie's favor. The Chancery Court's analysis demonstrated that not a single factor of *Ferguson* indicated that the PSA was inequitable toward Joesie. In fact, the Chancery Court

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16 *First Nat'l Bank of Vicksburg v. Caruthers*, 443 So.2d 861, 864 (Miss.1983); *Weatherford v. Martin*, 418 So.2d 777, 778 (Miss.1982)

17 *Newell v. Hinton*, 556 So.2d 1037, 1042 (Miss. 1990); *East v. East*, 493 So.2d 927, 931-33 (Miss. 1986); *Travelers Indem. Co. v. Chappell*, 246 So.2d 498, 510 (Miss. 1971)

18 *Osborne v. Bullins*, 549 So.2d 1337, 1339 (Miss. 1989); *Morris v. Morris*, 541 So.2d 1040 (Miss. 1989)

19 *Amended Judgment of Divorce [Dkt. 45]* Page 40-46 ¶64-75; R.E. Page 118-119

concluded that the majority of the Ferguson factors indicated that the PSA was written to Joesie's benefit. Regardless, the Chancery Court awarded Joesie 22% of Michael's military retirement pay, 100% of her own 401(k) retirement plan, and extended the time that Michael was to pay alimony. (A more detailed examination of the irregularities in the Chancery Court's *Ferguson* analysis is provided in Argument II of this brief.)

The Chancery Court's *Judgment on Remand* [*Dkt. 99*] saw yet another change of view toward the PSA. In its *Judgment on Remand*, the Chancery Court repeatedly stated that it would no longer be bound by the parties' PSA, therefore, it would be adjusting the date of demarcation for purposes of property division and the length of the marriage from September 18, 2013 to December 7, 2015.

(*Dkt. 99* Page 11 ¶37; R.E. Page 179):

With the Supreme Court's reversal of this Court's Judgment on all matters outside of child custody, including the granting of divorce on irreconcilable differences, **this Court is no longer limited by the parties' Property Settlement Agreement** and must now perform a review of its asset division, in conjunction with its award of alimony in light of Joesie's fault. [emphasis added]

(*Dkt. 99* Page 14 ¶44 Footnote 11; R.E. Page 182):

In the previous Judgments, the Court was abiding by the parties' Property Settlement Agreement in arriving at the length of the marriage (previously assessed at 101 months, based on the date of the Property Settlement Agreement was executed). **Without the constraint of operating under the Property Settlement Agreement**, the Court finds the date of demarcation for purposes of property division to be the first day of trial, December 7, 2015, making the marriage 204 (sic)<sup>20</sup> months. [emphasis added]

(*Dkt. 99* Page 17 ¶51; R.E. Page 185):

**Since the Court is no longer abiding by the parties' agreement**, which would make the date of demarcation September 18, 2013 (the date of the agreement), the Court finds the marital portion to extend from the date of marriage (May 7, 2005) to December 6, 2015. [emphasis added]

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<sup>20</sup> The Chancery Court made an error in this calculation. The length of time between the parties' date of marriage, May 7, 2005 and the first date of the trial, December 7, 2015 is 127 months not 204 months.

While the Chancery Court did not state a legal precedence to justify its decision to no longer abide by the parties' PSA, nor did it find that the PSA was unfair, it seemed to imply that because the parties were not granted an irreconcilable differences divorce, then, the PSA was no longer legally binding. The Chancery Court, however, had previously ruled that this same PSA was legally binding regardless of why or even if the parties were granted a divorce. (Dkt. 45 Page 38 ¶61; R.E. Page 116):

Therefore, the "foundation of the bargain" of the Agreement between the Gertys **was not limited to an irreconcilable divorce**. Id. at 340 [emphasis added]

The Chancery Court's most recent decision to no longer abide by the parties' PSA was not made because the parties were not granted an irreconcilable differences divorce or because the Chancery Court suddenly realized that the parties' PSA was unenforceable or unfair. There is no question that the Chancery Court felt that the parties' PSA was fair, legally binding regardless of why or even if the parties were granted a divorce, and established September 18, 2013 as the demarcation date in regards to the parties' division of marital property as well as the length of the marriage. (Dkt. 99 Page 17 ¶51; R.E. Page 185):

Since the Court is no longer abiding by the parties' agreement, which would make **the date of demarcation September 18, 2013** (the date of the agreement)... [emphasis added]

The Chancery Court's reversal was made as retribution for Michael's appeal of the Chancery Court's judgment. This reversal is a very obvious ploy by the Chancery Court to unjustly move the date of demarcation and increase Joesie's claim to Michael's military retirement pay by an additional 25%.

The Chancery Court's original *Judgment of Divorce* [Dkt. 33] did not award Joesie any of Michael's military retirement; the Chancery Court's *Amended Judgment of Divorce* [Dkt. 45] awarded Joesie 22% of Michael's military retirement pay; the Chancery Court's *Judgment on Remand* awarded Joesie 26% of Michael's military retirement pay. The Chancery Court is ignoring the law and its own precedent in order to reach a conclusion that the Chancery Court desires not the conclusion that would naturally

be reached if the law were followed. These actions by the Chancery Court are an unmistakable abuse of power.

The parties' PSA very plainly states that both parties intended to be legally bound once and for all to the PSA upon its date of execution, September 18, 2013.

(*Dkt. 3* Page 1; R.E. Page 14):

The parties make this Agreement to settle once and for all the division of property, what they may owe to each other and what they can expect to receive from each other; ... and the parties intend that this Agreement shall be binding on them from and after the date and time of execution, and that this Agreement may be incorporated into a final judgment of divorce at some future time. [emphasis added]

(*Dkt. 3* Page 6; R.E. Page 19):

#### Section 14 – DIVORCE

It is agreed and understood that **this Agreement is not contingent upon a divorce being granted.** However, if the parties are granted a divorce on any grounds, **the parties agree that this Agreement shall be made a part of the Judgment** and that such Judgment shall not conflict with the terms of the Agreement except to the extent disapproved by the Court ... [emphasis added]

(*Dkt. 3* Page 8; R.E. Page 21):

#### Section 21 – FULLY READ AND UNDERSTAND; INFORMED CONSENT

Each party represents and acknowledges that he or she has fully read this Agreement, consulted with each other, carefully considered same, and have signed and executed same after such consultation, that the signing of the Agreement is free and voluntary without force or collusion by either party or any third party, and that each party signed same with the full knowledge of said party's rights, obligations, and responsibilities. Each party agrees that they have had a reasonable opportunity to consult with an attorney of their choice in the negotiation and preparation of this document, and regarding any divorce proceeding.

The parties' *Property Settlement Agreement* [*Dkt. 3*] is a legally binding agreement "governing all the issues of equitable division of marital property and alimony", is not contingent on a divorce being

granted, must be included in the parties' divorce, and established September 18, 2013 as the date of demarcation in regards to the division of marital assets as well as the length of the marriage.

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The remaining Arguments of this brief will further illustrate the Chancery Court's willingness to ignore evidence, ignore testimony, ignore the law, invent new legal standards, and even change the law in order to reach a conclusion desired by the Chancery Court. The Mississippi Supreme Court made note of this trend when discussing how the Chancery Court refused to address Ms. Haffner's testimony in which Ms. Haffner testified about the extent of Joesie's relationship with Kyle and that to her knowledge Michael was unaware that this relationship continued after Joesie's confession; the Mississippi Supreme Court stated "Again, testimony adduced during the first two days of trial, December 7 and 9, 2015, including the testimony provided by Joesie's best friend Haffner, was not referenced in either of the chancellor's final judgments." <sup>21</sup> The Chancery Court refused to acknowledge testimony that was in direct opposition to the Chancery Court's desired outcome. The Mississippi Supreme Court also noted the Chancery Court's tendency to pick and choose which issues to address. (*Supreme Court Opinion* Page 18 ¶36; R.E. Page 161):

However, the chancellor failed to make any findings of fact regarding Joesie's multiple adulterous acts, nor did she make any findings of fact about whether Michael knew about or condoned any adulterous acts outside the "fling."

Once again, the Chancery Court refused to address issues that would lead to a conclusion that was not desired by the Chancery Court.

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<sup>21</sup> *Supreme Court Opinion* Page 10 ¶18 Footnote 15; R.E. Page 153

## ARGUMENT II:

### The Chancery Court Was Manifestly Wrong, Applied the Wrong Legal Standard, and Erred by Awarding Joesie a Percentage of Michael's Military Retirement Pay

There are a number of questions that need to be clarified with regard to Michael's military retirement pay:

- A. When does military retirement pay become an asset?
- B. Does the parties' *Property Settlement Agreement* [Dkt. 3] address Michael's military retirement pay?
- C. Does the Chancery Court have the authority to award Joesie a percentage of Michael's military retirement pay?
- D. Does Joesie meet the requirements of *Ferguson* to establish a claim to Michael's military retirement pay?

#### A. When Does Military Retirement Pay Become an Asset?

Michael's military retirement pay was not an asset at the time the parties entered into the PSA. Congress agrees, that at the time that Michael and Joesie entered into their PSA, Michael's entitlement to military retirement pay did not exist. (*U.S. Code Title 10 § 12731, Age and Service Requirements*):

- (a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 12739 of this title, if the person—
  - (2) **has performed at least 20 years of service** computed under section 12732 of this title; [emphasis added]

Michael would not be entitled to any military retirement pay unless he has completed at least 20 years of service. Michael's 8.05 filed with the Court did not include his military retirement pay because it was not an asset or income at the time the parties filed for divorce.<sup>22</sup> Military retirement pay becomes an asset only after a member has served 20 years of qualifying service and is discharged from service.

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<sup>22</sup> Michael's 8.05 [*Exhibit 4*]; R.E. Page 264

**B. Does the Parties' *Property Settlement Agreement* [Dkt. 3] Address Michael's  
Military Retirement Pay?**

Michael's military retirement pay did not exist at the time the parties signed and executed their PSA, therefore, it is clear that Michael and Joesie correctly considered this pay as "Future Earnings". Future earnings are expressly covered by the party's PSA under Section 10.<sup>23</sup> Furthermore, the Chancery Court classifies Michael's military retirement pay as a "stream of income";<sup>24</sup> future income is also clearly covered under Section 10 of the PSA (*Dkt. 3* Page 5; R.E. Page 18):

Section 10 – FUTURE EARNINGS AND ACQUISITIONS

Each party, as of the effective date of this Agreement waives, releases, and relinquishes all right, title, and interest in **all income, earnings and other property** of the other party except as necessary to collect any sums due in the event of a default. [emphasis added]

Moreover, the PSA clearly states that the parties did not expect to receive any property that was not expressly divided by the PSA (*Dkt. 3* Page 1; R.E. Page 14):

The parties make this Agreement to settle once and for all the division of property, what they may owe each other and **what they can expect to receive from each other**; [emphasis added]

Both parties agreed that the PSA was fair and equitable and neither party intended to divide either Michael's retirement pay or Joesie's 401(k) Retirement Plan.

(*Dkt. 3* Page 4; R.E. Page 17):

Section 7 – FULL, OPEN FINANCIAL DISCLOSURES

Each party represents to the other that he or she has full and openly disclosed their financial status, including their assets and liabilities of all types and agree that the terms of the Agreement are fair, just, and equitable.

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<sup>23</sup> PSA [*Dkt. 3*] Page 5; R.E. Page 18

<sup>24</sup> *Judgment on Remand* [*Dkt. 99*] Page 14 ¶44; R.E. Page 182

(Dkt. 3 Page 6; R.E. Page 19):

#### Section 16 – ABSENCE OF DURESS OR UNDUE INFLUENCE

The parties agree and state that each has feely (sic) and voluntarily enter (sic) into this Agreement. This Agreement was executed free of any duress, coercion, collusion, or undue influence. In some instances, the Agreement represents a compromise of disputed issues; however, both parties believe that its terms and conditions are fair and reasonable.

The parties' retirement plans were not a secret from one another. Both, Joesie and Michael signed a *Waiver of Rule 8.05 Financial Statements and Disclosures* [Dkt. 4] in which the parties "acknowledge that both of them are familiar with the work history of the other during the period of the marriage and are generally familiar with their individual and joint assets, liabilities, debts, income and expenses."<sup>25</sup>

The Chancery Court originally ruled that the PSA governed "all the issues of equitable division of marital property and alimony."<sup>26</sup> The *Property Settlement Agreement* [Dkt. 3] sufficiently addresses Michael's military retirement pay as well as Joesie's 401(k) plan; Joesie did not expect to receive a percentage of Michael's military retirement pay and Michael did not expect to receive a percentage of Joesie's 401(k) plan.

#### **C. Does the Chancery Court Have the Authority to Award Joesie a Percentage of Michael's Military Retirement Pay?**

Notwithstanding the fact the PSA addresses Michael's military retirement pay, the Chancery Court lacked the authority to award Joesie a percentage of Michael's military retirement pay.<sup>27</sup> *The Uniform Services Former Spouses Protection Act* (US Code Title 10 Part II Chapter 71 Section 1408 (d)(2)) governs when a state court is authorized to award a spouse a percentage of a member's military retirement pay:

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<sup>25</sup> Dkt. 4 Page 15 - 16

<sup>26</sup> *Judgment of Divorce* [Dkt. 33] Page 27 ¶41; R.E. Page 59

<sup>27</sup> *The Uniform Services Former Spouses Protection Act* (US Code Title 10 Part II Chapter 71 Section 1408 (d)(2))

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

Argument I above illustrated that the parties' PSA established September 18, 2013 as the date of demarcation in regards to the division of marital assets as well as the length of the marriage. The length of time between the parties' date of marriage (May 7, 2005) and September 18, 2013 is eight years and five months. Additionally, in its *Judgment on Remand* [Dkt. 99], the Chancery Court confirmed that "... the parties were married eight years and four (sic) months."<sup>28</sup> This is well short of the ten years required by *The Uniform Services Former Spouses Protection Act* before a state court is authorized to award a spouse a percentage of a member's military retirement pay.<sup>29</sup>

#### **D. Does Joesie Meet the Requirements of *Ferguson* to Establish a Claim to Michael's Military Retirement Pay?**

Notwithstanding the previous arguments, the Chancery Court's decision to award Joesie a percentage of Michael's military retirement pay as well as its decision to subsequently increase that award by 25% are not consistent with the requirements of *Ferguson*.<sup>30</sup>

#### **Ferguson Division Analysis**

*Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows: a. Direct or indirect economic contribution to the acquisition of the property; b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and*

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28 *Judgment on Remand* [Dkt. 99] Page 22 ¶63; R.E. Page 190

29 *The Uniform Services Former Spouses Protection Act* (US Code Title 10 Part II Chapter 71 Section 1408 (d)(2))

30 *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994)

*duration of the marriage; and c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.*

*Hemsley v Hemsley*, 639 So.2d 909 (Miss 1994) - Justice McRae, dissenting:

Ferguson further recognizes that only a spouse who has made a material contribution to the marital assets may claim equitable interest therein. *Id.* at 935. Moreover, **only when a contribution is proven by a party does the chancellor have authority to divide the assets accumulated during the marriage.** [emphasis added]

The Chancery Court's finding that Joesie sufficiently contributed to the accumulation of Michael's military retirement pay is not supported by the record, employs the wrong legal standard, and is in error. The Chancery Court found (*Dkt. 99* Page 16 ¶49; R.E. Page 184):

The evidence established that both parties contributed to the marital and family stability. **Michael's deployments and time away from Joesie caused instability.** However, it was Joesie's eventual extramarital relationship which was the ultimate catalyst for the marital demise. [emphasis added]

The Chancery Court's practice of equivocating any time it is forced to acknowledge Joesie's faults is a common theme throughout its various judgments. (*Dkt. 45* Page 5 ¶7; R.E. Page 83):

The Court finds Joesie's testimony was credible on most issues but questionable on the extent of her relationship with Kyle Rebstock. However, there is insufficient evidence for the Court to determine that Joesie's testimony was actually impeached. It is believable that Joesie continued to remain friends with Kyle's mother after their breakup. The Court, however, also finds Michael's testimony regarding his relationship with Amy to be questionable as well.

This equivocation is often made with statements and accusations that are unsupported and contrary to the record. This charge that Michael's military deployments caused instability is neither supported by the evidence nor does it follow the legal standard. Michael was in the military when he met Joesie. (*T.* Page 457; R.E. Page 237) Joesie worked on a military base when the parties met. (*T.* Page 457; R.E. Page 237) Michael made a deployment while the parties were dating. (*T.* Page 554; R.E. Page 253) Joesie was fully aware of the lifestyle associated with military service prior to making the decision to marry Michael. Michael made two more deployments before the couple decided to have a child. (*T.*

Page 467; 554; R.E. Page 239, 253) Joesie fully understood the couple's lifestyle prior to deciding to have a child with Michael. Joesie and Michael agreed that Michael would deploy as part of his family duties. Michael's military service is what put food on the family's table, put clothes on their backs, and put a roof over their heads. It is categorically unfair and not in keeping with the legal standards established by *Ferguson* for the Chancery Court to rule that Michael's military service caused instability when Joesie clearly understood what to expect from Michael's military service. It is unjust to tell Michael to go earn a living for his family, doing what most people would consider an honorable profession, and then after his spouse commits adultery condemn him for how he earned that money. The Chancery Court is allowing personal beliefs to cloud what would otherwise be a legally neutral judgment. Perhaps the Chancellor would find being married to a service member to be disruptive but Michael was not married to the Chancellor, Michael married Joesie, who entered the marriage with her eyes wide open to the military lifestyle. Moreover, Joesie did not complain of Michael's military service. Joesie's complaints with Michael were that he was quiet and that he was not very good in bed. (T. Pages 118, 625 - 626; R.E. Page 210, 258-259)

Furthermore, the Chancellor's ruling incorrectly applies the legal standard. The aspect of this *Ferguson* factor concerning "the stability and harmony of the marital and family relationships" was developed with the intent of protecting the rights of a "traditional" stay at home spouse and/or the spouse whose income was devoted to household expenses rather than investments.<sup>31</sup> The Chancery Court, however, perverts this factor to make the claim that the negative affect Joesie's infidelity had on the stability of the family is at least partially offset by the effect of Michael's military service. The Chancery Court's opinion that a spouse of a military member, even an unfaithful spouse as in this case, is more entitled to marital property than a spouse of a non-military member otherwise would be is not consistent with the spirit of *Ferguson* and is a very dangerous and dishonorable precedent to

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<sup>31</sup> *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994)

establish. The men and women who serve in our country's military should not have to fear the court system as a result of their honorable service.

It was Joesie, not Michael, who did not substantially contribute to the accumulation of Michael's military retirement pay. Joesie's continued deception regarding her on-going relationship with Kyle and her feigned interest in reconciliation are the only reasons that Michael did not press for finalization of the parties' divorce agreement until January of 2015.<sup>32</sup> Even at this date Michael could have filed for divorce from Joesie based on adultery but he relied on Joesie's word that she was going to process the couple's previously negotiated *Joint Complaint for Divorce* [Dkt. 2].<sup>33</sup> The parties' PSA was signed on Sept 18, 2013 and Joesie did not contribute to the marriage after this date nor did she support Michael's military career after this date. A convincing argument can be made that due to her adultery Joesie did not contribute to "the stability and harmony of the marital and family relationships" well prior to this date. The Mississippi Supreme Court noted that Joesie's adulterous affairs began as early as 2011. (*Supreme Court Opinion* Page 10 ¶18; R.E. Page 153):

The trial began in December 2015.<sup>34</sup> Joesie called her best friend Haffner as a witness. Haffner testified that she was aware that Joesie had dated other men besides Kyle. **She also testified that Joesie had been in a relationship with Kyle beginning in 2011** and continuing through the time of her testimony. Haffner testified that she was aware that Joesie and Kyle still socialized together. Haffner admitted that she was aware that Joesie exposed her own daughter Joy (sic) (from her first marriage) to her adulterous relationship with Kyle.

Another argument can be made that Joesie's decision to move in with her boyfriend's family instead of moving with Michael and Jayden to the Great Lakes area made Michael's military career more challenging.

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<sup>32</sup> *Supreme Court Opinion* Page 21 ¶40; R.E. Page 164

<sup>33</sup> *Supreme Court Opinion* Page 6 ¶9; R.E. Page 149

<sup>34</sup> Again, testimony adduced during the first two days of trial, December 7 and 9, 2015, including the testimony provided by Joesie's best friend Haffner, was not referenced in either of the chancellor's final judgments.

The entitlement to military retirement pay is contingent on completing a minimum of 20 years of qualifying service.<sup>35</sup> The member is not entitled to any military retirement pay if the member's time in service comes up even as little as a day short. Due to this stringent standard established by Congress and the fact the *Ferguson* specifically states that there is no automatic right to an equal division of jointly-accumulated property it is important to address the cause of the marriage failure in order to make an equitable decision concerning the division of military retirement pay.<sup>36</sup>

1. Irreconcilable Differences – If the parties do not come to an agreement concerning the division of marital property then it would be equitable to divide military retirement pay based on the amount of time that the marriage coincided with military service, all other factors considered.
2. Military Member is at Fault – It would be equitable to divide military retirement pay based on the amount of time that the marriage coincided with military service. A good argument could be made to expand this entitlement in favor of the non-military spouse but this entitlement is currently limited by federal law.
3. Non-Military Spouse is at Fault – The non-military spouse did not meet the same stringent standards that the military member must meet in order to be eligible to receive military retirement pay. It would **not** be equitable to reward the at fault spouse by awarding him/her a percentage of the military retirement pay.

It is not equitable to hold Michael to a higher standard than Joesie. Michael must serve honorably for 20 years to earn the right to receive military retirement pay.<sup>37</sup> The parties' marriage ended prematurely due to Joesie's marital faults and her refusal to mend her ways. Joesie, the non-military member, made the choice to commit adultery and therefore should not benefit from military retirement pay that very clearly does not have contingencies for partial completion of military service.

Mississippi is not a "No Fault Divorce" state nor is it a 50/50 division state. Regardless of whether the Chancery Court wants to change this law, the Chancery Court has a sworn responsibility to faithfully apply the laws of the state as written. Joesie did not meet the requirements of "substantial

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35 U.S. Code Title 10 § 12731, *Age and Service Requirements*

36 *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994)

37 U.S. Code Title 10 § 12731, *Age and Service Requirements*

contribution to the accumulation of Michael's military retirement pay as required by *Ferguson*. Awarding Joesie any percentage of Michael's military retirement pay is quite simply financially rewarding Joesie for her duplicitous acts.

***The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.***

The Chancery Court's finding that the parties' "property settlement agreement failed to divide all the parties' assets, namely Michael's military retirement and Joesie's 401(k)"<sup>38</sup> is manifestly wrong. Michael and Joesie have a legally binding PSA that, as previously discussed in Section B if this Argument, addresses Michael's military retirement pay.

*Ferguson* is very clear that the "prior distribution of such assets by agreement" should be respected by the court not ignored as the Chancery Court has done. *Ferguson* specifically states that there is no automatic right to an equal division of jointly-accumulated property.<sup>39</sup> Both parties agreed that the PSA was fair and equitable and neither party intended to divide either Michael's retirement pay or Joesie's 401(k) Retirement Plan.

(*Dkt. 3* Page 4; R.E. Page 17):

#### Section 7 – FULL, OPEN FINANCIAL DISCLOSURES

Each party represents to the other that he or she has full and openly disclosed their financial status, including their assets and liabilities of all types and agree that the terms of the Agreement are fair, just, and equitable.

(*Dkt. 3* Page 6; R.E. Page 19):

#### Section 16 – ABSENCE OF DURESS OR UNDUE INFLUENCE

The parties agree and state that each has feely (sic) and voluntarily enter (sic) into this Agreement. This Agreement was executed free of any duress, coercion, collusion, or undue influence. In some instances, the Agreement represents a compromise of disputed issues; however, both parties believe that its terms and conditions are fair and reasonable.

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38 *Judgment on Remand* [*Dkt. 99*] Page 16 ¶50; R.E. Page 184

39 *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994)

The parties' retirement plans were not a secret from one another. Both, Joesie and Michael signed a *Waiver of Rule 8.05 Financial Statements and Disclosures* [Dkt. 4] in which the parties "acknowledge that both of them are familiar with the work history of the other during the period of the marriage and are generally familiar with their individual and joint assets, liabilities, debts, income and expenses."<sup>40</sup> The PSA includes an agreement to not make any further claims against property in the other's possession and to make no further claims to future income.<sup>41</sup> Joesie's 401(k) plan and Michael's military retirement pay were considered future earnings and would not be divided. Furthermore, the PSA clearly states that the parties did not expect to receive any property that was not expressly divided by the PSA (Dkt. 3 Page 1; R.E. Page 14):

The parties make this Agreement to settle once and for all the division of property, what they may owe each other and **what they can expect to receive from each other**; [emphasis added]

A review of the PSA demonstrates that not only is the PSA fair and equitable but that it significantly favored Joesie. This fact is amplified when viewed in the light of Joesie's marital fault. Mississippi law requires that an agreement made between a married couple needs to be "adequate and sufficient"<sup>42</sup> and *Ferguson* requires that each party's financial security should be considered.<sup>43</sup> There is no question that the parties' unadulterated PSA met all of these requirements and as such should not have been adjusted by the Chancery Court. It was not equitable for the Court to distribute Michael's Military retirement because the parties had already agreed to an equitable distribution of the parties' assets and both parties were aware of the other's retirement plans.<sup>44</sup>

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<sup>40</sup> Dkt. 4 Pages 15 - 16

<sup>41</sup> PSA [Dkt. 3] Page 5; R.E. Page 18

<sup>42</sup> *Grier v. Grier*, 616 So.2d 337, 341 (Miss. 1993)

<sup>43</sup> *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994)

<sup>44</sup> *Myrick v. Myrick*, 186 So.3d 429, 433 (Miss. Ct. App 2016)

Private citizens of Mississippi should not be required to write contracts that protect themselves from the Court. The Court should not be an advisory to either party in a civil agreement. The Court should not search for a loop hole to enter a private agreement or as in this case completely disregard a legal agreement between parties. In cases where agreements are found to be ambiguous the Court has an obligation to understand the intent of the agreement. By acknowledging that the Court has jurisdiction the parties are not giving the Court the right to fundamentally change an agreement without first finding that the agreement was unfair or misleading.<sup>45</sup> The Chancery Court agreed, “(n)othing in the record indicates that the Agreement was patently unfair regarding the property division and alimony actually set out therein.”<sup>46</sup> The *Property Settlement Agreement* [Dkt. 3] is fair and equitable and provides for Joesie’s financial security therefore should be enforced without changes or additions.

***The market value and the emotional value of the assets subject to distribution.***

The Chancery Court’s assessment of the market value of the parties’ assets was incomplete, manifestly wrong, and in error. The Chancery Court admittedly did not have a good idea of the market value of the parties’ real property and had no idea of the value of Michael’s military retirement pay.<sup>47</sup> The Chancery Court was correct, however, in assessing that the PSA was written to Joesie’s favor.

(Dkt. 99 Page 17 ¶51; R.E. Page 185)

The Pass Christian home provides Joesie with a residence she would be unable to afford on her own income. Additionally, it is the residence of the minor child and provides stability in that regard. The Gulfport home had a negative equity balance at the time of the divorce.

(Dkt. 99 Page 18 ¶52; R.E. Page 186)

This is of considerable benefit to Joesie.

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45 *Miss. Code* § 93-5-2

46 *Amended Judgment of Divorce* [Dkt. 45] Page 8-9 ¶11; R.E. Page 86-87

47 *Judgment on Remand* [Dkt. 99] Page 17 ¶51; R.E. Page 185

Michael assumed financial responsibility of both real properties while Joesie was granted the right to live at the Pass Christian property and was relieved of financial responsibility for the underwater mortgage of the Gulfport property. In describing Michael's agreement to take on the responsibility of the Gulfport property the Chancery Court stated, "This house is not a benefit to Michael."<sup>48</sup> The *Property Settlement Agreement* [Dkt. 3] was written in Joesie's favor.

*The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse*

The Pass Christian property was brought to the marriage by Michael. The Chancery Court agreed that the distribution of the Pass Christian property in the PSA provided a significant contribution to Joesie's financial security, stating that "(t)his is of considerable benefit to Joesie."<sup>49</sup> Joesie received not only the right to live in the Pass Christian home for as long as she liked but will also receive 50% of the proceeds should the parties decide to sell the home. Additionally, the PSA gives Joesie the right to the financial proceeds from renting the Pass Christian property should she prefer that option. The *Property Settlement Agreement* [Dkt. 3] favored Joesie.

*Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution*

The Chancery Court failed to account for the fact that Joesie can claim Jayden on her income tax return. This will potentially result in Joesie receiving a considerable financial benefit.

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48 *Amended Judgment of Divorce* [Dkt. 45] Page 43 ¶68; R.E. Page 121

49 *Judgment on Remand* [Dkt. 99] Page 18 ¶52; R.E. Page 186

As the Chancery Court noted Michael has paid all taxes associated with the real property and took on the responsibility of the Gulfport property's mortgage. As further noted by the Chancery Court the Gulfport property was underwater and fell into foreclosure.<sup>50</sup> The Gulfport property represented a substantial financial liability for Michael. Again the *Property Settlement Agreement* [Dkt. 3] favored Joesie.

*The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties; and the needs of the parties for financial security with due regard to the combination of assets, income and earning capacity*

The Chancery Court was manifestly wrong, employed the wrong legal standard, and erred when it modified the terms of the parties' PSA and in doing so, contrary to the recommendations of this *Ferguson* factor, created multiple sources of future friction that are neither necessary to create an equitable division of marital property nor necessary to ensure either parties' need for financial security.

The parties' PSA was written to the financial benefit of Joesie, as noted numerous times by the Chancery Court, and provided for Joesie's financial security. The PSA provided Joesie with immediate financial help following the divorce and eliminated the concern for Joesie's future housing needs forever. Michael paid Joesie spousal support in the amount of \$300 per month for a period of 5 years even though Joesie was at fault. Joesie enjoys the benefit of the Pass Christian home, as previously discussed, forever if she desires. Joesie also has the flexibility to receive the financial proceeds from renting the Pass Christian home if she desires, the Chancery Court's ruling eliminates that flexibility. Joesie is entitled to the full benefit of her own retirement plan. Joesie also receives child support payments in the amount of \$764 per month. It is not equitable nor necessary for Joesie's

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<sup>50</sup> *Judgment on Remand* [Dkt. 99] Page 22 ¶62; R.E. Page 190

financial security to further benefit Joesie by awarding her a percentage of Michael's military retirement pay. Additionally, granting Joesie a percentage of Michael's military retirement pay is creating periodic payments in perpetuity that will be a potential source of conflict until one of the parties dies.

The Chancery Court's ruling also differed from the PSA in that Michael is to receive 50% of Joesie's 401(k) plan. This is an additional and completely unnecessary source of future friction. The Chancery Court's ruling included a clause that makes it very easy for Joesie to avoid making this payment. (Dkt. 99 Page 26 ¶83; R.E. Page 194):

Joesie shall assign this amount of her retirement to Michael which shall be payable to him **when it may be withdrawn without penalty**. If the benefit plan allows a loan to be withdrawn in this amount **without penalty** other than interest, Joesie shall provide Michael with \$11,500.00 in loan proceeds within ninety (90) days from the date of this judgment. [emphasis added]

Joesie can simply tell Michael that she would incur a penalty and Michael would be left with the burden of providing proof to the contrary and forced to file further litigation or wait until Joesie reaches the age of 59 ½, 15 years in the future. This built in potential friction between Michael and Joesie is not only unnecessary but is in direct opposition of the advice of *Ferguson*.

Finally, the Chancery Court ordered the parties to sell the Pass Christian home when Jayden reaches the age of 21.<sup>51</sup> Once again, adding a new wrinkle to the PSA and creating an enormous source of future friction as well as jeopardizing Joesie's future housing security. None of these changes made by the Chancery Court improve on the existing *Property Settlement Agreement* [Dkt. 3] which already provided for an equitable division of marital property and ensured the needs of both parties' financial security. In fact, all these changes create future friction and harm Joesie's future housing security.

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<sup>51</sup> *Judgment on Remand* [Dkt. 99] Page 20 ¶56; R.E. Page 188

*Marital Debt and Any Other Factors Which in Equity Should Be Considered*

The Chancery Court erred by not taking into account that Michael assumed the bulk of the parties' marital debt. Michael not only took on financial responsibility for both real properties as discussed previously but Michael also took financial responsibility for the bulk of the parties' substantial credit card debt. The credit card debts reported on Michael's 8.05 dated 12/4/2015 totaled \$49,091 Joesie's credit card debts reported on her 8.05 dated 11/30/2015 totaled \$10,949.<sup>52</sup> All told, Michael took on \$264,112 worth of marital debt. Michael's 8.05 was not questioned by either Joesie or her attorney with the exception of a disagreement over the present value of the parties' homes.

The Chancery Court acknowledged that this factor of the *Ferguson* Analysis should favor Michael due to Joesie's adultery, however, the Chancery Court equivocated by adding unsupported claims against Michael. (Dkt 99. Page 19 ¶55; R.E. Page 187):

Michael, however, is not without fault. He proved to be a controlling husband and unsupportive of Joesie with regard to her two daughters. He was also not honest with Joesie in December of 2014 about their relationship.

No part of these statements are consistent with the record.

The Chancery Court judged Michael to be controlling but the evidence does not support this charge. Joesie made no allegations that Michael was a controlling husband. Joesie asked Michael for a divorce while Michael was deployed to Guam. (*T.* Page 255; R.E. Page 221) Michael asked for the chance to work on their marriage when he returned from deployment. (*T.* Page 468; R.E. Page 240) Upon Michael's return, Joesie moved out of the parties' marital bedroom by her own choice because she was not happy in the marriage. (*T.* Page 37, 80, 82, 98, 323; R.E. Page 197, 199, 200, 201, 224) Joesie testified that she made the decision to not move with Michael and Jayden but instead secretly moved into Kyle's mother's house. (*T.* Page 565, 638; R.E. Page 254, 262) Joesie testified that Michael, although unaware that Mrs. Caldwell was Kyle's mother, helped Joesie move her possessions into

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<sup>52</sup> Michael's 8.05 [*Exhibit 4*] Page 7; R.E. Page 270 and Joesie's 8.05 [*Exhibit 14*] Page 7; R.E. Page 278

Kyle's mother's house. (T. Page 638; R.E. Page 262) Joesie testified that the *Joint Complaint for Divorce* (Dkt. 2) and the attached *Child Custody and Property Settlement Agreement* [Dkt. 3] were a result of mutual discussion. (T. Page 80, 109, 110, 323; R.E. Page 199, 205, 206, 224) Michael paid for all of Joesie's transportation costs so that she could maintain her visitation with Jayden. (T. Page 107, 113 – 114; R.E. Page 203-204) Joesie never complained that Michael was controlling but instead complained that the parties' marital troubles arose because Michael was quiet and that Michael was a boring lover. (T. Page 118, 625 - 626; R.E. Page 210, 258-259)

Michael's actions do not represent the actions of a controlling husband: Michael agreed to pay 5 years of spousal support to help Joesie with the change to her financial status, even though Joesie had admitted to having a summer "fling" with Kyle; Michael agreed that it would be best for Joesie to stay rent free, in a home that was purchased prior to the marriage, for as long as she desired; Even agreeing that Joesie should receive any rental income so as not to force her to stay in the home if she did not want to; Michael agreed to take on the financial burden of the Gulfport house which had a mortgage that was underwater; Michael agreed to take on the bulk of the parties' credit card debt. At no point during her testimony did Joesie call Michael controlling or provide any evidence that would lead the Chancery Court to this conclusion.

Joesie made no allegations that Michael was unsupportive of her two daughters. Joesie and her witnesses testified that Michael was a good father. (T. Page 101, 329; R.E. Page 202, 226) Michael testified that he considered Joesie's two daughters as his own daughters. (T. Page 19, 534, 613; R.E. Page 196, 252, 257) On the other hand, Joesie testified that she did not pay her court ordered child support for her daughters (T. Page 328; R.E. Page 225) and Joesie took her eldest daughter on a date with Kyle. (Ex. 16 Page 3); (T. Page 254; R.E. Page 220)

The Court's finding that Michael was not honest with Joesie in December of 2014 is not consistent with the evidence or the testimony. It was Joesie who admitted that she secretly had phone

conversations and Facebook messaging with Kyle while the parties were in California. (T. Page 667, 345 - 346; R.E. Page 263, 227-228) Michael's attempts to reconcile were always honest, it was Joesie who continued to lie to Michael. (T. Page 475 - 477; R.E. Page 245) The Mississippi Supreme Court's ruling under the heading *Facts and Procedural History* more accurately describes that period of time:<sup>53</sup>

Numerous exhibits were admitted showing that Joesie remained in regular contact with Kyle. They continued to text each other, to communicate over Facebook, to attend the same parties, and to take overnight trips together.

Michael testified that he attempted to reconcile with Joesie after she confessed that she had a summer "fling" in 2013, and that she told him that it had ended. He believed that Joesie also wanted to reconcile until they took a family vacation to California in December 2014. However, in January 2015, Michael learned that Joesie had not been honest with him about the expansive nature of her relationship with Kyle. She admitted at trial that she had continued to communicate with Kyle, even during the trip to California in December 2014.

The Mississippi Supreme Court continued under the *Analysis* heading:<sup>54</sup>

Our detailed review of the record (absent the distractions visited upon every trial court) reveals that Joesie lied about the beginning, timing, and duration of the affair and attempted to obscure the continuous adulterous relationship with Kyle after Michael had condoned a brief summer "fling", not a course of adulterous behavior spanning years. The chancellor found that Joesie's credibility was questionable about the extent of her relationship with Kyle. Joesie failed to mend her ways by texting Kyle, taking overnight trips with Kyle, spending holidays with Kyle and his family, and having sexual relations with Kyle, all after Joesie informed Michael that she had a summer "fling" and had ended it. Michael believed that both he and Joesie were working toward reconciling their marriage. However, Joesie never rid herself of the adulterous inclinations, and she continued to place herself in situations which allowed her a reasonable opportunity to satisfy her adulterous inclinations.

Joesie's continued secretive, evasive, and deceptive relationship with Kyle, after she informed Michael of her brief fling leading him to attempt to reconcile, "evidences an intent not to perform the conditions of the condonation in good faith." *Id*

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<sup>53</sup> *Supreme Court Opinion* Page 12 ¶¶22 and ¶¶23; R.E. Page 155

<sup>54</sup> *Supreme Court Opinion* Page 21 ¶¶40; Page 22 ¶¶41; R.E. Page 164, 165

At no time during the party's marriage did Michael deceive Joesie. The Chancery Court is punishing Michael for his genuine attempts to reconcile the marriage. Joesie was continuously deceptive throughout the couple's marriage and led Michael to believe that reconciliation was possible even though she had no remorse or any intention of changing her ways.

The Chancery Court concocted these illusions about Michael's character, while at the same time ignoring Joesie's clear deception, to justify awarding Joesie a percentage of Michael's military retirement pay and subsequently increasing this award by 25%. These decision were made despite Joesie being at fault and despite the fact that the Chancery Court originally did not award Joesie any of Michael's military retirement pay.<sup>55</sup> (The Chancery Court's ever changing view of the parties' PSA and the resultant change of view toward Michael's military retirement pay is discussed in detail in Argument I of this brief.)

The statements of fault made by the Chancery Court against Michael are not supported by the record and are prejudicial. The parties' PSA is fair and equitable, provides for Joesie's financial security, and eliminates periodic payments and sources of future friction; as such the *Property Settlement Agreement* [Dkt. 3] should be enforced without any changes or additions.

### *Valuation and Division*

The Chancery Court's overall evaluation of the parties' assets and financial standing failed to properly address key aspects that favored Joesie and burdened Michael. The Chancery Court is also operating under the unsubstantiated opinion that Michael is lying concerning his financial standing. (Dkt 99 Page 18-19 ¶54; R.E. Page 186):

Because Michael is burdened with taxes, insurance, and any mortgage debt on the parties' properties, as well as alimony and child support from a previous marriage, his expenses exceed his income – at least on paper.

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<sup>55</sup> *Judgment of Divorce* [Dkt. 33]

The Chancery Court makes a prejudicial sleight towards Michael's honesty: "... at least on paper." Michael's financial disclosures were not questioned by Joesie, with the exception of disagreements over the current value of their real property. As noted by the Chancery Court the Gulfport property eventually went into foreclosure, a clear indication that Michael's financial standing was poor and only worsened with the Chancery Court's *Judgment of Divorce* [Dkt 45]. The Chancery Court often noted that because the Gulfport home went through foreclosure that Michael's financial outlook would improve.<sup>56</sup> While Michael would no longer have a monthly mortgage payment associated with the Gulfport property, a foreclosure does not improve a person's overall financial standing. To the contrary, there are potentially extensive tax consequences associated with a foreclosure and the potential for negative remarks on Michael's credit history have the potential to put his future housing security in jeopardy.

The Chancery Court's analysis also did not properly account for the fact the PSA provided a great deal of housing security for Joesie and that the alterations made by the Chancery Court put that security in jeopardy.

The Chancery Court acknowledges that the Mississippi Supreme Court found Joesie to be at fault and the Chancery Court additionally acknowledges that the property division leaves Michael at a much greater deficit than Joesie but nevertheless the Chancery Court not only awards Joesie a percentage of Michael's military retirement pay but actually increases this award by 25% over its previous judgment. Although the Chancery Court admittedly does not know the value of Michael's military retirement pay the Chancery Court claims that it is fair to use 26% of this pay to eliminate Joesie's \$60/month deficit while admittedly leaving Michael with a significant deficit.<sup>57</sup>

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56 *Judgment on Remand* [Dkt. 99] Page 22 ¶62; R.E. Page 190

57 *Judgment on Remand* [Dkt. 99] Page 23-24 ¶73; R.E. Page 191-192

The parties' PSA does a more effective job of addressing Joesie's \$60/month deficit. The parties' PSA not only awarded Michael 100% of his military retirement pay but it also awarded Joesie 100% of her 401(k) plan. The \$11,500 that the Chancery Court awarded Michael from Joesie's 401(k) plan would more than make up for Joesie's \$60/month deficit. \$11,500 calculates out to 16 years of \$60/month payments. This figure does not even take into account the rate of return that Joesie would be receiving on her \$11,500 investment. This arrangement also eliminates concerns of penalties associated with early withdrawal from a 401(k) plan. Once again, the unadulterated PSA has proven to be more than adequate and superior to the Chancery Court's adjustments.

Moreover, Joesie's deficit of \$60/month, as calculated by the Chancery Court, will be potentially more than eliminated by the benefit Joesie will receive from her income tax return especially in light of the fact that Joesie can claim Jayden on her tax return and is in a tax bracket that qualifies for the Earned Income Credit.<sup>58</sup> Joesie was at fault, it is not equitable to go to lengths to eliminate the smallest of deficits for Joesie, which potentially will already have been erased by her tax return, while leaving Michael with a significant deficit.

**In Conclusion of the *Ferguson* Analysis:**

While the Chancery Court's *Ferguson* analysis contained many errors and omissions, as noted above, the Chancery Court's analysis demonstrated that the parties' PSA was written to the benefit of Joesie and assured Joesie's financial security. Unfortunately, the driving force behind the Chancery Court's decision to ignore the parties' PSA and to grant Joesie a percentage of Michael's military retirement pay and subsequently increase this award by 25%, is not based on an unbiased weighing of *Ferguson* but is instead highlighted by numerous unsupported, erroneous, and prejudicial statements that are contrary to legal precedence.

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<sup>58</sup> Joesie's 8.05 [*Exhibit 14*]

(Dkt 99. Page 16 ¶49; R.E. Page 184):

Joesie's domestic contributions outweighed Michael's, especially during times of Michael's deployments.

Michael's deployments and time away from Joesie caused instability.

(Dkt 99. Page 19 ¶55; R.E. Page 187):

Michael, however, is not without fault. He proved to be a controlling husband and unsupportive of Joesie with regard to her two daughters. He was also not honest with Joesie in December of 2014 about their relationship.

(Dkt 99 Page 18-19 ¶54; R.E. Page 186-187):

Because Michael is burdened with taxes, insurance, and any mortgage debt on the parties' properties, as well as alimony and child support from a previous marriage, his expenses exceed his income – at least on paper.

The Chancery Court's rulings have **not** been consistent with the evidence but consistently have been made as if Michael was guilty of marital fault and Joesie was an innocent victim. (*Dkt. 33* Page 4 ¶8 and *Dkt. 45* Page 18 ¶30; R.E. Page 36 and 96):

Joesie's testimony, taken together, indicates she does not really want a divorce in her heart of hearts, but has accepted what she perceives to be Michael's rejection. Michael's actions, at least before 2015, indicate a continued hope of reconciliation. **The change in Michael's attitude was more likely due to his involvement with another woman rather than any disgust toward Joesie, real or otherwise.** [emphasis added]

This trend started in the Temporary Order (*Dkt. 19* Page 3 ¶5g; R.E. Page 26):

However, it would be important to note at this juncture that the court also found, again, subject to the evidence to be presented later, that the father's credibility here is in question, as well as whether or not he has clean hands as far as the moral fitness. There was not sufficient explanation on his part to rebut the clear inference made by the plaintiff that just following their vacation in California during Christmas of 2014, where the parties continued in a sexual relationship, and then sometime within a month of that time at the end of January that it was, in fact, him that called off the reconciliation and insisted on the divorce. **The only intervening event between those two times was the fact that he moved in with two other women.** [emphasis added]

Despite the Chancery Court's statement "subject to the evidence to be presented later"<sup>59</sup> the Chancery Court never let go of the belief that Michael must be guilty of adultery. No amount of evidence or testimony to the contrary was able to remove this unfounded and unsupported opinion from the mind of the Chancery Court. The Chancery Court acknowledged that there was no proof to support Joesie's accusations but the Chancery Court believes that it is only common sense and logical that Michael, a man in the military, must be guilty of adultery. (*Dkt. 33* Page 5 ¶10 and *Dkt. 45* Page 19 ¶32; R.E. Page 37 and 97):

Joesie failed to establish Michael committed uncondoned adultery. **The evidence that Michael may have had an adulterous inclination or infatuation toward Amy is scant**, although common sense might dictate otherwise. [emphasis added]

(*Dkt. 33* Page 6 ¶ 11 and *Dkt. 45* Page 20 ¶ 33; R.E. Page 38 and 98):

Although here the conclusion of adultery appears logical ... **No such infatuation between Michael and Amy has been established.** [emphasis added]

(*Dkt. 99* Page 6 ¶19; R.E. Page 174):

The Defendant did not present a sufficient explanation to negate the clear inference of his own infidelity, at least in thought if not in deed.

The Chancery Court is inventing a new legal standard claiming that Michael must prove that he did not have "thoughts of infidelity". Michael did not testify to having thoughts of infidelity and no witness testified to hearing Michael talk of "thoughts of infidelity" but clearly this unsubstantiated inference made by Michael's estranged wife, during a child custody dispute, stuck with the Chancery Court throughout the hearing and most certainly manifested in its increasingly punitive judgments.

To justify increasing Joesie's award to Michael's military retirement pay by 25% the Chancery Court performed a reversal on the demarcation date with regards to the parties' property division as

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<sup>59</sup> *Temporary Order [Dkt. 19]* Page 3 ¶5g; R.E. Page 26

well as the length of the marriage. The Chancery Court's reversal is the latest in a series of decisions designed to unfairly punish Michael. Joesie was found to be at fault but it is Michael who has borne the full weight of the Chancery Court's ire with ever increasing severity.

The Chancery Court made its first cut the deepest when, at the Temporary Hearing, it reversed the parties' child custody arrangement. This change of custody was made, by the Chancery Court's own admission, without conducting a thorough Albright Analysis (T. Page 155 – 156, 518 – 519; R.E. Page 215-216, 250-251):

Well, I didn't even do a full analysis of the Albright factors. And I say that. I mention every one of them, but I say particularly that I am not doing a full Albright analysis, and that I wasn't even citing any case authority, which I normally do.

This decision was instead influenced by Joesie's unsupported accusations of adultery and lies told by Joesie and her attorney. Joesie fraudulently stated in her *Complaint for Divorce* [Dkt. 8] that Jayden resided with her in Mississippi and only occasionally visited Michael in Illinois.<sup>60</sup> The Mississippi Supreme Court agreed that these deceptive statements made by Joesie were made with prior planning and on advice from her attorney. (*Supreme Court Opinion* Page 2-3 ¶3; R.E. Page 145-146):

Joesie, upon the advice of her attorney, surreptitiously told Michael that she was ready to complete the irreconcilable-differences divorce. Based on the advice of her counsel, Joesie waited until her summer visitation had begun pursuant to the PSA and until her son was physically in Mississippi before withdrawing her consent to an irreconcilable-differences divorce.

From that point on, the Chancery Court continued to punish Michael more and more with every decision it issued even though these decisions were contrary to the testimony and evidence presented. In the original *Judgment of Divorce* [Dkt. 33] the Chancery Court went so far as to declare Mississippi law unconstitutional to avoid holding Joesie responsible for her marital faults and the Chancery Court significantly reduced Michael's summer visitation with Jayden without any explanation and **more**

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<sup>60</sup> Joesie's Complaint for Divorce [Dkt. 8] Page 5 ¶23a

importantly without any request from either Michael or Joesie. After Michael requested that the Chancery Court reconsider its decision on child custody the Chancery Court financially penalized Michael by awarding Joesie 22% of his military retirement pay as well as extending the time period that Michael was to pay Joesie alimony, beyond what the parties had agreed to in their PSA. And now, after Michael appealed and the Mississippi Supreme Court vacated and reversed the Chancery Court's *Judgment of Divorce*, the Chancery Court performs a reversal on the enforcement of the parties' PSA so that the Chancery Court can unjustly change the date of demarcation regarding Joesie's claim to Michael's military retirement pay and increase Joesie's award by an additional 25%. At this point, the Chancery Court's treatment of Michael can only be classified as vindictive.

The Chancery Court made the appearance of equitability by removing Michael's obligation to pay alimony and awarding Michael 50% of Joesie's 401(k) retirement plan. The actual effect that these rulings have on the parties' property division should be examined a little more closely. The Chancery Court's ruling that Michael will be relieved of the obligation to pay alimony is closing the barn door after the horses have already fled. Michael and Joesie agreed that Michael would pay Joesie \$300 per month for a period of five years. Michael faithfully made these payments for more than the originally agreed upon 5 years from October 1, 2013 until the Mississippi Supreme Court vacated the Chancery Court's judgment on December 13, 2018 for a total of \$18,483.87. As discussed previously, the Chancery Court's ruling that Michael is to receive 50% of Joesie's 401(k) plan included a clause that makes it very easy for Joesie to avoid making this payment.

The Chancery Court's decision to award Joesie a percentage of Michael's military retirement pay was not supported by its *Ferguson* Analysis. A review of the Chancery Court's analysis demonstrates that not a single factor of *Ferguson* indicated that the PSA was inequitable toward Joesie. In fact, the Chancery Court concluded that the majority of the *Ferguson* factors indicated that the PSA was written to Joesie's benefit. The PSA is fair and equitable, provides for Joesie's financial security, and

eliminates periodic payments and sources of future friction; as such the *Property Settlement Agreement* [Dkt. 3] should be enforced without any changes or additions.

**In Conclusion for Argument II:**

A. When does military retirement pay become an asset?

Only after the member has served at least 20 years of qualifying service and has been discharged.

B. Does the parties' *Property Settlement Agreement* [Dkt. 3] address Michael's military retirement pay?

Yes, in multiple sections.

C. Does the Chancery Court have the authority to award Joesie a percentage of Michael's military retirement pay?

No, the length of the marriage was less than the 10 years required by *The Uniform Services Former Spouses Protection Act*.

D. Does Joesie meet the requirements of *Ferguson* to establish a claim to Michael's military retirement pay?

No.

The Chancery Court was manifestly wrong, applied the wrong legal standard and erred when it awarded Joesie a percentage of Michael's military retirement pay.

**ARGUMENT III:**

**The Chancery Court was Manifestly Wrong for Significantly Limiting the Father's Summer Visitation**

A child's natural parents "are infinitely more capable of devising a workable custody plan than are the judges of this state."<sup>61</sup> Michael and Joesie detailed a visitation schedule for the non-custodial parent in their *Child Custody Agreement* [Dkt. 3]. The visitation schedule established and followed by the

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<sup>61</sup> *Cheek v Ricker*, 431 So. 3d 1139 (Miss. 1983)

parties for three years was made with the understanding that Michael and Joesie were going to live in different states, with a drive time of approximately 14 hours. (T. Page 48; R.E. Page 198) Due to this large distance it is not practicable for the non-custodial parent to exercise every other weekend visitation. Michael and Joesie agreed that the best interest of Jayden would be best protected if he was allowed significant time with both of his parents.

The Court's decision to limit the time Jayden spent with his father originally was not supported or explained by the Chancery Court.<sup>62</sup> The Chancery Court is now inventing reasoning to support a poor decision. (Dkt. 99 Page 9 ¶29; R.E. Page 177):

The Court's Albright analysis *was* and *is* the basis for its findings and ruling on the matter of visitation. To clarify its position, the Court finds it is not in the best interest of a young child to spend *two consecutive* months away from his primary custodial parent. [emphasis in original]

Nothing in the Chancery Court's *Albright* analysis indicated that it would be in Jayden's best interest to severely limit the time Jayden spent with his father.<sup>63</sup> Michael detailed his disagreements with the Chancery Court's *Albright* analysis in his *Motion for Reconsideration* [Dkt. 34] and in his initial appeal but even when taken at face value the Court's *Albright* analysis does not support limiting Jayden's time with his father. In fact, the Chancery Court found that only one *Albright* factor favored Joesie, *Capacity to Provide Primary Childcare and Employment Responsibilities* and a second factor favored Joesie only slightly, *Moral and Religious Upbringing*.<sup>64</sup> Michael disagrees with both of these assessments especially considering Michael provided primary care for Jayden in Joesie's absence for 2 years, part of that time Joesie was living with her boyfriend's family, Joesie took her daughter on a date with Kyle, and Joesie was found at fault of adultery. Nothing in the Chancery Court's *Albright* analysis indicates that it is in Jayden's best interest to severely limit the time Jayden spends with his father. More importantly, neither Joesie

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62 *Amended Judgment of Divorce* [Dkt. 45] Page 50 ¶89; R.E. Page 128

63 *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983)

64 *Judgment on Remand* [Dkt. 99] Page 5 ¶17 and Page 4 ¶15; R.E. Page 173 and 172

nor Michael requested a modification of the visitation arrangement that was established by their *Child Custody Agreement* [Dkt. 3]. Summer visitation should remain as detailed in the *Child Custody Agreement* [Dkt. 3]: The non-custodial parent would have custody of Jayden starting seven (7) days after school ended for the year until seven (7) days prior to the beginning of the next school year.<sup>65</sup>

#### ARGUMENT IV:

##### **The Chancery Court was Manifestly Wrong and Abused Its Power by Allowing a Clear and Unmistakable Bias to Determine Its Child Custody Decision**

As discussed in Argument II of this brief, the Chancery Court's rulings have consistently been made as if Michael was guilty of marital fault and Joesie was an innocent victim. As part of the Chancery Court's *Albright* analysis the Chancery Court insists that Michael produce proof that an event never happened in order to prove his innocence. (*Dkt. 33* Page 30 ¶50 and *Dkt. 45* Page 49 ¶84; R.E. Page 62 and 127):

Within the month following the vacation of the parties in California during Christmas of 2014, wherein the parties continued in a sexual relationship, the Defendant called off the reconciliation and insisted on the divorce. The only intervening event between those two circumstances was the fact that the Defendant moved and began to reside with two other women. **The Defendant did not present a sufficient explanation to negate the clear inference of his own infidelity, at least in thought if not in deed.** This inference did not rise to the level to establish grounds of adultery by clear and convincing evidence, however, it does raise the question of the Defendant's morality here. [emphasis added]

This requirement is contrary to the very core beliefs of the United States' judicial system. Mississippi law is very clear on this point, it is the responsibility of the accuser to present convincing evidence of adultery, it is not the responsibility of the accused to present evidence that an act did not happen.<sup>66</sup>

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65 PSA [Dkt. 3] Pages 1 - 2; R.E. Page 14-15

66 *Miss. Code Ann. Section 95-5-1* (2004)

Why would Michael abandon his attempts at reconciliation and ask for a divorce from a wife who committed adultery? In the Chancery Court's opinion the only logical conclusion is that Michael must be committing adultery. The Chancery Court refused to apply an unbiased eye toward the evidence but instead invented a new legal standard, "at least in thought if not in deed".<sup>67</sup> Why would Michael ask for a divorce from a wife who committed adultery? As Michael explained in his testimony, after many reconciliation attempts Michael came to the realization that Joesie was not truly repentant for the damage she had done to the marriage and to Jayden's wellbeing. (T. Page 477 - 478; R.E. Page 247-248) Michael felt a lack of intimacy for and from Joesie. (T. Page 473, 568; R.E. Page 243, 256) Michael felt Joesie would soon grow to resent being in the marriage and would once again commit adultery. (T. Page 149, 474; R.E. Page 214, 244) The findings of the Mississippi Supreme Court confirmed Michael's instincts were correct; "Joesie lied about the beginning, timing, and duration of the affair and attempted to obscure the continuous adulterous relationship with Kyle after Michael had condoned a brief summer 'fling', not a course of adulterous behavior spanning years."<sup>68</sup>

Additionally, we know that there were indeed other "intervening events" that the Chancery Court neglected to acknowledge because these events contradicted the Chancery Court's desired outcome. The Mississippi Supreme Court's ruling under the heading *Facts and Procedural History* more accurately describes that period of time:<sup>69</sup>

Numerous exhibits were admitted showing that Joesie remained in regular contact with Kyle. They continued to text each other, to communicate over Facebook, to attend the same parties, and to take overnight trips together.

Michael testified that he attempted to reconcile with Joesie after she confessed that she had a summer "fling" in 2013, and that she told him that it had ended. He believed that Joesie also wanted to reconcile until they took a family vacation to California in December 2014. However, in January 2015, Michael learned that Joesie had not been honest with him about the expansive nature

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<sup>67</sup> *Judgment of Divorce [Dkt. 33]* Page 30 ¶50 and *Amended Judgment of Divorce [Dkt. 45]* Page 49 ¶84; R.E. Page 62 and 127

<sup>68</sup> *Supreme Court Opinion* Page 21 ¶40; Page 22 ¶41; R.E. Page 164 and 165

<sup>69</sup> *Supreme Court Opinion* Page 12 ¶22 and ¶23; R.E. Page 155

of her relationship with Kyle. **She admitted at trial that she had continued to communicate with Kyle, even during the trip to California in December 2014.** [emphasis added]

The Mississippi Supreme Court continued under the *Analysis* heading:<sup>70</sup>

Our detailed review of the record (absent the distractions visited upon every trial court) reveals that Joesie lied about the beginning, timing, and duration of the affair and attempted to obscure the continuous adulterous relationship with Kyle after Michael had condoned a brief summer “fling”, not a course of adulterous behavior spanning years. The chancellor found that Joesie’s credibility was questionable about the extent of her relationship with Kyle. Joesie failed to mend her ways by texting Kyle, taking overnight trips with Kyle, spending holidays with Kyle and his family, and having sexual relations with Kyle, all after Joesie informed Michael that she had a summer “fling” and had ended it. Michael believed that both he and Joesie were working toward reconciling their marriage. However, Joesie never rid herself of the adulterous inclinations, and she continued to place herself in situations which allowed her a reasonable opportunity to satisfy her adulterous inclinations.

Joesie’s continued secretive, evasive, and deceptive relationship with Kyle, after she informed Michael of her brief fling leading him to attempt to reconcile, “evidences an intent not to perform the conditions of the condonation in good faith.” *Id*

The Chancery Court admits that Joesie failed to produce compelling proof of adultery but it is clear that the Chancery Court made its judgments on child custody as if Michael was guilty of adultery. The stark difference in level of proof the Chancery Court required is startling. Joesie admitted in court that Michael was unaware that she continued to have sex with Kyle after her initial revelation in August of 2013 but still the Chancery Court said that Michael condoned this affair. An allegation with no further proof was enough to convince the Chancery Court that Michael must have committed adultery, “at least in thought if not in deed”,<sup>71</sup> but multiple photos, Facebook post, statements by Joesie’s witnesses that Michael was unaware of Joesie’s continuous affair, and a confession by Joesie in court that Michael was unaware of her continuous affair was not enough for the Chancery Court to find Joesie guilty of uncondoned adultery.

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<sup>70</sup> *Supreme Court Opinion* Page 21 ¶40; Page 22 ¶41; R.E. Page 164 and 165

<sup>71</sup> *Judgment of Divorce Dkt. 33* Page 30 ¶50 and *Dkt. 45* Page 49 ¶84; R.E. Page 62 and 127

The Chancery Court continuously turns a blind eye toward Joesie's faults while inventing faults to apply to Michael. The Chancery Court very clearly had a desired outcome and was determined not to let the truth get in the way. The Chancery Court has been afforded multiple opportunities to review the evidence and testimony but not only refuses to acknowledge that its initial ruling was in error but continues to punish Michael more and more with every new iteration of its judgment. It is unmistakable that this clearly demonstrated bias led the Chancery Court to award Joesie primary custody of Jayden. The Mississippi Supreme Court cannot continue to excuse the abuse of power so clearly demonstrated by the Chancery Court.<sup>72</sup> Excusing these acts does not protect the court system but causes the people to lose faith. Michael wore the uniform of this country and defended the Constitution of the United States for 20 years only to have the Mississippi Supreme Court affirm the Chancery Court's decision to take his only son from him because of that service. (*Dkt. 33* Page 29 ¶48 and *Dkt. 45* Page 48 ¶82; R.E. Page 61 and 126):

The Mother is better able to provide primary childcare due to the Father's employment responsibilities.

The Chancery Court, in its **Judgment on Remand**, changed the *Home, School and Community of Record* factor to favor Michael.<sup>73</sup> The result is that the Chancery Court found that only one Albright factor favored Joesie, *Capacity to Provide Primary Childcare and Employment Responsibilities* and a second factor favored Joesie only slightly, *Moral and Religious Upbringing*.<sup>74</sup> It would seem unlikely that the *Moral and Religious Upbringing* factor weighed heavily on the Chancery Court's decision, therefore, the Chancery Court's decision on child custody was primarily based on the *Capacity to Provide Primary Childcare and Employment Responsibilities* factor. Michael, however, clearly demonstrated that he was quite capable of raising Jayden in Joesie's absence as she lived with her boyfriend's family, therefore, the

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<sup>72</sup> *Supreme Court Opinion* Page 21 ¶40; R.E. Page 164

<sup>73</sup> *Judgment on Remand [Dkt. 99]* Page 7 ¶21; R.E. Page 175

<sup>74</sup> *Judgment on Remand [Dkt. 99]* Page 5 ¶17 and Page 4 ¶15; R.E. Page 173 and 172

Chancery Court's child custody decision was driven by Michael's occupation and the Chancery Court's insistence that a military man must be controlling, disruptive, and would logically commit adultery. The Chancery Court is announcing loud and clear that the only way a military man will be allowed to raise his son is if he stays married to a wife who has committed adultery with multiple men over a number of years and has shown no signs that she is either remorseful or plans to change her ways. The Mississippi Supreme Court, in upholding the Chancery Courts decision on child custody, is announcing the same. This Court is now being given a second opportunity to correct a previous mistake. It is never too late to do the right thing.

The Chancery Court's bias and abuse of power is clearly demonstrated by its series of judgments. The Chancery Court reversed the child custody arrangement at the Temporary Hearing, without conducting a thorough Albright Analysis. The Chancery Court declared Mississippi law unconstitutional so as not to hold Joesie accountable for her clear marital faults. The Chancery Court severely limited Michael's summer visitation without request or providing a reason. The Chancery Court awarded Joesie 22% of Michael's military retirement pay following Michael's request for the Chancery Court to reconsider its child custody decision and despite the Chancery Court's *Ferguson* analysis demonstrating that the PSA was written to Joesie's benefit. Additionally, this change was made despite the fact that the Chancery Court originally ruled that the parties' PSA sufficiently governed "all the issues of equitable division of marital property and alimony."<sup>75</sup> Finally, in its *Judgment on Remand*, the Chancery Court declared that it would no longer abide by the parties' PSA, in complete opposition to its previous rulings, in order to justify awarding Joesie an additional 25% of Michael's military retirement pay.

I challenge this Court to review and comment on the Chancery Court's *Albright* analysis. There can be no doubt that the Chancery Court's unfounded belief that Michael, a man in the military, must

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<sup>75</sup> *Judgment of Divorce [Dkt. 33]* Page 27¶ 41; R.E. Page 59

have committed adultery, despite all evidence and testimony to the contrary, was the reason Joesie was awarded custody of Jayden. Michael raised Jayden in the absence of Joesie while Joesie lived with her boyfriend's family. An unbiased review of the *Albright* factors will, without doubt, lead to the conclusion that the best interests of Jayden will be served by returning him to his father's primary care.

## CONCLUSION

Michael and Joesie entered into their original *Property Settlement Agreement* [Dkt. 3] in order to avoid the cost and time required to litigate a contested divorce. Both Michael and Joesie agreed that the *Property Settlement Agreement* [Dkt. 3] was fair and equitable. Mississippi permits married couples to contract and holds these contracts as legally enforceable. Michael has maintained the same argument from the very first day of the Temporary Hearing through this latest appeal request. The parties' *Property Settlement Agreement* [Dkt. 3] is much more than adequate and sufficient as required by Mississippi law.<sup>76</sup> In fact the Chancery Court's *Ferguson* analysis demonstrates that that *Property Settlement Agreement* [Dkt. 3] was written to Joesie's favor especially when the court considers that Joesie was at fault. The parties' *Property Settlement Agreement* [Dkt. 3] is fair and equitable, provides for Joesie's financial security, and eliminates periodic payments and sources of future friction; as such the *Property Settlement Agreement* [Dkt. 3] should be enforced without any changes or additions.

Michael and Joesie established and followed a visitation schedule that was in the best interest of Jayden. The Chancery Court's *Albright* analysis did not provide a reason to deviate from the parties' agreement. Summer visitation should remain as detailed in the *Child Custody Agreement* [Dkt. 3].

Michael raised Jayden in the absence of Joesie while Joesie lived with her boyfriend's family. An unbiased review of the *Albright* factors will, without doubt, lead to the conclusion that the best interests of Jayden will be served by returning him to his father's primary care.

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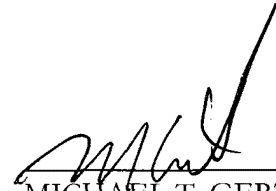
<sup>76</sup> *Grier v. Grier*, 616 So.2d 337, 341 (Miss. 1993)

Appellant Michael Gerty submits that the Chancery Court employed the wrong legal standards, was manifestly wrong, committed error, and abused its power as regards to the matters set forth above. Appellant Michael Gerty urges this Court as follows:

1. That this Court reverse as regards to the enforceability of the parties' *Property Settlement Agreement* [Dkt. 3].
2. That this Court reverse as regards the distribution of Michael's military retirement pay.
3. That this Court reverse as regards to the summer visitation and follow the visitation schedule detailed in the *Child Custody Agreement* [Dkt. 3].
4. That this Court revers as regards to primary physical custody of Jayden.

Appellant Michael Gerty asserts that this Court should do the following: reverse and render.

RESPECTFULLY SUBMITTED, this the 21<sup>st</sup> day of October, 2019.

  
\_\_\_\_\_  
MICHAEL T. GERTY, APPELLANT

CERTIFICATE OF SERVICE

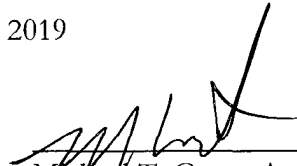
I, Michael T. Gerty, Defendant/Appellant, do hereby certify that I have on this date filed this Brief of the Appellant with the Clerk of this Court, and have served a copy of same via US Mail to the Honorable Jennifer Schloegel, Chancellor, Harrison County Chancery Court and to Michael C. Powell, Attorney for the Plaintiff/Appellee.

Channing Powell  
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Honorable Jennifer Schloegel  
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Chancery Court Clerk  
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D. Jeremy Whitmire  
Supreme Court Clerk  
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So certified this the 21<sup>st</sup> day of October, 2019

  
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