IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

JOESIE R. GERTY — **PLAINTIFF COUNTER-DEFENDANT**

VERSUS — **CIVIL ACTION CAUSE NO. C2401:13-cv-2446-2**

MICHAEL T. GERTY — **DEFENDANT COUNTER-PLAINTIFF**

VERUS

JIM HOOD, ATTORNEY GENERAL, STATE OF MISSISSIPPI — **DEFENDANT**

AMENDED AND RESTATED JUDGMENT OF DIVORCE

THIS CAUSE came on for trial on the 2nd, 3rd and 4th days of May, 2016 on Plaintiff's *Complaint for Divorce* and Defendant's *Counter-Complaint for Divorce* with the parties being present and represented by counsel; namely, the Honorable Channing Powell for the Plaintiff and the Honorable Thomas W. Teel for the Defendant. After having considered the evidence presented and arguments of counsel made, and having been fully advised in the premises, on November 15, 2016 the Court entered a *Final Judgment of Divorce and Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as amended*. In so doing, the Court added the Mississippi Attorney General as a party giving notice of the issue of the unconstitutionality of the statute. The next day on November 16, 2016, the clerk made a notation on the docket sheet that a copy of the final judgment had been mailed to the attorneys of record "along with Jim Hood" the Attorney General. Shortly thereafter, Michael

Gerty filed his Motion for Reconsideration on November 22, 2016. Joesie Gerty filed her Motion for Reconsideration on November 23, 2016. However, on December 6, 2016 it came to the Court's attention that the Court's judgment was mailed to the Attorney General at the wrong address and as such, was returned marked "undeliverable" to the Court on November 23, 2016. Upon this discovery, the chancery clerk mailed the Court's judgment to the Attorney General at the correct address, and the Court issued a Notice of Compliance with MRCP 77(d) to all the parties. Also on December 6, Defendant Attorney General Jim Hood filed Motion to Alter Judgment re Final Judgment of Divorce, 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". The post-trial motions were heard by this Court on March 23, 2017 being brought on by notice of the Attorney General. Both Michael Gerty and Joesie Gerty filed briefs on April 7, 2017 after said hearing. After having considered the motions, arguments and briefs the Court hereby *grants in part* and *denies in part* Joesie Gerty's Motion for Reconsideration; *denies* Michael Gerty's Motion for Reconsideration; *denies* the Motions of the Attorney General; and hereby finds, adjudges, amends and restates its Final Judgment entered on November 15, 2016 as follows, to wit:

I. PROCEDURAL HISTORY

1. On September 18, 2013, the parties filed their *Joint Complaint for Divorce* along with a *Separation and Child Custody and Property Settlement Agreement* (attached hereto as Exhibit "A" and hereinafter referred to as the "Agreement"). Nothing occurred for nearly two years until Joesie Gerty filed her withdrawal of consent to the Agreement on June 10, 2015, and her *Complaint for Divorce* against Michael on June 17, 2015, on the grounds of Adultery,

Desertion, Habitual Cruel and Inhuman Treatment, and Irreconcilable Differences in the alternative.

2. On July 10, 2015, Michael filed his *Answer and Counter Complaint for Divorce*. In his Answer, Michael asserts various affirmative defenses, including estoppel, alleging irreconcilable differences between the parties arose due to Joesie Gerty's adultery. According to Michael, these differences still exist and resulted in the filing of the *Joint Complaint for Divorce* in 2013 as well as the accompanying Agreement. Michael contends the Agreement should be considered a post-nuptial agreement still in full force and effect despite Joesie Gerty's subsequent withdrawal of her consent to the Agreement and to the *Joint Complaint for Divorce*. Michael maintains that the Agreement should be enforced by the Court, or, if not, that he be granted a divorce on the ground of Adultery or, in the alternative, Habitual Cruel and Inhuman Treatment. However, in Michael's prayer for relief he requests modification of certain provisions of the Agreement regarding spousal support and property division. On December 1, 2015, Joesie answered Michael's *Counter Complaint,* pleading the affirmative defense of condonation, among other things.

3. A temporary hearing was conducted on July 13, 2015. Based upon an *Albright* analysis, the Court granted temporary primary physical custody of the minor child of the parties to Joesie with visitation to Michael, as evidenced by the *Order for Temporary Relief* entered August 6, 2015. The trial was conducted on May 2, 3, and 4, 2016. Due to a miscommunication, attorneys for parties did not provide requested property division proposals to the Court until October 2016.

4. The Court entered its *Final Judgment of Divorce and Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as amended,* sua sponte raising the issue of the unconstitutionality of the mutual consent provision contained within the irreconcilable differences divorce statute giving notice to the parties as well as to the Attorney General of Mississippi, Jim Hood, and adding him as a party pursuant to Mississippi Rules of Civil Procedure 21 and 19(a). Motions for Reconsideration were filed by both Michael Gerty and Joesie Gerty. The Attorney General filed a motion to alter or amend judgment and for other relief. The immediately following paragraphs herein provide the Court's rulings on the various post-trial motions. The Court's original judgment is restated in its entirety except as to the portions it amends based upon its rulings on the post-trial motions.

II. MOTIONS FOR RECONSIDERATION AND TO AMEND JUDGMENT

5. On reconsideration, Michael Gerty contends (i) the Child Custody and Property Settlement Agreement of the parties is binding upon the parties and not contingent upon divorce, including the custody provisions; (ii) the Court was without the authority to alter the custody portion, even though Joesie claimed the Agreement was no longer in the best interests of the child and the parties litigated the issue of the bests interests of the child both at the temporary hearing and the trial; (iii) nevertheless, the Court's Albright analysis should have favored Michael; (iv) Joesie's testimony was incredible on numerous material points; (v) Joesie did not affirmatively plead condonation as a defense; (vi) Michael proved uncondoned adultery; and (vii) the Mississippi irreconcilable divorce statute is not unconstitutional.

6. The Court finds Michael's Motion for Reconsideration is not well taken and should be denied for the following reasons: The Court should not simply rubber-stamp child

custody agreements. Not only must the Court determine the custody agreement is "adequate and sufficient", it must always make a determination it is in the best interest of the child. *Bell v. Bell*, 572 So.2d 841 (Miss. 1990) ("Children of divorcing parents are, in a very practical sense, wards of the court which is by law charged to regard their best interests"). *Owens v. Huffman,* 481 So.2d 231, 244 (Miss.1985); *Tighe v. Moore,* 246 Miss. 649, 151 So.2d 910, 917, *cert. denied,* 375 U.S. 921, 84 S.Ct. 265, 11 L.Ed.2d 164 (1963). See also, *Lowrey v. Lowrey*, 919 So.2d 1112 (Miss. Ct. App. 2005) *relying upon McManus v. Howard*, 569 So.2d 1213 (Miss. Ct. App. 1990). In *McManus* the Court held that "a court may not subordinate its authority and be bound by a custody agreement" without some further determination of the bests interests of the child at stake: "The welfare of the **children** and their best interest is the primary objective of the law, and the courts must not accord to contractual arrangements such importance as to turn the inquiry away from that goal." *Id.* at 1215-16. In the present case, the Court conducted an *Albright* analysis both at the temporary hearing and again at the trial in order to determine the best interests of the child herein. This was the Court's duty under the circumstances considering no original custody decree had been entered and the parties were disputing custody. *Albright v. Albright,* 437 So.2d 1003, 1005 (Miss.1983). The Court's *Albright* analysis was conducted fairly and thoroughly based upon all the evidence presented. Additionally, the Agreement of the parties specifically grants this Court Therefore, the Court declines to amend its Judgment on these points.

7. 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. The Court does not find that Michael proved uncondoned adultery by clear and convincing evidence. On December 1, 2015, Joesie answered Michael's *Counter Complaint,* pleading the affirmative defense of condonation. Furthermore, the contact between Joesie and Kyle after December, 2014, as well as the Facebook photos, do not establish adultery by clear and convincing evidence. Joesie Gerty affirmatively plead the defense of condonation in her Answer to Counterclaim filed in this Court on December 1, 2015. Therefore, the Court declines to amend its judgment on these points as well.

8. Joesie Gerty contends (i) Michael waived the argument that the Agreement of the parties is binding, because of his participation in the litigation which ensued thereafter; (ii) the Agreement of the parties is not binding because she withdrew her consent and, in the alternative, she was taken advantage of by Michael due her lack of ability to understand the English language with proficiency, and the Agreement is patently unfair because, among other things, it is silent as to the division of the marital asset of Michael's military retirement; (iii) because the defense of condonation was litigated at trial without objection from Michael, Michael waived the objection he now raises on reconsideration that condonation was not affirmatively plead by Joesie; (iv) Joesie proved Uncondoned adultery; and (v) the Mississippi irreconcilable divorce statute is not unconstitutional.

9. The Court finds Joesie's Motion for Reconsideration on the issue of the military retirement should be granted for the following reasons. The Agreement of the parties, which the Court finds to be binding as to the property division and alimony as stated herein, is silent

as to a significant marital asset: Michael's military retirement. The Agreement does not set out with particularity that Michael will retain the full benefit, nor does it provide that Joesie shall receive no share. Section 7 of the Agreement states the parties have made a full financial disclosure to the other of their respective assets and liabilities. Section 17 states that the parties waive, renounce and give up all right, title and interest to "property awarded to the other." Section 10 states with regard to future earnings and acquisition of property, "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…". Emphasis added. The Court finds the Agreement is at least ambiguous with regard to the division of Michael's military retirement, but also to the division of Joesie's 401k retirement plan (Trial Ex.25). In Section 14 of the Agreement, the parties affirmatively submit themselves to the jurisdiction of the Chancery Court agreeing that any such divorce Judgment

> **shall not conflict with the terms of the Agreement except to the extent disapproved of by the Court the parties agree that each mutually submits to the personal jurisdiction of the Chancery Court of Harrison County, State of Mississippi, so that the Court has the power to decide any and all matters and questions concerning the dissolution of the parties' marriage, and the division of the parties' property and debts.**

The Court finds, based upon Section 14, the parties by Agreement have relinquished to the Court the power and authority to divide their assets and debts, as well as decide child custody matters. Accordingly, the Court construes the ambiguity and silence of the Agreement as to Michael's military retirement and Joesie's 401k retirement plan as the consent and agreement of the parties for the Court to decide the division of this property. The marital portion of

military retirement in general is based upon the number of months of the marriage during the time served in the military. The Court finds the marital portion of the military retirement is limited by the Agreement of the parties at Section 10 to 8 years and 5 months (101 months) from the date of the marriage May 7, 2005 through and including the date of the Agreement, September 18, 2013. Michael has served a total of 19 years (228 months) in the military since his first entry in 1998. Thus the marital portion of Michael's military retirement benefit is approximately 42%, less than half. Joesie values her 401k retirement plan at $23,000. Trial Ex. 25.

10. The Court grants the parties a divorce upon the ground of irreconcilable differences. Retirement and pension benefits acquired during marriage are considered marital property, even if the non-owning spouse did not make any direct contributions to the asset. *Baker v. Baker*, 807 So. 2d 476, 480 (Miss. Ct. App. 2001). Had the Court not granted a divorce to the parties, it would be precluded from addressing the division of this marital asset. *Daigle v. Daigle*, 626 So. 2d 140, 146 (Miss. 1993). Therefore, the Court is obligated to equitably divide these significant marital assets not covered by the parties' property settlement agreement. *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994), and *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994). In order to do so, the Court conducts a *Ferguson* analysis as set out *infra*, and therefore, amends its judgment on this issue.

11. The Court bases its ruling on the remaining portions of the Agreement regarding the parties' property division and alimony on sound reasoning well supported by the law as set out *infra*. The evidence presented does not demonstrate that Joesie had difficulty understanding the Agreement based upon her proficiency of the English language. Nothing in

the record indicates that the Agreement was patently unfair regarding the property division and alimony actually set out therein. Therefore, the Court declines to amend its judgment on this point.

12. Joesie did not prove uncondoned adultery by clear and convincing evidence. The Court declines to amend its judgment on this point.

13. The Attorney General contends through post-trial motion (i) the Court erred in addressing the constitutionality of the Mississippi irreconcilable differences divorce statute because the Court raised the issue sua sponte; and (ii) the Attorney General was not provided notice that the Court intended raise the issue prior to the Judgment.

14. The Court finds that the Attorney General's Motions are not well taken and should be denied. Despite the procedural irregularities, the Attorney General was given as much notice and time as the parties to address the constitutional question. As to whether the Court had the authority to raise the constitutional issue sua sponte, the Court makes the following findings:

15. While it is fundamental that the Court will not ordinarily inquire into the constitutionality of a statute on its own motion, there are, however, noteworthy exceptions[1]: when a statute is patently unconstitutional on its face; when the statute is void; where the court's jurisdiction is affected[2] or where the court's plenary powers are affected.

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[1] 16 C.J.S., Constitutional Law, page 176, § 83, page 220, § 96. See also, 16 C.J.S., Constitutional Law, page 221, § 96, and cases cited in footnote 24 ("**This is not an inflexible rule, however, and in some instances constitutional questions inherently involved in the determination of the cause may be considered even though they may not have been raised as required by orderly procedure**.")

[2] *Liberty Mutual Insurance Co v Wetzel*, 424 US 737, 740 (1976) (raising subject matter jurisdiction sua sponte); *Mt. Healthy City School District Board of Education v Doyle*, 429 US 274, 278 (1977) ("we are obliged to inquire

16. Plenary power is defined by Black's Law, 9th ed., as that "power or authority which is broadly construed; especially, a court's power to dispose of any matter properly before it." Article VI, Section 156 of the Mississippi Constitution vests the Chancery Court with the plenary power to dispose fully the matters properly before it, in particular:

(a) All matters in equity;

(b) Divorce and alimony;

(c) Matters testamentary and of administration;

(d) Minor's business;

(e) Cases of idiocy, lunacy, and persons of unsound mind;

(f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation.

17. "Equity court has plenary power to mould its decrees so as to conform to full limits of details of any justiciable right…". *Floyd v. Vicksburg Cooperage Co*., 126 So. 395, 395 (Miss. 1930). In the landmark decision of *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015), the United States Supreme Court affirmed that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment...". The Supreme Court has also held that persons enjoy a fundamental right of the freedom of association (and disassociation), especially in intimate personal relationships such as marriage. See analysis *supra*. The Mississippi irreconcilable differences divorce statute, *in part and as applied*, deprives the Chancery Court of its

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sua sponte whenever a doubt arises as to the existence of federal jurisdiction"). See also *Mansfield, C & L M Railway Co v Swan*, 111 US 379, 382 (1884) (noting the existence of an "inflexible" rule that "without exception" requires the Court, on its own motion, to determine if jurisdiction is lacking).

constitutional authority to do equity and to grant the relief of divorce **in this case** as well as many others. In so doing, it deprives the citizens of this state the fundamental right to marry and the freedom of association in intimate relationships. As is shown in the Court's analysis below, it is necessary for this Court to raise the constitutional question in order to **dispose fully** the matters before it, namely, divorce and division of marital property. Equity is not done in halves. According to the separation of powers doctrine, the Legislature does not have the authority to deprive the Chancery Court of the plenary power conferred upon it by the Mississippi Constitution.[3] In order to do complete equity, the Court must recognize the fundamental rights at stake in the matter before it, even if the parties themselves do not.

18. An unconstitutional statute is void from its inception and is unenforceable.[4] As in the example of the Jim Crow laws, this is true even when years after its passage the Supreme Court announces with clarity the fundamental right being denied by the statute. The *United*

[3] See e.g., *City of Baton Rouge, v. Stauffer Chem. Co*., 500 So.2d 397, 400 n. 7 (La.1987)(A court has the authority to raise the issue of the constitutionality of a statute on its own motion "when that statute interferes with or curtails the plenary power vested in the court by the state constitution."); see also *Vaughn v. State, Dep't of Pub. Safety & Corrections*, 566 So.2d 1021 (La.App. 3 Cir.1990).

[4] See *Meshell v. State*, 739 S.W.2d 246 (Tex.Cr.App.1987)(Court held that the Legislature by enacting the Speedy Trial Act had violated the separation of powers doctrine under Article II, § 1 of the Texas Constitution); *see also*, *Boales v. Ferguson*, 55 Neb. 565, 76 N.W. 18 (1898) ("The Court did not annul the statute for it was already lifeless. It had been fatally smitten by the Constitution at its birth."); *Seneca Min. Co. v. Secretary of State*, 82 Mich. 573, 47 N.W. 25, 9 A.L.R. 770 (1890), (An unconstitutional statute "is of no more force or validity than a piece of blank paper, and is utterly void."); *Hiett v. United States*, 415 F.2d 664, 666 (5th Cir.1969), *cert. den*. 397 U.S. 936, 90 S.Ct. 941, 25 L.Ed.2d 117; *El Paso Electric Co. v. Elliott*, 15 Fed.Supp. 81, rev'd. 88 F.2d 505, cert. den. 301 U.S. 710, 57 S.Ct. 945, 81 L.Ed. 1363; *Reyes v. State*, 753 S.W.2d 382, 383-84 (Tex.Cr.App.,1988); *Melbourne Corp. v. City of Chicago*, 76 Ill.App.3d 595, 31 Ill.Dec. 914, 394 N.E.2d 1291 (1979) (Court held that an invalid law is void ab initio and confers no rights, imposes no duties and affords no protection.); *Shirley v. Getty Oil Co*., 367 So.2d 1388 (Ala.1979); *People v. Nicholson*, 61 Ill.App.3d 621, 18 Ill.Dec. 427, 377 N.E.2d 1063 (1978); *Stanton v. Lloyd Hammond Produce Farms*, 400 Mich. 135, 253 N.W.2d 114 (1977); *Ulrich v. Beatty*, 139 Ind.App. 174, 216 N.E.2d 737, *reh. den*. 139 Ind.App. 174, 217 N.E.2d 858 (1966); *Johnson v. State*, 271 Md. 189, 315 A.2d 524 (1974).

States Supreme Court in Brown v. Board of Education of Topeka, 347 U.S. 483 (U.S. 1954) held that racial segregation of public school was a violation of the right protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In clearly recognizing racial segregation as a whole denied citizens of the right to equal protection of the law, all state laws embracing racial segregation were recognized as being void and unenforceable. It was not necessary for state legislatures to repeal Jim Crow laws in order to blunt their efficacy.

19. After the Supreme Court's decision in *Brown,* segregation laws became unenforceable by operation of law. In fact, in Mississippi the last of these laws were not repealed until 2009. In 16 Am.Jur.2d, Constitutional Law, § 256, p. 724, it is written:

> The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose, **since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law**, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted. **No repeal of such an enactment is necessary**… Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it....

20. It is the Court's obligation to determine the existence and validity of the law. In *Town of South Ottawa v. Perkins*, 94 U.S. 260, 268, 24 L.Ed. 154 (1876), the United States Supreme Court held that a federal court must take judicial notice of a state law that is invalid, stating that "on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States." A Court should raise the issue of the constitutionality of a statute *sua sponte* where the statute encroaches upon the jurisdiction

of the court. This exception is founded upon the basic principle that every court has the power and duty to decide all issues related to the determination of its own jurisdiction.[5] Similarly, a Court must determine its authority to grant relief;[6] whether that authority is curtailed by statute; and whether the statute works to unfairly deprive citizens of their constitutional rights. For example, in *Mountain States Telephone & Telegraph Co. v. Animas Mosquito Control District*, 152 Colo. 73, 380 P.2d 560, 562 (1963), the Court held that the constitutionality of the statute was properly addressed by the Court on its own motion and not urged by the parties. In recognizing this departure from the general rule, the *Mountain* Court stated: "Though generally it is not considered good practice for courts to resolve cases on grounds not urged by the parties or their counsel, yet in cases such as we have before us, when much of the argument revolves around which of two words and meanings the legislature intended, and which by either interpretation reveals legislation that is patently unconstitutional and void, and **under which many persons are receiving unfair, discriminatory and unlawful treatment, it is the duty of the courts to resolve the question to the end that citizens may not be deprived of their constitutional rights**." See also, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding

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[5] See e.g., *State v. Keenan*, 278 S.C. 361, 364-65, 296 S.E.2d 676, 677-78 (S.C.,1982); *State v. Huber*, 129 W.Va. 198, 40 S.E.2d 11 (1946); *State v. Gatlin*, 241 La. 321, 129 So.2d 4 (1961); 16 Am.Jur.2d, Constitutional Law, § 174, p. 564 (1979); 16 CJS, Constitutional Law, § 96, p. 331, n. 21 (1956); *Bridges v. Wyandotte Worsted Company*, 243 S.C. 1, 132 S.E.2d 18 (1963); *State v. Hudson*, 253 La. 992, 221 So.2d 484 (1969).

[6] See *Howell v. Woodland School Dist*., 198 Colo. 40, 44, 596 P.2d 56, 57-58 (Colo.1979) (affirming decision of trial court which sua sponte addressed the constitutionality of a statute finding it was necessary for the trial court to address the issue to determine whether relief was proper and the appropriate form of relief), overruled on other grounds by *deKoevend v. Board of Educ*., 688 P.2d 219, 230 (Colo.1984); see also, *Townsend v. Beck,* 140 Fla. 553, 192 So. 390, ("It is true that the question of the constitutionality of the statute, supra, was not presented in the court below, but as the complainant in the court below could not have the relief sought, except under the provisions of that statute, equity should not grant such relief, if the statute is clearly unconstitutional, and, therefore, void.").

that Congress does not possess the legislative authority to supersede a Supreme Court decision construing the Constitution).

21. Courts are not bound by legal theories, legal interpretations and agreements between parties and their counsel as to the interpretation of the law. At times courts make determinations beyond the particular legal theories presented by the parties.[7] Likewise, courts are not bound agreements and stipulations of parties to determine what the law is.[8] The Supreme Court noted in *Kamen v. Kemper Financial Services, Inc*., 500 U.S. 90, 111 S.Ct. 1711, 1718, 114 L.Ed.2d 152 (1991) the "**court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law**". The Court must say what the law is, even when the litigants fail to do so.

22. As the Court wrote in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*: "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law . . . ." *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-47 (1993); see also, Kamen v. Kemper Fin. Serv., Inc., 500 U.S. 90, 99 (1991). In *Independent Insurance Agents* the D.C. Circuit raised concern as to whether the statute in

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[7] See e.g., *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990) (Court disposed of the case on a completely different basis than the one agreed upon by the parties finding that the challenged orders did not fall within the scope of the Federal Power Act).

[8] See *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51, 60 S.Ct. 51, 59, 84 L.Ed. 20 (1939)(Federal courts "are not bound to accept, as controlling, stipulations as to questions of law."); see also *Sebold v. Sebold*, 444 F.2d 864, 870 n. 8 (D.C.Cir.1971) ("Since this is a question of law, ... the agreement of counsel is not binding on this court.").

question had been repealed on its own motion. The parties, after briefing the issue, stipulated to the court that the statute remained in effect. Therefore, the court entered a judgment in favor of the agents based upon the statute. The Supreme Court reversed the D.C. Circuit finding that the stipulation of litigants could not possibly bind the federal courts. Justice Scalia noted in concurrence that had the Supreme Court not refused to be bound by the stipulation of the parties, it would have been forced to construe and apply a possible non-existent statute. *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 471 (1993). The D.C. Circuit Court of Appeals was NOT reversed for raising the issue of the validity of the statute sua sponte. In fact, the Supreme Court found that it was proper for the court to do so.

23. While this Court agrees with and recognizes the importance of the doctrine of judicial restraint, sometimes sua sponte consideration of legal issues and arguments not raised by the parties is necessary to the development of the law as in the present case. See *United States v Burke*, 504 US 229, 246 (1992) (Scalia concurring) ("(T)here must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it."). See also *United States v Pryce*, 938 F2d 1343, 1348 (DC Cir 1991) (opinion by Williams) ("Only if one adopts an absolutist approach to the adversary system can one contend that courts must never address unargued issues, no matter how obvious their proper resolution may be.").

24. The parties herein do not raise the constitutionality of the mutual consent requirement of the Mississippi irreconcilable differences divorce statute for two simple reasons. First, no party has ever done so to this Court's knowledge. Litigants and lawyers in Mississippi

have lived with and suffered through, both financially and emotionally, archaic divorce laws, statutory as well as common law, which have deprived Mississippi citizens of the fundamental right to choose whether or not to voluntarily remain in the most intimate relationship recognized by the law, marriage. The deprivation of this choice necessarily deprives the citizens of this state of the right to marry *someone other than the one to whom they are presently married* and the right to freely associate and disassociate in intimate private relationships. These rights are fundamental rights of liberty and association guaranteed by the Constitution of the United States. Secondly, the parties herein, like many litigants before them, do not raise the constitutional issue, because they perceive some monetary or custodial advantage in using the mutual consent provision of the statute to force the other party to compromise in order to obtain their freedom. In this situation, while the Court might potentially rule on some matters of child custody, it is usually prevented from granting the parties full equitable relief regarding property division, alimony and divorce. The Court should be under an obligation to prevent parties from using a facially unconstitutional law to deprive the other of their freedom, even when the parties themselves do not raise the issue. For these reasons and the reasons set out *infra*, the Court denies the Motions of the Attorney General, the motion of Michael Gerty and the motion of Joesie Gerty and declines to amend its judgment on this point.

25. In hindsight, the Court should have given the parties as well as the Attorney General notice of its consideration of the constitutional issue and requested briefs on the subject before it entered its judgment. However, both parties as well as the Attorney General had ample time to brief and argue the constitutional issue before the entry of this Amended

Judgment and did so. Therefore, despite the procedural irregularities, the Court's error on this point, if there be any, is harmless.

III. GROUNDS FOR DIVORCE

26. The Court finds parties have failed to prove grounds for divorce.

27. ***Desertion***. Joesie Gerty filed her *Complaint for Divorce* on June 17, 2015 alleging, among other grounds, "willful, continued and obstinate desertion for the space of one year" as defined by Miss. Code Ann. Section 93-5-1 (2004). Her burden was to establish that Michael was absent for a period of one year without her consent and that he intended to abandon the marriage. While the evidence establishes Michael refused to return to the marriage after January 2015, the evidence is conflicting as to whether Joesie would have taken him back for a space of one year subsequent to January 2015. The parties filed a *Joint Complaint for Divorce*, entering into a settlement agreement in 2013. Before this filing, Joesie admits to adultery. However, the parties both claim attempts at reconciliation after Joesie's admission of adultery. Joesie learned Michael was living with Amy and Cherie in December 2014 after the parties vacationed together in California. Joesie claims Michael refused to return to the marriage in January 2015, and she filed her Complaint six months later in June 2015.

28. The Court finds Joesie did not successfully establish a period of one year in which Michael deserted and she would have taken him back. Joesie also consented to the separation even after January 2015. The parties separated originally due to Joesie's admitted adultery in 2012 and the parties then entered into their Agreement in 2013, discussed *supra*. The evidence of Michael's desertion is conflicting prior to January 2015. Joesie testified that Michael made a good faith offer of reconciliation in December 2014, which would have interrupted the one-

year period. See *Criswell v. Criswell*, 182 S0. 2d 587, 588 (Miss. 1966). Therefore, the Court denies Joesie's *Complaint for Divorce* on the ground of "willful, continued and obstinate desertion for the space of one year" as defined by Miss. Code Ann. Section 93-5-1 (2004).

29. ***Habitual Cruel and Inhuman Treatment.*** Both parties plead the ground of habitual cruel and inhuman treat as defined by Miss. Code Ann. Section 93-5-1 (2004). A stringent test of cruelty coupled with a causal connection between the cruel conduct and the plaintiff's physical or mental health with corroborating evidence must be proved in order to establish habitual cruel and inhuman treatment sufficient to divorce. Since 1915, the traditional test for establishing habitual cruel and inhuman treatment requires proof that the continuing habitual conduct on the part of the offending spouse must be reasonably permanent and "so unkind, unfeeling or brutal as to endanger, or put one in reasonable apprehension of danger to life, limb or health…". *Wilson v. Wilson*, 547 So. 2d 803, 805-806 (Miss. 1989) (citing *Russell v. Russell*, 157 Miss. 425, 129 So. 270 (1930); *Humber v. Humber*, 109 Miss. 216, 68 So. 161 (1915)). During the last eighty-six years, the *Wilson* Court noted only a brief ten-year (1974-1984) judicial "thaw" – "a recognition of the inhumanity of the law" – but subsequently abandoned this attitude in favor of strict construction of the statute. *Id.*

30. Looking to the subjective effect of each spouse's behavior on the other[9] the Court finds that neither party in the present case has proven habitual cruel and inhuman treatment as required by law. 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.

[9] See *Jones v. Jones*, 43 So.3d 465 (Miss. Ct. App. 2009); *Smith v. Smith*, 90 So. 3d 1259 (Miss. Ct. App. 2011); *Bodne v. King*, 835 So. 2d 52 (Miss. 2003).

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. The marriage was not intolerable to either spouse; undesirable at times and ill-advised maybe, but not intolerable. Therefore, the Court denies divorce to both parties on the ground of habitual cruel and inhuman treatment.

31. ***Uncondoned Adultery***. In Mississippi, one seeking a divorce on the ground of adultery pursuant to Miss. Code Ann. Section 95-5-1 (2004) must show by clear and convincing evidence both an adulterous inclination by the Defendant and a reasonable opportunity to satisfy that inclination *with corroboration*.[10] Condonation or forgiveness of the adultery by the aggrieved spouse is a defense. See *Brewer v. Brewer*, 919 So. 2d 135, 139 (Miss. Ct. App. 2005).

32. 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. Amy's former husband Joe looks back with a jealous eye to the time when Michael lived with Amy and Joe. Michael may have had a reasonable opportunity to satisfy that inclination while he lived with Amy and her husband and then later with Amy and Cherie, however, that evidence is not corroborated. Although Amy and her husband Joe later divorced, Amy flatly denies the allegation. Amy testified that she allowed Michael to live with them at Joesie's request and assisted in child-care for Michael, whose work schedule kept him until late in the evening. Joe suspected an adulterous relationship between Amy and Michael, but only after Joe and Amy divorced.

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[10] *Owen v. Gerity*, 422 So. 2d 284, 287 (Miss. 1982); *Magee v. Magee*, 320 So. 2d 779, 783 (Miss. 1975); *Rodgers v. Rodgers*, 274 So. 2d 671, 673 (Miss. 1973); *Dillon v. Dillon*, 498 So. 2d 328-29, 330 (Miss.,1986); *McCraney v. McCraney*, 208 Miss. 105, 43 So.2d 872 (1950).

33. If two or more reasonable theories may be drawn from the facts proven, the proof will be insufficient. *McAdory v. McAdory*, 608 So. 2d 695, 700 (Miss. 1992). The Supreme Court thus held in *McAdory*, "the conclusion must not only be logical, and tend to prove the facts charged, but must be inconsistent with a reasonable theory of innocence." *Id*. Although here the conclusion of adultery appears logical, it is not inconsistent with the reasonable theory of innocence put forth by Amy; *i.e.,* that the living arrangement between Cherie, Amy, and Michael provided financial benefit to all of them as well as child-care assistance to Michael, and was not predicated on adultery. It is also reasonable for one to infer that Joe was simply jealous of the interaction between Michael and Amy. Whether Michael had the opportunity is meaningless unless the Plaintiff first establishes by the evidence an infatuation existed. *Id.*[11] No such infatuation between Michael and Amy has been established. The Court therefore denies Joesie's *Complaint for Divorce* on the ground of adultery.

34. ***Condonation***. Joesie admits to committing adultery with Kyle in 2012, which became the impetus for the *Joint Complaint for Divorce* and *Separation, Property and Child Custody Agreement* in 2013. However, Joesie claims she cut off the affair permanently with Kyle in January 2014**.** Although the Parties physically separated in September 2013, they continued a sexual relationship for more than a year through December 2014. Both parties admitted to working toward reconciliation during this time period. Joesie's testimony further established the parties committed to reconciliation during a trip to California in December 2014. Joesie

[11] See also, *Magee v. Magee*, 320 So. 2d 779, 783 (Miss. 1975); *Rodgers v. Rodgers*, 274 So. 2d 671, 673 (Miss. 1973)(Where the plaintiff relies upon circumstantial evidence, he or she retains the burden of presenting evidence sufficient to lead the trier of fact to a conclusion of guilty (not necessarily, however, beyond a reasonable doubt)).

relied upon this commitment and requested a transfer of her employment to join Michael in January 2015. The Court finds Michael condoned Joesie's admitted adultery through December 2014 by continuing a sexual relationship with her, forgiving her and planning reunification. Michael did not establish with clear and convincing evidence that Joesie resumed her adulterous affair sufficient to overcome his condonation during this time period. See *Lindsey v. Lindsey,* 818 So. 2d 1191, 1195 (Miss. 2002).

35. The Court hereby overrules Joesie's objection to the authenticity of Trial Exhibit of Kyle's mother's Facebook page. Joesie identified the page as Kyle's mother's and the photographs as her own. The Court does, however, strike any hearsay statements made by third persons contained within the exhibit. While the photographs depict Joesie with Kyle's family after Joesie claims she ended the sexual relationship with Kyle, the photos do not establish that Kyle and Joesie had a reasonable opportunity to commit adultery even if the Court assumes an infatuation still existed between them.[12] The Court therefore denies Michael's *Counter-Complaint* on the ground of adultery.

IV. NOTICE OF UNCONSTITUTIONALITY OF SECTION 93-5-2 OF MISSISSIPPI CODE OF 1972, AS AMENDED, IRRECONCILABLE DIFFERENCES DIVORCE

36. The Court finds that it cannot grant the parties a divorce on the fault grounds, which were litigated as outlined above. However, Rule 57 of the Mississippi Rules of Civil Procedure provides the Court may declare rights, status, and ***other relief*** when such legal relations are affected by statute, et cetera, ***regardless of whether further relief is or could be***

[12] See *McAdory v. McAdory*, 608 So. 2d 695, 699-700 (Miss. 1992).

claimed. Although the parties have not requested declaratory relief, the pleadings raise the issue of divorce on the ground of irreconcilable differences. It was initially pled via the Joint Complaint of the parties, withdrawn by Joesie Gerty, then pled in the alternative by Joesie Gerty in her Complaint on June 17, 2015; and not withdrawn by Michael. In fact, Michael admits that irreconcilable differences remain between the parties and arose in 2012.

37. MRCP 15(b) allows amendment by the Court for issues not raised in the pleadings, but tried with express or implied consent, to conform to the evidence presented at trial and the Court "shall do so freely when the presentation of the merits of the action will be subserved thereby…". The Court finds herein neither party is entitled to a divorce upon the fault-based grounds pled by both parties. The parties have not mutually consented for the Court to adjudicate disagreeable matters and grant divorce on the ground of irreconcilable differences as provided by Section 93-5-2 of Mississippi Code Of 1972, as amended. Unless the Court, on its own motion, determines the rights and legal relations of the parties in a declaratory fashion, the merits of the action will be subserved by a denial of substantially all the relief sought by both parties; namely, property division, alimony, and divorce. The Court therefore finds it is necessary to provide declaratory relief by conforming the pleadings and relief sought to the evidence presented at trial.

38. Because the Court has undertaken to provide declaratory relief, the Court provided notice to the Attorney General pursuant to MRCP 24(d)(2) of the unconstitutionality of § 93-5-2 Mississippi Code of 1972, as amended, in its Judgment of November 15, 2016, to the extent that portions of the statute providing for divorce on the ground of irreconcilable differences require the mutual consent and agreement of both parties. Mississippi Constitution

of 1890, Article 3, Sections 11[13], 13[14] and 14[15]; United States Constitution, Amendments 1[16] and 14[17]. The Court therefore joins and adds the Attorney General as a necessary party hereto pursuant to MRCP 21 and MRCP 19(a), finding that in the Attorney General's absence, complete relief cannot be accorded among the parties.

V. DIVORCE BLACKMAIL AND FINANCIAL LIMBO

39. Mississippi's fault based divorce system has seen few changes in the course of the last century. In order to obtain divorce upon fault grounds, the parties must provide corroborating evidence; default judgments are not permitted. In the case of divorce upon the ground of adultery, proof with clear and convincing evidence is also required. The common law defense of condonation utilized in the instant case demonstrates that even if grounds are proven, the divorce may be denied anyway based upon forgiveness of marital offenses. Mississippi's irreconcilable differences divorce statute does not provide its citizens divorce

[13] "The right of the people peaceably to assemble and petition the government on any subject shall never be impaired." Mississippi Constitution of 1890, Article 3, Section 11.

[14] "The freedom of speech and of the press shall be held sacred; and in all prosecutions for libel the truth may be given in evidence, and the jury shall determine the law and the facts under the direction of the court; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted." Mississippi Constitution of 1890, Article 3, Section 13.

[15] "No person shall be deprived of life, liberty, or property except by due process of law." Mississippi Constitution of 1890, Article 3, Section 14.

[16] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S.C.A. Const. Amend. I.

[17] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Amend XIV.

based upon true unilateral no-fault application. Rather, mutual consent is required on all the issues. The parties are allowed to additionally mutually consent for the court to adjudicate disagreeable issues, however, in most cases, one party withholds even this consent in order to maintain a superior bargaining position over the marital assets, issues of spousal and child support and custody of the children by delaying or threatening to prevent the divorce altogether. This tactic is better known as "divorce blackmail" and leaves the parties in financial limbo.

40. In her Mississippi Law Journal article of 2013, Professor Deborah H. Bell grapples with the dilemma of divorce in Mississippi and its effects, particularly on low income families, victims of domestic violence and self-represented litigants.[18] Professor Bell makes many relevant points, some of which are expounded upon here:

a. The fault-based system increases the costs of litigation. Proving fault grounds are necessarily more costly than true unilateral divorce due to the potential of increased attorney's fees and expenses.

> Representation in fault-based divorce is beyond the means of many low-income litigants who might be able to afford an attorney for a no-fault divorce. Low-income litigants are left with two choices. One, they can step unrepresented into a fault-based system that they are unlikely to successfully navigate. They must understand the grounds, the elements, the type of proof required, and the potential defenses. They are unlikely to understand and properly apply the rules of evidence and procedure. Or, two, they can remain outside of the system—married but separated. Bell, *The Cost of Fault-Based Divorce*, 82 Miss. L.J. Supra at 142.

[18] Deborah H. Bell, *The Cost of Fault-Based Divorce*, 82 Miss. L.J. Supra 131 (2013), http://mslj.law.olemiss.edu/mlj_online/volume82/articles/deborahhbell.pdf.

b. Despite the strong interest the state has in protecting and preserving marriage, this burdensome system may also increase and expand the litigation even when the marriage itself is over. **The result can be an extended separation with no reconciliation, a worsening of the relationship, and increased conflict, which has a negative impact on children**. In the meantime, the Court is hampered in dividing the assets of the parties and awarding support to an aggrieved spouse. Instead of protecting marriage, the law may in actuality prevent healing of the relationship between the parties and guarantee "an ongoing broken home and prevent the formation of a household unit based upon remarriage." *Id.* at 144-145.

> The financial and personal consequences are significant… a spouse who cannot obtain consent to a divorce or prove grounds **may live for many years (potentially for life) married but separated, without resolution of financial issues. The court cannot order division of marital assets in this situation—property division is available only upon divorce.** See *Daigle v. Daigle*, 626 So. 2d 140, 146 (Miss. 1993) (error for chancellor to divest husband of real property and profit-sharing funds); *Bridges v. Bridges*, 330 So. 2d 260, 264 (Miss. 1976) (husband cannot be ordered to sell the existing marital home and build another home for his wife). The court's only tool for sorting out the couple's finances is to order payment of separate maintenance. **The inability to divorce can leave spouses in a permanent financial limbo of joint ownership and financial uncertainty**. *Id*. (Emphasis added.). Bell, *The Cost of Fault-Based Divorce*, 82 Miss. L.J. Supra at 144.

c. **Low-income victims of domestic violence** are physically at risk of harm and more at risk of being denied relief by the court:

> Abusers are more likely to refuse to agree to divorce as a means of control, increasing the likelihood that the victim will be forced into the fault-based system. Corroboration of the often-secret act of spousal abuse may be hard to come by. And the condonation defense, which acts as a bar to divorce, is at direct odds with the state and national emphasis on protecting victims of violence. Bell, *The Cost of Fault-Based Divorce*, 82 Miss. L.J. Supra at 145.

d. True unilateral divorce is simple and inexpensive to obtain, although parties may ultimately litigate contested matters such as child custody or property division. However, the divorce itself is still granted. *Id.* at 138.

e. **Mississippi and South Dakota[19] are the only two states in the union which lack true unilateral no-fault divorce**. *Id*. at 142.

V. CONSTITUTIONAL RIGHT TO MARRY AND FREEDOM OF ASSOCIATION

41. The right to marry has been recognized by the United States Supreme Court as a fundamental right protected by the Constitution. Marriage is the most intimate ***voluntary*** relationship in which human beings agree to enter. While the government places some structure around the manner in which persons may marry and end marriage, it should not force persons to remain in undesirable and unwanted marriages. To do so works a deprivation of liberty and freedom of association guaranteed by the Fourteenth Amendment. Likewise, the laws of this state should not prevent or enable one party to prevent the disassociation of married couples. This contravenes the basis upon which the marital relationship is founded: the voluntary gift of self. Indeed the Judeo-Christian heritage[20] upon which our laws and notions of marriage are founded embodies the principle that marriage is not bondage but rather a "personal choice central to individual dignity and autonomy". *Obergefell v. Hodges*, 135 S.Ct. 2584 (U.S. 2015).[21] Human beings are called to live in peace. This is not to say that the

[19] Professor Bell's article states that Mississippi stands alone as the only state lacking true no-fault divorce. However, Professor Bell has since corrected this position to add the state of South Dakota.

[20] See e.g., **1 Corinthians 7:15.**

[21] See also, *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U. S. 479, 484–486 (1965).

government ought not be involved in the separation of the parties, the division of the assets of the marriage, and the custody and best interests of the children. It is and it should be for public policy reasons when parties cannot agree, parties are at risk of harm, or children are at risk. However, when the law forces parties to mutually agree in order to divorce or else litigate narrowly constructed statutory fault grounds, the law deprives the parties of the freedom to end the association, even if it does so in a constructive manner. **The law thus becomes a bludgeon instead of an instrument of justice.**

42. **Right to Marry.** In the landmark decision of *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015), the United States Supreme Court affirmed that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty." Although the issue of same-sex marriage is not before this Court, **the right to marry and the freedom of association is.** The Supreme Court held in *Obergefell* that public policy of the State of Tennessee determining its licensure requirements unconstitutionally infringed upon individual liberty rights and freedom of association. Thus, states are prohibited from denying licensure to marry to couples of the same sex. The Court crystallized earlier precedent that the right to marry is protected by the Constitution.

43. The nature of marriage between two consenting adults transcends mere contract principles. In *Griswold v. Connecticut*, 381 U. S. 479, 485 (1965) the Supreme Court recognized the intimate association protected by this fundamental right to marry extended to the right of married couples to use contraception without state or government interference. The following is a summary of the precedent relied upon by the *Obergefell* Court, which is

relevant to the Court's inquiry here; i.e., whether the government may deprive a person of the right to be married or "unmarried" either outright or in a constructive manner by conditioning it upon the mutual consent of another.

44. In *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "**one of the vital personal rights essential to the orderly pursuit of happiness by free men**." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the **right to marry is fundamental under the Due Process Clause**. See, e.g., *M.L.B. v. S.L.J.,* 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–640, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Griswold*, supra, at 486, 85 S.Ct. 1678; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015).

45. Indeed, decisions concerning marriage are among the **most intimate** that an individual can make. See *Lawrence*, *supra*, at 574, 123 S.Ct. 2472… **Choices about marriage shape an individual's destiny**. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the **decision whether and whom to**

marry is among life's momentous acts of self-definition." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599 (2015).

46. Suggesting that marriage is a right "**older than the Bill of Rights**," *Griswold* described marriage this way: "Marriage is a coming together for better or for worse, hopefully enduring, and **intimate to the degree of being sacred**. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; **a bilateral loyalty**, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." Id., at 486, 85 S.Ct. 1678. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599-600 (2015).

47. Marriage is thus one of the most intimate personal choices recognized by the law. In many ways, choices regarding marriage shape a greater portion of the lives of most people. Persons are free to choose whom to marry with very little government restriction. This freedom is obstructed when persons are prohibited from ending the voluntary intimate association of marriage by governmental statutes, which are either outright or in practice unduly burdensome. In far too many cases, citizens of Mississippi spend years in litigation and thousands, if not hundreds of thousands, of dollars attempting to obtain a divorce from an uncooperative spouse. Many times, the relief sought, i.e., the end of the intimate association, is denied altogether. The fault ground statutes require a heightened level of proof and a trial on the merits. This can be quite costly – a cost most of our citizens cannot afford to bear. The arcane divorce statutes in Mississippi, including the irreconcilable differences statute, create an undue burden upon the citizens of this state and in many cases prevent them from exercising their fundamental right to marry rooted in the right to freedom of association protected by the First and Fourteenth Amendments. When the law creates the potential to indefinitely deny any

person without just cause a fundamental right and liberty by forcing one to remain in an intimate relationship, it is unconstitutional.

48. Persons are not required to wait upon legislative action before asserting a fundamental right. The Supreme Court explains, as follows:

> Thus, when the rights of persons are violated, "the Constitution requires redress by the courts," notwithstanding the more general value of democratic decisionmaking. Id., 134 S.Ct., at 1637. **This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity**. The dynamic of our constitutional system is that **individuals need not await legislative action before asserting a fundamental right**. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An **individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act**. The idea of the **Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.**" *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). This **is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections**." *Ibid*. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2605-06 (2015).

49. **Right of Association and the Right to be Free from Compelled Association.** The right to marry is a peripheral right of the liberty right of association. During the 1950's and 1960's the concept of freedom of association began to emerge as the Court recognized an interrelation between the freedom of speech, freedom of assembly, and the right to privacy of the First Amendment all protected by the Due Process Clause of the Fourteenth Amendment. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958), a unanimous Supreme Court held as unconstitutional a citation of contempt against the National Association for the Advancement of Colored People for refusal to comply with a court order to disclose a list of its

members to the State of Alabama. The Court found that the State "failed to demonstrate a need for the lists which would outweigh the harm to associational rights which disclosure would produce." *Id*. The Court explained: "… freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . .". *Id*. The Court protected the "**freedom to associate and privacy in one's associations**," noting that freedom of association was a peripheral First Amendment right. *Id*. at 462. In other cases, the Court seems to treat the right to freedom of association as a completely separate and independent right from freedom of speech.[22]

50. Section 93-5-2 of the Mississippi Code of 1972, as amended, impinges upon the fundamental right of association and privacy in associations by unduly burdening the right to disassociate. **The right not to associate or the right to be free from compelled association**[23] is inherent in the right to freedom of association protected by the Fourteenth Amendment.

[22] See e.g., *Bates v. City of Little Rock*, 361 U.S. 516, 522 -23 (1960); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 578 -79 (1971); *Healy v. James*, 408 U.S. 169, 181 (1972).

[23] See *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), and *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977)(Freedom of association is unconstitutionally burdened where the state requires an individual to support or espouse ideals or beliefs with which he or she disagrees.); *Keller v. State Bar*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990)(Mandatory state bar membership dues could not be used to further ideological causes with which some members might disagree, unless the state could show that the expenditures were incurred for the purpose of regulating the legal profession or improving the quality of legal service). See also, Seana Valentine Shiffrin, Essay, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 874 (2005) ("Compelled association...displays an objectionable indifference to the autonomous thought processes manifested in voluntary social associations and their genesis, while yet representing an effort to make use of the character virtues associated with the close connections that are the product of voluntary association.").

"[F]reedom of association ... plainly presupposes a freedom not to associate."[24] *Roberts* v. *United States Jaycees,* 468 U. S. 609, 622 (1984).

51. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court found unconstitutional New Jersey's decision compelling the Boy Scouts of America to admit homosexuals. The Supreme Court reversed the Supreme Court of New Jersey, affirming the right not to associate and holding that the New Jersey decision violated the Boy Scout's right to expressive association and freedom from suppression of ideas as a private association. *Id*. at 644, 660-61.[25] Thus, a person's right to associate is necessarily restricted by whoever is willing to associate with him and not just with whomever he chooses. As between private citizens and private groups then, any person has the right not to associate with whomever he chooses and for any reason. This is a basic tenet of a free society. Nonetheless, within the framework of autonomy, certain obligations to others, which arise out of associations may need to be protected under the law. However, a state must establish a compelling interest to restrict associational freedoms. Strict scrutiny is the standard the government must demonstrate to

[24] Some constitutionally guaranteed rights do not protect the corresponding inverse rights. For example, "the Eighth Amendment gives people the right to refuse cruel and unusual punishment, not the right to insist on it…; the Thirteenth Amendment creates a right against slavery but no corresponding right to be a slave…"; the right to life protected by the Fourteenth Amendment does not grant a corresponding right to die. California Law Review, Vol. 100, August 2012, No. 4, *Rights To and Not To*, Joseph Blocher.

[25] When constitutional rights compete one freedom can be overridden by another. Therefore, freedom from compelled association, like many other freedoms, is not absolute. For example, in *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984), the Court held that the policy of the Jaycees to exclude women unconstitutionally promoted gender discrimination. *Boy Scouts of America* distinguished *Roberts* on the basis that *Roberts* did not involve the suppression of ideas, and therefore, the right of association of the male Jaycees was outweighed by the state's interest in eliminating gender discrimination.

impinge upon the freedom. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 -61 (1958).

52. **Right to Freedom of Intimate Association and Right of Marital Privacy**. Additionally, as a part of the right to privacy recognized in cases such as *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), the Court has also determined the constitutional **right to freedom of intimate association** as "**the fundamental human right to create and maintain intimate human relationships**". *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015). In so doing, the Supreme Court in *Griswold* held a state statute, which criminalized medical advice to married couples regarding birth control, unconstitutionally intruded on the right of marital privacy. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

53. **Governmental Interests**. Undeniably, states have an interest in protecting and preserving marriage. What, if any, effect does current Mississippi law have on marriages in Mississippi? According to The National Center for Family & Marriage Research (NCFMR) at Bowling Green State University, using a refined divorce rate, **Mississippi ranks number three (3) in the highest divorce rate among all states in 2013** with 24.98 per 1000 marriages ending in divorce, well above the U.S. average of 18.47.[26] Additionally, in 2013, there were 1.53

[26] Payne, K. K. (2014). Divorce Rate in the U.S., 2013 (FP-14-17). National Center for Family & Marriage Research. Retrieved from http://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/FP-14-17-divorce-rate-2013.pdf. The divorce rate used is a refined divorce rate defined as [(number of women divorced in the past 12 months) / (number of women divorced in the past 12 months + number of currently married women)]. Mississippi's crude divorce rate calculated in **2010** at last census is 4.3 divorces per 1000 people surpassed only by Alabama, Alaska, Arkansas, Florida, Idaho Kentucky, Nevada, Oklahoma, West Virginia, and Wyoming. Divorce rates by State: 1990, 1995, and 1999-2014 published by CDC/NCHS, National Vital Statistics System. [Rates are based on provisional counts of divorces by state of occurrence. Rates are per 1,000 total population

marriages for every one divorce in Mississippi, well below the national average of 1.80. Mississippi ranks in the top ten (10) states with the lowest marriage to divorce ratio. *Id*. According to another study,[27] Mississippi ranks number 9 out of 10 states considered to have a high divorce rate.

54. According to the 2012 Mississippi Department of Health Report on Live Births, Mississippi's unwed birthrate has doubled since 1980. The overall rate of births to unwed mothers was 54.7% in 2010, but was 28% in 1980. Thirteen counties reported unwed birth rates of over 75%. It can be inferred from the unwed birth statistics that marriages in Mississippi have not been strengthened or protected when a majority of our children are being born out of wedlock.

55. With this statistical basis, the justification behind the current irreconcilable differences divorce scheme is arbitrary and not related to protecting and preserving marriage at all. Mississippi's divorce rate is among the highest in the nation. This is an astounding statistic considering the difficult and costly system the citizens of this state must navigate in order to obtain a divorce. Mississippi, on the other hand, has a low marriage rate.[28]

56. Some states, in an effort to protect and preserve marriage, have modified unilateral no-fault divorce statutes by requiring a greater separation period than Mississippi's

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residing in area. Population enumerated as of April 1 for 1990, 2000, and 2010 and estimated as of July 1 for all other years].

[27] http://divorce-laws.insidegov.com/saved_search/States-With-Highest-Divorce-Rates.This study calculates Mississippi has 11 divorces per year per 1000 state residents **over the age of 15** taken from the U.S. Census Bureau. This is not quite the refined divorce rate used in the NCFMR study, but it at least excludes children, which the crude divorce rate does not.

[28] See also, https://betterchancery.com/2011/08/29/mississippis-divorce-rate-and-the-current-statutory-scheme/.

60-day rule.[29] At least nineteen (19) states — Arkansas, Arizona, Connecticut, Delaware, Florida, Illinois, Louisiana, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, Utah, Virginia, Washington, West Virginia and Wisconsin — require classes for divorcing and separated parents; twenty (20) other states require only divorcing couples with minor children to attend some type of class.[30] Forty-eight states offer classes in some form to assist in marriage and parenting, according to a 2008 study from the Association of Family and Conciliation Courts. There are no laws in Mississippi which proactively support marriage in family. The Mississippi divorce statutes offer only a costly and prohibitive scheme to end marriage without regard to minimizing conflict, educating parents, support for victims of domestic violence or the poverty and illegitimacy plaguing our state. **The law in Mississippi does not support marriage or family.**

57. In the case of *Tackett v. Tackett*, 967 So. 2d 1264, 1267 (Miss. Ct. App. 2007), a husband of eighteen months was unable to prove he was entitled to divorce on the ground of habitual cruel and inhuman treatment. The parties admitted a broken marriage and

[29] "For example, in Louisiana **(**LA. CIV. CODE ANN. art. 101–103.1 (2012)) a divorce may granted if the parties have been living separate and apart for 180 days if they have no children and 365 days if they do have minor children. Arkansas (ARK. CODE ANN. § 9-12-301 (2009)) permits divorce when spouses have lived separate and apart from each other for eighteen months, whether the separation was the choice of one or both, and without regard to fault. And, in Tennessee (TENN. CODE ANN. §§ 36-4-101-02 (2010)) a couple without children may be divorced if they have lived separate and apart for two years." Deborah H. Bell, The Cost of Fault-Based Divorce, 82 Miss. L.J. Supra 131, 144 (2013), http://mslj.law.olemiss.edu/mlj_online/volume82/articles/deborahhbell.pdf.

[30] http://www.usatoday.com/story/news/politics/2014/02/25/alabama-divorce-class-bill/5811419/. "• Alaska requires either viewing a 48-minute video in person in the state's largest cities or completing an online class. • Minnesota and New Jersey require classes if parents cannot agree on custody or parenting time. • Some jurisdictions in Indiana, Idaho, Michigan, Oregon, Tennessee and Texas also mandate classes. • And courts in California, Colorado, District of Columbia, Iowa, Kansas, Kentucky, Maryland, Montana, New York, North Carolina and Vermont may require parents to attend classes."

contentious relationship, but the wife would not agree to divorce. Remarking upon the inequity of outcome forced under the current statutory divorce scheme, which denied divorce and required the husband to pay fifty percent of his net income to his wife as separate maintenance, Judge Irving stated, "**I can think of no public interest that is served by requiring two people to remain married under circumstances that are likely to lead only to more tension between them, especially in a situation like we have before us where one party has to pay a substantial sum of money to the other yet is unable to move on with his life.**[31] *Id.*

58. In conclusion, without a true no-fault unilateral divorce option, the present Mississippi statutory fault-based divorce scheme, or in the alternative, irreconcilable differences requiring mutual consent of couples to divorce, unconstitutionally restricts and, in some cases, denies the following fundamental rights and freedoms: the right to marry rooted in freedom of speech, right to privacy, and right to liberty; the right to freedom of association; the right of freedom of intimate association; the right not to associate or the right to disassociate rooted in the right to liberty and freedom of association; and the right to re-marry rooted in the right to liberty and freedom of association. Because of the fundamental rights at issue, the compelling interest standard should be applied. *Mississippi Employment Security Comm'n v. McGlothin*, 556 So.2d 324 (Miss.1990). Under that standard, legislation impinging on a fundamental right is valid on if a compelling state interest is reasonably related to the legislative intent and is the "least restrictive means reasonably available" to support that interest. Id. at 328. The compelling state interest to protect and preserve marriage is not

[31] Cited in Deborah H. Bell, *The Cost of Fault-Based Divorce*, 82 Miss. L.J. Supra 131, 144 (2013), http://mslj.law.olemiss.edu/mlj_online/volume82/articles/deborahhbell.pdf.

advanced by the present state of Mississippi law as is abundantly evidenced by the statistics of divorce, marriage and illegitimacy cited above.

59. Although the parties did not execute a formal consent for the Court to adjudicate contested matters on this basis, Joesie plead the irreconcilable differences ground in the alternative. Michael did not withdraw his consent to the Joint Complaint of divorce on the ground of irreconcilable differences and affirmatively plead that the parties have irreconcilable differences in his Counter-Complaint. The parties are constitutionally entitled to a divorce without the mutual consent of the other. Therefore, the Court hereby grants divorce to Josie Gerty and Michael Gerty on the ground of irreconcilable differences.

VII. CHILD CUSTODY AND PROPERTY SETTLEMENT AGREEMENT

60. 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. Section 14 of the Agreement provides as follows:

> 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 extend disapproved by the Court the parties agree that each mutually submits to the personal jurisdiction of the Chancery Court of Harrison County, State of Mississippi, so that said Court has the power to decide any and all matters and questions concerning the dissolution of the parties' marriage, and the division of the parties' property and debts.

Furthermore, Section 17 of the Agreement provides that each party specifically waives any rights and claims to the other's estate "regardless of whether one party shall die prior to the entry of a Final Judgment of Divorce."

61. In *Grier v. Grier*, 616 So.2d 337, 341 (Miss. 1993) the Supreme Court held that a "property settlement agreement executed in contemplation of a divorced based upon irreconcilable differences is unenforceable when one party withdraws from the irreconcilable differences proceeding and seeks a divorce on grounds other than irreconcilable differences." However, in the very next sentence, the Court states that confusion on this issue may be avoided by spelling out the parameters of the contingency. Pointing out that it did not intend to limit parties' right to contract, the Court concluded its holding 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 any 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 disapprove, 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…". Therefore, the "foundation of the bargain" of the Agreement between the Gertys was not limited to an irreconcilable divorce. *Id.* at 340.[32] Indeed, Michael pleads in his *Answer* that the Court should essentially ratify the Agreement as a post-nuptial contract and points out that the

[32] "The statute's intent is to provide a less painful alternative to the traditional grounds for divorce which required the parties to publicly put on proof of sensitive private matters." *Grier v. Grier, 616 So.2d 337, 340 (Miss.1993).* "The cornerstone of the process is mutual consent." Id. "The parties bargain on the premise that reaching an agreement will avoid the necessity of presenting proof at trial." Id. "It would be fundamentally unfair to hold either of the parties to portions of the package after the foundation of the bargain is removed." Id.

parties abided by the Agreement for two years prior to the filing of Joesie's *Complaint for Divorce*. The Agreement specifically survives the death of the parties at Section 17 prior to the entry of a divorce judgment.

62. Settlement of disputes is favored in the law and, generally, contractual agreements will be enforced, absent any fraud, mistake, or overreaching.[33] 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.[34] This is especially true with regard to the property of the parties with few, if any, exceptions.[35] However, when custody of a minor child is at issue, as in the present case, this basic rule is abnegated in favor of the primary objective of the law in determining and protecting the best interests of the child.[36] Therefore, the Court finds it is incumbent upon it to determine the best interests for the custody of the child herein despite the prior agreement of the parties. The only formal custody adjudication which has been made in this matter was set forth in the Court's *Order for Temporary Relief* entered August 6, 2015. For the foregoing reasons, the Court finds the Agreement of the parties are binding upon the parties and should be enforced with the exception of the child custody provisions.

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[33] *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).*

[34] *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).

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

[36] *Pace v. Owens*, 511 So.2d 489, 490 (Miss. 1987); *Duran v. Weaver,* 495 So.2d 1355, 1357 (Miss. 1986); *Tucker v. Tucker,* 453 So.2d 1294, 1297 (Miss. 1984); *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983).

63. However, because this Court has sought to do complete equity granting the divorce to the parties on the ground of irreconcilable differences, the Court must address the equitable division of a substantial marital asset, Michael's military retirement. Retirement and pension benefits acquired during marriage are considered marital property, even if the non-owning spouse did not make any direct contributions to the asset. *Baker v. Baker*, 807 So. 2d 476, 480 (Miss. Ct. App. 2001). Had the Court not granted a divorce to the parties, it would be precluded from addressing the division of this marital asset. *Daigle v. Daigle*, 626 So. 2d 140, 146 (Miss. 1993). The Agreement between the parties is silent as to its division and ambiguous at best. The Agreement does not provide that Michael will retain the full benefit, nor does it provide that Joesie shall receive no share. See the findings herein *supra* at paragraphS 9 and 10. Equitable distribution pursuant to divorce is governed by the cases of *Hemsley v. Hemsley*, 639 So.2d 909 (Miss. 1994), and *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994). Therefore, the Court incorporates the Agreement (attached hereto as Exhibit "A") as a part of this Judgment governing the issues of equitable division of marital property and alimony expressly provided for in the four corners of the Agreement. The Court further makes the following findings regarding equitable division of marital property, child custody, child support and the best interests of the child.

VIII. EQUITABLE DISTRIBUTION – FERGUSON ANALYSIS

64. "[F]airness is the prevailing guideline in marital division." *Ferguson v. Ferguson*, 639 So.2d 921, (Miss. 1994). The Court makes the following findings based upon *Ferguson*:

65. **The 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 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. Michael's economic contributions outweigh Joesie's. He was the primary bread winner, although Joesie worked throughout the marriage and supported Michael's military career. During periods of time the couple agreed to participate in a marital relationship, Joesie's domestic contributions outweighed Michael's, especially during times of Michael's deployments. The Court finds, however, Supra (ALBRIGHT ANALYSIS) during the entire course of the marriage both parties were the primary caretakers of the child. 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 extra-marital relationship which was the ultimate catalyst for the marital demise. This factor favors Michael.

66. **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 parties did not complain of the disposal of marital assets prior to their first separation.** As noted, the Court finds herein that the child custody and property settlement agreement of the parties divides of the marital assets with the exception of Michael's military retirement and Joesie’s 401k retirement plan.

67. **The market value and the emotional value of the assets subject to distribution.** The Court was provided with no evidence of the present value of Michael's

military retirement. However, the marital portion of his retirement is based upon the number of months Michael served in the military during the marriage. The Court finds the marital portion of the military retirement is limited by the Agreement of the parties at Section 10 to 8 years and 5 months (101 months) from the date of the marriage May 7, 2005 through and including the date of the Agreement, September 18, 2013. Michael has served a total of 19 years in the military since his first entry in 1998. Thus the marital portion of Michael's military retirement benefit is approximately 42%, less than half of the total. Joesie values her 401k retirement plan at $23,000. Trial Ex. 25.

68. **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.** In weighing this factor, the Court considered the value of the assets already divided among the parties by virtue of their Agreement. Sections 8a and 8b of the Agreement divide jointly held real estate. As per the parties' Agreement at Section 8a, the real property located at 10578 Steeplechase Dr., Gulfport was transferred to Michael via quit claim deed executed by Joesie. Michael asserted in 805 and in testimony that this house will sell at loss. In Trial Ex. 1, dated July 14, 2015, Michael asserts the home is valued at $160,000, with a mortgage balance of $179,371, leaving and negative equity balance of -$19,371. However, in Trial Ex. 26, dated May 2, 2016, not quite one year later, Michael asserts the value of the home has dropped to $108,000, with a mortgage balance of $177,433 leaving a negative equity of -$69,433. Joesie, on the other hand, estimates the value of this home to be $189,000 in both Trial Ex. 2 and 25. It is not believable, without further evidence, for the Court to find the value of this home

decreased in value by $52,000 or 32.5% in less than a year. The Court finds the value of the home is $174,500, which the average of the original figures presented by the parties, $160,000 and $189,000. This leaves a negative equity value of -$2,933. This house is not a benefit to Michael.

69. Contrary to Joesie's assertions, paragraph 8b regarding the home located in Pass Christian, Mississippi, the Blue Meadows Rd. property, does not unduly prejudice Joesie. Joesie resides in the home. The agreement specifically states that Michael shall maintain all debt, insurance, taxes and liens on said property while Joesie is given the right to exclusive possession including the ability to lease. Joesie is only responsible for the cost of ordinary upkeep and repair. If the property is sold, the parties shall divide the net proceeds equally. This provision does not give Michael the right to sell the property out from under Joesie without her consent. The provision does not indicate a limited period Joesie is to enjoy exclusive possession. Furthermore, the Agreement does not state that the house shall be sold. It only contemplates the division of the proceeds in the event of sale. Therefore, the Court concludes within the plain meaning of the contract, Joesie is to remain in the home while Michael maintains all debt, insurance, taxes and liens. The parties may mutually agree to sell the home, in which case they would split any proceeds after any remaining debt and any liens have been satisfied less expenses. Michael alleges in his 8.05 financial statement, Trial Ex. 26, dated May 3, 2016 the fair market value of the home is $50,000, with a mortgage liability of $33,133, and an equity value of $16,867. Joesie estimated the fair market value to be $100,000 in her 8.05 financial statement dated April 28, 2016, Trial Ex. 25. The Court was provided no other evidence with which to value the home. Averaging the values presented by

both the parties, the Court finds the home to valued at $75,000 with an equity value $41,867. While both parties would share equally in the proceeds of any sale, Joesie still retains the right to exclusive use and possession of the home while Michael is saddled with most of the financial obligations. This is of considerable benefit to Joesie.

70. Also the parties agreed to divide their vehicles giving no equity value for either one. The parties do not give value to the personal items they each agreed to keep in their possession. Michael has cash in the amount of $812.89. Joesie has cash in the amount of $3,156. This factor favors Michael.

71. **Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution.** The Agreement provides that Michael shall pay Joesie alimony in the amount of $300 per month for a period of five (5) years following the ratification of the Agreement. The Court finds that it ratified the Agreement of the parties on November 15, 2016 when it rendered its Final Judgment of Divorce on November 15, 2016. Therefore, the Court finds alimony was due from Michael to Joesie on December 1, 2016 and on the first day of each month thereafter until the completion of the five (5) year period. Alimony is deductible from Michael's taxable income and counted as taxable income to Joesie. See 26 U.S.C. §§ 71(a), 163(h)(3)(A), 215(a) (2008) . This factor favors Michael.

72. **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.** The division of Michael's military retirement and the 401k plan will not eliminate the alimony Michael is contractually obligated to pay Joesie. This factor is neutral.

73. **The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity.** While Joesie momentarily has the advantage of the exclusive use and possession of the home located on Blue Meadows Road, she does not as have as great of an education, earning capacity or monthly income as Michael. Joesie's net monthly income is $2,654 just slightly exceeding her monthly expenses of $2,626. This includes alimony and child support payments. Trial Ex. 25. Michael's net monthly income is far greater than Joesie's, more than twice as much. Trial Ex. 1 provides Michael's monthly income as $6,707.11 with combined monthly expenses of $7,434 leaving a deficit of -$727. Trial Ex. 26 provides Michael's monthly income as $5,763.64 with combined monthly expenses of $7,115 leaving a deficit of -$1,351.36. The fluctuation in Michael's income is due to extra duties served in alternating years. Because Michael is saddled with the taxes, mortgage debt and insurance on both homes, as well as alimony and child support from a previous marriage, his expenses exceed his income... at least on paper. If the parties do sell the Blue Meadows Road home, Michael will be relieved of this liability, but Joesie will not have the income to afford a reasonable residence for herself and their child. Additionally, the alimony she receives from Michael of $300 per month will cease in five (5) years. Of course, Michael's financial picture will brighten should he sell the Steeple Chase property, as he does not need it to live in. This factor favors both parties.

74. **Any other factor which in equity should be considered.** "[M]arital misconduct is a viable factor entitled to be given weight by the chancellor when the misconduct places a burden on the stability and harmony of the marital and family relationship." Carrow v. Carrow, 642 So.2d 901, 904–05 (Miss.1994). See also Brabham v. Brabham, 950 So.2d 1098, 1101–02

(Miss.Ct.App.2007). Joesie Gerty's relationship with Kyle Rebstock was the ultimate catalyst bringing about the demise of the marriage. Michael is not, however, without fault. He proved to be a controlling husband and unsupportive of Joesie with regard to her two daughters. He was not honest with Joesie in December of 2014 about their relationship. Nevertheless, this factor weighs against Joesie.

75. Based upon the principles of equitable division set forth in *Ferguson*, the Court awards Joesie Gerty 50% of the marital portion (101 months) of Michael's military retirement, which is the equivalent of 50.5 months or approximately 22% of the total retirement benefit (228 months). Because Michael retain 78% of his total retirement benefit and alimony will cease after five years, the Court awards Joesie Gerty 100% of the value of her 401k retirement plan.

IX. CHILD CUSTODY – *ALBRIGHT* ANALYSIS

76. The "polestar consideration" in any child custody determination is the best interests of the child. *Grant v. Martin*, 757 So.2d 264, 266 (Miss. 2000). Our Supreme Court provides some guidance in the case of *Albright v. Albright*, 347 So. 2d 1003, 1005 (Miss. 1983), which sets forth a list of probative factors for consideration in every custody dispute. It is well-established that the Court, in its analysis to determine the best interests of the child, shall make findings of fact under the "*Albright* factors." *Sturgis v. Sturgis*, 792 So.2d 1020, 1025 (Miss. Ct. App. 2001). The Court will consider these findings in light of the "totality of the circumstances." *Ash v. Ash*, 622 So.2d 1264, 1266 (Miss.1993). (The Court sometimes refers to the parties as "mother" and "father" respectively). The *Albright* factors and the Court's findings of fact and analysis for each are as follows:

77. ***Age, Health and Gender***. The child is a 7 year old boy. At the time of the temporary hearing, the child was experiencing some behavioral problems which could be attributable to the breakup of the marriage; enduring extended periods of absence from one parent or the other; problems with discipline in the home of either parent; and problems with attention. Both parents have real concerns regarding the "over-diagnosis" and misdiagnosis of ADHD, but acknowledge the school raised it as a concern and it is diagnosed in the medical records. However, the mother denies she procured an evaluation for this purpose. Both parents are suspicious of the validity of a diagnosis given the young age of the child. This factor weighs in favor of both parents.

78. ***Parenting skills*.** Although both parents raise concerns regarding the parenting skills of the other, these concerns are predominantly weighted in speculation and fear. The child's problems in school cannot be attributed to one parent or the other. There is no evidence that either parent has bad parenting skills. This factor weighs in favor of both parents equally.

79. ***Parent child bond*.** Both parents are equally bonded to child and the child is equally bonded to both parents. This factor favors both parents.

80. ***Moral and religious upbringing***. Michael did not take the child to church when the child lived with him. Joesie takes the child to church, however, neither parent went to church or took child to church when they lived together. Factor favors mother only slightly.

81. ***Primary Care***. During Michael's two six-month deployments, Joesie had primary care of child. Both parties relied on friends as well. Joesie voluntarily allowed Michael to have primary physical custody of the child as per their Agreement during a portion of their

separation. Joesie claims this was to make up time the Father spent away from the child during his deployment. It was during this time that Joesie admitted to an extra-marital relationship. As per the Court's temporary order awarding temporary physical custody to Joesie, the child has been in her physical custody for approximately an equal period post separation. This factor favors both parties equally.

82. ***Capacity to provide primary childcare and employment responsibilities.*** Both pre and post separation, Joesie has worked mostly from 8:00 a.m. until 3:00 p.m. She is presently employed at Stennis Space Center in Mississippi and previously worked on the naval base at the exchange. Michael is the recruit division commander for the United States Navy. He has been employed with the military for 18.5 years. When he is on hold status (a one year period), he works 8 hours a day from 7:00 a.m. – 4:00 p.m. and is able to have some flexibility in his schedule. However, when he is on push status (the alternating one year period) he works many more hours including evenings – more than 40 hours per week. The Father plans to maintain this position through his retirement, which he is not eligible for until 2017. The Mother is better able to provide primary childcare due to the Father's employment responsibilities. This factor favors the Mother.

83. ***Physical health, mental health and age of the parents***. Michael is 43 and Joesie is 38 years old. Although Michael speculated that Joesie is "mentally fatigued," the Court finds both parents are in good health. This factor favors both parties equally.

84. ***Moral fitness.*** The parties began their relationship while the Plaintiff was still married to her previous husband. She admits to adultery during her current marriage also, which occurred prior to the initial separation of the parties. Despite the fact that the

Defendant engaged in an adulterous relationship with the Plaintiff, he seems to take the position that she was more culpable than he in that instant. 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. Therefore, this factor weighs slightly in favor of the Father.

85. ***Preference of the child***. Not applicable.

86. ***Home, school and community record of the children***. Michael lives in Grays Lake, Illinois in a 2 bedroom, 1400 square feet townhouse. Prior to the temporary order, the child attended preschool while in the father's care. Michael relied upon child care assistance from the two women, Amy and Cherry, living in the home with him. Michael lives alone presently. In the mother's community, the child has ties with two half sisters, two siblings, and also a close-knit Filipino community of friends that have been close to the mother and whom assist with the care of the child. The child has experienced some behavioral problems at school while in his mother's custody, however, the evidence does not establish these problems are due to Joesie's parenting skills. This factor favors the Mother.

87. ***Stability of the home environment for each parent.*** For the reasons stated in the previous factor, the Court finds that both parties have a stable home environment. This factor favors both parties equally.

88. ***The best interests of the child.*** The Court finds it is in the best interests of the child to remain in the primary custody of the mother with liberal visitation granted to the father.

89. **The Court hereby awards primary physical custody to Joesie Gerty and liberal visitation to Michael Gerty as mutually agreed upon by the parties or otherwise as follows:**

a. The first and third weekends of every month, beginning at 6:00 p.m. on Friday and ending at 6:00 p.m. on Sunday.

b. In even years, father shall have the child for Thanksgiving. In even years, the father shall have the child for the second half of the Christmas/New Year holidays beginning the day after Christmas. In odd numbered years, the father shall have the child for the first half of the Christmas/New Year holidays beginning the day after school recesses and ending the day after Christmas. The father shall have the child every year for Spring Break.

c. The father shall exercise summer visitation as follows: in even numbered years the month of June; in odd numbered years the month of July, provided child is home for a reasonable and adequate readjustment and preparation period prior to the next school year beginning.

90. **Child Support.** The Court finds Michael Gerty shall pay child support pursuant to the statutory guidelines of 14% of his adjusted gross income, at $764.00 per month beginning

December 1, 2016, and continuing on the first of each month. The Court finds Michael's monthly adjusted gross income is $5,547.11 as determined by Trial Exhibit 4.

IT IS THEREFORE ORDERED AND ADJUDGED that Joesie Gerty's Complaint for Divorce on the ground of willful, continued and obstinate desertion for the space of more than one year, on the ground of adultery, and on the ground of habitual cruel and inhuman treatment is hereby denied. It is further

ORDERED AND ADJUDGED that Michael Gerty's Counter-Complaint for Divorce on the ground of habitual cruel and inhuman treatment and on the ground of adultery is hereby denied. It is further

ORDERED AND ADJUDGED that pursuant to Mississippi Rules of Civil Procedure 57 and 15(c), **SECTION 93-5-2 OF MISSISSIPPI CODE OF 1972, AS AMENDED, IRRECONCILABLE DIFFERENCES DIVORCE,** is hereby declared unconstitutional to the extent that it requires mutual consent of the parties. It is further

ORDERED AND ADJUDGED that pursuant to Mississippi Rules of Civil Procedure 21 and 19(a) the Attorney General of the State of Mississippi was properly joined and added as a necessary party hereto. It is further

ORDERED AND ADJUDGED that the bonds of matrimony heretofore existing between Joesie Gerty and Michael Gerty are hereby dissolved and held for naught; that Joesie Gerty and Michael Gertie are hereby granted a full, final and complete divorce from each other on the ground of irreconcilable differences. It is further

ORDERED AND ADJUDGED that *Separation and Child Custody and Property Settlement Agreement* (attached hereto as Exhibit "A") executed by the parties on September 18, 2013 is

binding upon the parties and remains in full force and effect with the exception of the child custody and support provisions modified by the Court herein. It is further

ORDERED AND ADJUDGED that Joesie Gerty is hereby awarded 50.5 months (half of the marital portion) or approximately 22% of Michael's total military retirement benefit, which shall be paid to her by Michael upon his retirement on the 5th day of each month. It is further

ORDERED AND ADJUDGED that Joesie Gerty is hereby awarded 100% of the value of her 401k retirement plan. It is further

ORDERED AND ADJUDGED that Joesie Gerty is hereby awarded $300 per month alimony for a period of five (5) years commencing on the date of the original judgment, November 15, 2016, to be paid on the 15th of each month. It is further

ORDERED AND ADJUDGED that Michael Gerty is hereby awarded all right, title and interest in and to property described herein located on Steeplechase Drive, Gulfport, Mississippi. Michael is further responsible for all mortgages or other liability against said property. It is further

ORDERED AND ADJUDGED that Joesie Gerty is hereby awarded the exclusive use and possession of the property described herein located on Blue Meadows Road, Pass Christian. She shall be financially responsible for all upkeep and repairs to the property. She is awarded the right to lease the property and collect income. Michael Gerty shall be responsible for all mortgages, insurances, taxes and liens associated with this property. Upon the sale of said property, each party shall share equally in the proceeds of the sale after the satisfaction of the current debt against the property and less any expenses associated with the sale. It is further

ORDERED AND ADJUDGED that JOESIE GERTY is hereby awarded primary physical custody of the minor child herein and that MICHAEL GERTY is hereby awarded visitation consistent with the provisions set forth herein. The parties are further awarded joint legal custody of the minor child. It is further

ORDERED AND ADJUDGED that each party entitled to reasonable telephone and/or electronic visitation with the child when the other party is exercising custody or visitation rights at the expense of the calling parent. Reasonable telephone visitation is defined as the right to call the children at the other party's house during the evening hours between 5:00 P.M. and 9:00 P.M. Both parents shall continue to have means of receiving messages from the other parent or child (i.e. voice mail or answering machine), and messages left on said device for the child shall be returned as soon as possible no later than eight (8) hours. Neither parent shall refuse to answer the call or turn off the phone in order to deny the other parent telephone contact the child. The child may call either parent whenever she wants during reasonable hours. It is further,

ORDERED AND ADJUDGED that the Father, 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 minor child. Should health insurance become available to the Mother for the children 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 and counseling, hospital expenses, pharmaceuticals, physical therapy, eye glasses, eye exams, contact lenses, dermatologist visits, etc.), of the children. It is further

ORDERED AND ADJUDGED that pursuant to Uniform Chancery Court Rule 8.06 both parties shall keep each 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 which 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.

ORDERED AND ADJUDGED that JOESIE GERTY shall be allowed to claim the child for income tax purposes. It is further,

ORDERED AND ADJUDGED that MICHAEL GERTY shall pay child support pursuant to the statutory guidelines of 14% of his adjusted gross income, at $764.00 per month beginning December 1, 2016, and continuing on the first of each month until such time as the minor child attains the age of twenty-one years, or otherwise becomes emancipated, or until further order of the Court.

SO ORDERED AND ADJUDGED this the 8th **day of** June**, 2017.**

JENNIFER T. SCHLOEGEL, CHANCELLOR

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