

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**ROBERT D. DE ST. GERMAIN**

**APPELLEE**

**VERSUS**

**CASE NO. 2006-CA-01480**

**BRENDA L. DE ST. GERMAIN**

**APPELLANT**

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**ON APPEAL FROM  
THE CHANCERY COURT OF LAWRENCE COUNTY, MISSISSIPPI**

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**BRIEF OF APPELLANT, BRENDA L. DE ST. GERMAIN**

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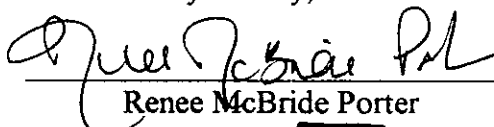
**ORAL ARGUMENT NOT REQUESTED**

### CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications or recusal:

- |   |                        |
|---|------------------------|
| 1. Brenda L. de St. Germain   | Appellant              |
| 2. Robert D. De St. Germain   | Appellee               |
| 3. Renee McBride Porter<br>Porter Law Firm, P.A.<br>P.O. Box 982<br>915 Main Street<br>Columbia, MS 39429               | Attorney for Appellant |
| 4. Honorable Robert E. Evans<br>Attorney at Law<br>Post Office Box 636<br>Monticello, Mississippi 39654                 | Attorney for Appellee  |
| 5. Honorable Judge Larry Buffington<br>101 Dogwood and Main Street<br>Post Office Box 924<br>Collins, Mississippi 39428 | Trial Court Judge      |

Respectfully submitted, on this the 11<sup>TH</sup> day of May, 2007.

  
\_\_\_\_\_  
Renee McBride Porter  
MS Bar No.: [REDACTED]

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Taylor v. Taylor, 317 So.2d 422, 423 (Miss. 1975).

United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893.

Zwerg v. Zwerg, 254 Miss. 8 (1956)

## OTHER MATERIALS

Mississippi Code Annotated Section 93-5-1 and 93-5-2

Black's Law Dictionary 108 (Abridged Seventh Ed., West Publishing Co.)2000)

Uniform Chancery Court Rule 8.05

### **STATEMENT OF THE ISSUES**

1. The lower Court erred in not setting aside the divorce, that was entered by this Court, as there was no finding that the agreement entered into by and between the parties was adequate and sufficient.
2. The lower Court erred in not setting aside the divorce, that was entered by this Court, as there were no Rule 8.05 financial declarations filed as per the Uniform Rules of Chancery Court procedure.
3. The lower Court erred in not setting aside the divorce as the agreement that was made was not fair and equitable and was overreaching and should be set aside.
4. The lower Court erred in not granting to the Appellant a property division even if the divorce was not set aside, as the parties resided together after their divorce and, after a marriage of fifteen years and living together five years, the Wife received no property and the Husband received all of the property.

## STATEMENT OF CASE

Brenda L. de St. Germain (hereinafter referred to as "Brenda") and Robert D. de St. Germain (hereinafter referred to as "Bobby") were married on August 11, 1984. The parties had one minor child namely, Devin Michael de St. Germain, born June 3, 1986. The parties filed a Joint Bill for Divorce on June 15, 1999. The Joint Bill for Divorce alleged that the parties "had divided their property." No assertion was made in the Joint Bill for Divorce that said division was adequate or sufficient. The parties thereafter filed a Property and Separation Agreement on September 8, 1999. Said Agreement provided that the Husband should receive all real property except a convenience store (which would be deeded to Wife). The agreement further provided that custody of the parties minor child would be vested in Husband with the Wife agreeing to pay child support. The Agreement was prepared by Honorable John D. Sutton, who represented Bobby. Wife (Brenda) had no counsel. Both parties signatures were notarized by Dana Elizabeth Howell. The parties then executed a First Amended Property and Separation Agreement, which provided that the Husband would receive the convenience store. Said agreement was again prepared by Honorable John D. Sutton on behalf of Bobby. A Final Decree of Divorce was entered by this Court on November 18, 1999, on the same date the First Amended Property and Separation Agreement was signed. The divorce did not make any findings relative to the agreement entered into by and between the parties. The divorce found that the "parties anticipate filing their Property and Separation Agreement wherein all property will be divided and that there will remain no further property to be disposed of...."

There were no financial declarations filed or produced according to the court records.

The parties actually were living together when the divorce was signed and presented.

The parties continued to live together until September of 2004 operating the chicken houses and acquiring equity in their home. At that time the parties separated in 2004 Bobby sought to enforce the Judgement of Divorce. Brenda then filed her Motion to Set Aside Divorce or in the Alternative for Equitable Distribution.

Process was served and the Court upon the hearing date dismissed the claim without a trial.

Brenda then moved to reconsider the dismissal and said motion was dismissed.

Brenda now appeals.

## **SUMMARY OF THE ARGUMENT**

The parties herein were married in 1984 and divorced in 1999. At the time of divorce they entered into an agreement prepared by the Appellee's attorney. Said agreement was amended. Said agreement provided that Appellee received all of the property accumulated during the marriage and custody of the minor child. The Final Judgement of Divorce did not provide that the agreement entered into was adequate and sufficient. There were no Rule 8.05 financial declarations filed. The parties lived together at the time of the granting of the divorce and continued to do so for five years operating their chicken farms. Then the parties separated and the Appellee sought to enforce the agreement of the Court.

The lower Court erred in not setting aside the divorce that was entered as there was no finding that the agreement entered into by and between the parties was adequate and sufficient. The lower Court erred in not setting aside the divorce that was entered by this Court as there were no Rule 8.05 financial declarations filed as per the Uniform Rules of Chancery Court procedure. The lower Court erred in not setting aside the divorce as the agreement that was made was not fair and equitable and was overreaching and should be set aside. The lower Court erred in not granting to the Appellant a property division, even if the divorce was not set aside, as the parties resided together after their divorce, and after a marriage of fifteen years and living together five years, the Wife received no property with the Husband receiving all of the property.



## **ARGUMENT**

**1. The lower Court erred in not setting aside the divorce that was entered by this Court as there was no finding that the agreement entered into by and between the parties was adequate and sufficient.**

Mississippi Code Annotated Section 93-5-1 provides as follows, to wit:

(1) Divorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process.

(2) If the parties provide by written agreement for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties and the court finds that such provisions are adequate and sufficient, the agreement may be incorporated in the judgment, and such judgment may be modified as other judgments for divorce.

(3) If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. Such consent must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment. Such consent may not be withdrawn by a party without leave of the court after the court has commenced any proceeding, including the hearing of any motion or other matter pertaining thereto.

The failure or refusal of either party to agree as to adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between the parties, or any portion of such issues, or the failure or refusal of any party to consent to permit the court to decide such issues, shall not be used as evidence, or in any manner, against such party. No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce. Appeals from any orders and judgments rendered pursuant to this subsection may be had as in other cases in chancery court only insofar as such orders and judgments relate to issues that the parties consented to have decided by the court.

(4) Complaints for divorce on the ground of irreconcilable differences must have been on file for sixty (60) days before being heard. Except as otherwise provided in subsection (3) of this section, a joint complaint of husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process, for divorce solely on the ground of irreconcilable differences, shall be taken as proved and a final judgment entered thereon, as in other cases and without proof or testimony in term time or vacation, the provisions of Section 93-5-17 to the contrary

notwithstanding.

(5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or canceled by the party filing same by leave and order of the court.

(6) Irreconcilable differences may be asserted as a sole ground for divorce or as an alternate ground for divorce with any other cause for divorce set out in Section 93-5-1.

"Divorce in Mississippi is a creature of statute." *Gardner v. Gardner*, 618 So.2d 108, 111-13 (Miss. 1993) (citing *Massingill v. Massingill*, 594 So.2d 1173, 1175 (Miss. 1992)).

The purpose of irreconcilable difference divorce is for the parties to knowingly, without coercion, pressure, or undue influence, to enter into a settlement of issues and matters in the divorce complaint and to settle these matters civilly and voluntarily between the parties. In the State of Mississippi a proceeding for divorce is purely a statutory proceeding. *Price v. Price*, 202 Miss. 268, 32 So.2d 124; *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893. As such the Courts and Chancellors must follow the law and statutes specifically.

In this case, the Court made no findings that the agreement entered into by and between the parties was adequate and sufficient. In fact the Final Decree found that "parties anticipate filing their Property and Separation Agreement wherein all property will be divided and that there will remain no further property to be disposed of...." Mississippi law provides that the Court must find the agreement to be adequate and sufficient. There was no such finding in this cause.

Mississippi case law provides that the statute must be strictly followed to obtain a divorce. *Perkins v. Perkins*, 787 So.2d 1256 (Miss. 2001). In the *Perkins* case the Court found that the statutory requirements were not followed and reversed a failure to set aside the divorce.

The Perkins Court stated “ What we do know for sure is that the Final Judgment nowhere recites that the chancellor found the "provisions [of the written agreement for the settlement of any property rights] are adequate and sufficient" as required by Miss. Code Ann. § 93-5-2(2) (1994). For that reason alone, this Court must reverse and remand.”

This case is on point with Perkins. In this case the Final Judgment no where provides that the provisions of the Agreement are adequate and sufficient, and this Court must reverse and remand because of that inadequacy.

**2. The lower Court erred in not setting aside the divorce that was entered by this Court as there were no Rule 8.05 financial declarations filed as per the Uniform Rules of Chancery Court procedure.**

The Uniform Chancery Court Rules provides in Rule 8.05 provides:

“Unless excused by Order of the Court for good cause shown, each party in every domestic case involving economic issues and/or property division shall provide the opposite party or counsel, if known, the following disclosures:

(A) A detailed written statement of actual income and expenses and assets and liabilities, such statement to be on the forms attached hereto as Exhibit "A" and "B".

(B) Copies of the preceding year's Federal and State Income Tax returns, in full form as filed, or copies of W-2s if the return has not yet been filed.

(C) A general statement of the providing party describing employment history and earnings from the inception of the marriage or from the date of divorce, whichever is applicable....”

The Case of Kalman v. Kalman, 905 So. 2d 760 (Miss App.2004) provides “ 8.05 disclosure is mandatory unless "excused by Order of the Court for good cause." The rule dictates that "each party in every domestic case involving economic issues and/or property division shall provide the opposite party or counsel, if known [enumerated financial disclosures.]”

In this case compliance with Rule 8.05 was not excused. The divorce must be set aside because Rule 8.05 was not complied with.

**3. The lower Court erred in not setting aside the divorce as the agreement that was made was not fair and equitable and was overreaching and should be set aside.**

Brenda married Bobby in 1984. They lived together until 1999. In 1999 they separated for a brief time and filed this divorce. Brenda had no counsel at the time she filed the divorce. Also, at the time she filed the divorce Brenda was under the care of a doctor for mental problems, which she was experiencing, and as such, was not competent to consent to the divorce or the terms of the Agreement. As Perkins v. Perkins, provides "[the purpose of irreconcilable difference divorce is for the parties to knowingly, without coercion, pressure, or undue influence, to enter into a settlement of issues and matters in the divorce complaint and to settle these matters civilly and voluntarily between the parties." Perkins v. Perkins, 787 So.2d 1256 (Miss. 2001).

The divorce agreement is not fair. Brenda was not represented by an attorney. The parties, by a quick review of the agreement that the parties filed in the record, had obtained both real and personal property, all of which Bobby received. Brenda, after a marriage of fifteen years, received no alimony, no support, nor any property division.

The Court in Lowery v. Lowery, 919 So.2d 1112 (Miss.App. 2005) a case which was decided after the motion to set aside the divorce was dismissed dealt with this issue. When the Lowery case was decided Brenda moved the Court to reconsider it's decision in light of the Lowery case. This Court refused. In the Lowery case, the Court set aside a parties joint agreement and no fault divorce because of the circumstances. The Court found that Mr. Lowery had over reached and due to his over reaching the Judgment should be set aside. The Court defined overreaching finding "That source defined overreaching, in the context of commercial law, as the act of 'taking unfair advantage of another through fraudulent practices or abuse of superior bargaining power.' Again, that definition suggests that overreaching is the act of "taking unfair advantage of another." Lowery v. Lowery, 919 So.2d 1112 (Miss.App. 2005).

In the case at hand Bobby hired his attorney to prepare documents. Bobby's attorney prepared the documents. The parties lived together after the divorce was filed and were having a relationship when the Final Decree was entered. Brenda was not healthy mentally or physically, when the documents were signed or presented to the Court. The documents, by a quick review, are one sided as Bobby receives all of the property. Certainly there was overreaching in the case at hand. Certainly Bobby took advantage of Brenda by having her sign the documents when he was living as husband and wife and then some five years later, after the parties separated, enforcing the documents. The Court in Lowery found "we must grant relief from a judgment upon a demonstration of fraud, misrepresentation, or other misconduct. Lowery v. Lowery, 919 So.2d 1112 (Miss.App. 2005). If we find overreaching, the agreement is unenforceable." Id. "Consequently, a finding of overreaching would leave this Court with no choice but to grant Cynthia's request for relief from the final judgment based on those unresolved issues, which became unresolved because the agreement that resolved those issues became unenforceable due to overreaching." Id

This case is analogous to the Lowery case where the court found " Still, did Cynthia demonstrate that the settlement agreement resulted from an inequality of bargaining power or other circumstances such that Cynthia had no meaningful choice whether to enter the settlement agreement? Cynthia claims that she was in a vulnerable position when she signed the agreement, so that she lacked bargaining power. Cynthia points to a lack of bargaining power because she had no attorney and no money to hire an attorney, while Perrin had an attorney. Cynthia also points out that Perrin once told her "you get you an attorney and we will see you in court. We will destroy you. You will never live in this town again and you will never ever see your children again." Cynthia claims that she signed such an inequitable agreement because of the persuasive effect of Perrin's threats to run her out of town and prohibit her from seeing her daughters."

The Court found: " that the settlement agreement is, likewise, insufficient to meet the standards of adequacy and sufficiency and is unenforceable as a result." Lowery v. Lowery.

The Court in Lowery used Rule 60(b) to set aside the divorce finding that "[o]n motion and upon such terms that are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) fraud, misrepresentation, or other misconduct of an adverse party; (2) accident or mistake." M.R.C.P. 60(b). "In those circumstances, the burden is upon the movant to prove fraud, misrepresentation or other misconduct, and to do so by clear and convincing evidence." Stringfellow, 451 So.2d at 221. Suffice to say, a chancery court can use Rule 60(b) to set aside a divorce judgment when an adverse party engages in "misconduct." Still, what falls under "misconduct?" Can "overreaching" equate to "misconduct" for the purposes of setting aside a judgment pursuant to Rule 60(b)?"

The Court answered yes.

In the case at hand Bobby clearly over reached and the agreement was thus not an agreement, and this Court must set aside the divorce.

The Court in Perkins went on to add "[the record before us presents a very one-sided agreement, which on its face appears inequitable." This case presents a one sided agreement with all of the parties property after twenty years going to Bobby which on it's face is inequitable.

The Mississippi Supreme Court has stated in Zwerg v. Zwerg, 254 Miss. 8 (1956) that "public policy will not allow a decree of divorce obtained by fraud to stand," the court further stated in Zwerg that "decrees of divorce obtained by fraud may be attacked successfully at any time whether basis of attack appears on face of the record or not." *Id.* at 15 and 16.

Brenda would argue that the Court can use Mississippi Rule of Civil Procedure

No. 60., to set aside this divorce as she filed promptly when the parties separated to set aside the divorce. Rule 60 provides that “(6) any other reason justifying relief from the judgment.” can be used to set aside a Judgement. Brenda would argue that “any other reason” would certainly fit this case. Brenda urges this Court to set aside the parties divorce based upon the clear overreaching of Bobby.

**4. The lower Court erred in not granting to the Appellant a property division even if the divorce was not set aside as the parties resided together after their divorce and, after a marriage of fifteen years and living together five years, the Wife received no property with the Husband receiving all of the property.**

The parties actually lived together from 1999 until 2004. The parties continued to operate their chicken houses and chicken farm and continued to live in the marital home. The actual checks from the chicken houses continued to come in the name of Brenda.

The Mississippi Supreme Court has dealt with this specific issue. The court has dealt provides that "while it is true that a spouse is not automatically entitled to an equal share of jointly accumulated properties, the record reflects that Mrs. Jernigan made substantial contributions to the accumulation of real property during the marriage and during the six years the couple lived together after the divorce." "Mrs. Jernigan worked and deposited her income into a joint bank account from which the couple paid bills associated with the marital partnership." Jernigan v. Jernigan 697 So.2d 387, 389 (Miss. 1997). The court also noted that Mrs. Jernigan "is not necessarily entitled to more than the amount already awarded to her by the chancellor's decree, and could conceivably be entitled to less." *Id.* The Jernigan court also noted that "Property division should be based upon a determination of fair market value of the assets, and these valuations should be the initial step before determining division." *Id.* at 390, citing

Ferguson, 639 So.2d at 929

This Court has recognized an exception for equitable division of property, where there was a marriage or the appearance of a marriage when no legal marriage actually existed.

Taylor v. Taylor, 317 So.2d 422, 423 (Miss. 1975).

The facts in this case demonstrate without question that the chancellor did what a decent regard for the sensibilities of humanity demanded. These people lived together and shared the vicissitudes of life for eighteen years. The separation cast her adrift just as surely as if she had been his lawful wife. The chancellor appears to have decided that the strict letter of the law ought not to require him to ignore that he was dealing with human beings.

In the case at hand the parties lived together for some five years after the divorce. The final separation did “cast her adrift” as the Taylor case refers. Human fairness demands that Brenda be entitled to an proper treatment under the law.

Pickens v. Pickens, 490 So. 2d at 876 is also is on point. In Pickens, this Court determined that a woman was entitled to equitable distribution for domestic services rendered. The Pickenses were once married, but chose to continue living together after they divorced. This Court held that: “Where parties such as these live together in what must at least be acknowledged to be a partnership and where, through their joint efforts, real property or personal property, or both, are accumulated, an equitable division of such property will be ordered upon the permanent breakup and separation.” *Id.*

In Pickens, the parties were married fifteen years and had five children, prior to



their divorce. After the divorce, the parties lived together for twenty years, had two more children, and held themselves out to the community as man and wife. Pickens, 490 So.2d at 873.

After thirty-five years and seven children, the parties finally separated. This Court affirmed the chancellor's decision to divide the parties' property and held:

... upon permanent separation, our law authorizes and sanctions an equitable division of property accumulated by two persons as a result of their joint efforts. This would be the case were a common law business partnership breaking up. It is equally the case where a man and woman, who have accumulated property in the course of a non-marital cohabitation, permanently separate.

Id. at 875.

Thus in this case, if the Court does not set aside the divorce then Brenda is entitled to an equitable division of property accumulated during the parties marriage and specifically that time they lived together after the separation. So the law demands that this case be remanded for an equitable division of property if the divorce is not set aside.

## **CONCLUSION**

The lower Court erred in not setting aside the divorce that was entered by this Court as there was no finding that the agreement entered into by and between the parties was adequate and sufficient. As per statute and case law this divorce must be set aside on this ground alone. Further, the lower Court erred in not setting aside the divorce that was entered by this Court as there were no Rule 8.05 financial declarations filed as per the Uniform Rules of Chancery Court procedure. Further, the lower Court erred in not setting aside the divorce as the agreement that was made was not fair and equitable and was overreaching and should be set aside. Lastly, if the divorce is not set aside Brenda is entitled to a property division as the parties resided together after their divorce and, after a marriage of fifteen years and living together five years, the Wife received no property and the Husband received all of the property.

Brenda asks that this Court set aside the divorce entered by this Court or in the alternative reverse and remand this case to determine the property division Brenda is to receive after twenty years.

**CERTIFICATE OF SERVICE**

This is to certify that I, Renee McBride Porter, on the 11<sup>th</sup> day of May, 2007, furnished a true and correct copy of the above and foregoing BRIEF OF APPELLANT to

Honorable Robert E. Evans  
Attorney at Law  
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Honorable Judge Larry Buffington  
101 Dogwood and Main Street  
Post Office Box 924  
Collins, Mississippi 39428

by placing same in the United States Mail, postage prepaid to the above addresses..

A handwritten signature in black ink, appearing to read "Renee McBride Porter", is written over a horizontal line.

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