IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GARY MOSHER — APPELLANT

VERSUS — CASE NO. 2015-CA-00142

LORI MOSHER — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

Presented to the Court by:

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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 disqualification or recusal.

1) Gary Mosher, Appellant

2) Kelly Michael Rayburn
Counsel of Record for Appellant

3) Lori Mosher, pro se, Appellee

4) Hon. Jennifer Schloegel
Chancellor
Eighth Chancery Court District

This the 6th day of July 2015

/s/ Kelly Michael Rayburn
Kelly Michael Rayburn

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STATEMENT OF THE CASE

Lori Mosher filed her complaint for divorce, through counsel, on October 21, 2011, alleging she was entitled to a divorce on the grounds of adultery, or in the alternative on irreconcilable differences. Gary Mosher, through counsel, filed a counterclaim for divorce on January 23, 2012, alleging he was entitled to a divorce on the grounds of habitual cruel and inhuman treatment, or in the alternative on irreconcilable differences. Gary Mosher also filed his answer to the complaint for divorce and affirmative defenses on that date as well. Gary Mosher filed an amended counterclaim for divorce on April 2, 2012. Lori Mosher's attorney filed a motion to withdraw on May 23, 2013. Subsequently, the Court entered an order on August 29, 2013 allowing Lori Mosher's attorney to withdraw.

On January 23, 2014, the parties filed their consent to adjudicate. RE-94. The consent to adjudicate provided as follows:

1) That both parties voluntarily consent to permit the Court to grant a divorce on the grounds of Irreconcilable Differences;
2) That both parties acknowledged that the marital residence was foreclosed on and is not an issue to be adjudicated;
3) That the parties had amicably divided their household contents;
4) That Gary would be awarded the Jeep Wrangler and motorcycle;
5) That Gary would be responsible for payment of the Keesler Federal Credit Union credit card;
6) That Lori would be responsible for payment of the Sears credit card;

7) That Lori would receive one half of Gary's military retirement;
8) That the parties would share joint legal custody of their remaining minor child;
9) That Lori would have the physical custody of their remaining minor child;
10) That Gary would have liberal visitation with the minor child;
11) That the parties' son is emancipated;
12) That Lori would claim the minor child as a dependent for tax purposes; and
13) That Gary would pay to Lori the sum of $727.00 per month as his child support obligation;

The consent to adjudicate provided that the Chancellor would decide only the following issues:

1) Whether Gary should be required to pay one-half of the indebtedness, taxes and mandatory insurance on the Lexus vehicle;
2) Whether Gary will be required to pay to Lori alimony, and if so, the amount;
3) Whether Lori is entitled to Gary's military survivor's benefits and if so, what type and what portion;
4) Whether the parties should be required to maintain the other as the beneficiary on their respective life insurance policies.

The trial of this case was held on January 23, 2014 and on January 24, 2014. The Chancellor made a bench ruling on January 24, 2014. RE-82. Subsequently,

the Court entered a Final Judgment of Divorce on October 8, 2014, which amended or modified parts of her earlier bench ruling. RE-8. The divorce was granted on the grounds of Irreconcilable Differences as provided in the parties' consent to adjudicate

Gary Mosher timely filed his motion for new trial or in the alternative to alter or amend final judgment on October 20, 2014. A hearing was held on Mr. Mosher's motion on December 10, 2014 in which the court reopened the record to consider additional testimony. TR-174. On January 2, 2015, the Chancellor entered an order denying motion for new trial and granting in part motion to alter or amend judgment. RE-76.

Gary Mosher timely filed his notice of appeal on January 26, 2015.

STATEMENT OF THE FACTS

The parties, Gary Mosher (hereinafter referred to as "Gary") and Lori Mosher (hereinafter referred to as "Lori"), were married to each other on November 7, 1987. They separated on or about November 12, 2010 in Harrison County, Second Judicial District, Mississippi. The parties have two children, Matthew Mosher, a male, born November 15, 1992, and Courtney Mosher, a female, born April 14, 1995. Following their separation, the parties' daughter continued to live with her mother and their son went to live with Gary while he was still a minor.

Gary entered the United States Navy on December 28, 1982, approximately five years prior to his marriage to Lori. At the time of the Court's Judgment of Divorce entered on October 8, 2014, Gary was forty-nine years of age and Lori was forty-seven years of age. Gary retired from the Navy on December 21, 2006 as a chief petty officer.

Gary received his college (bachelor's) degree while in the Navy during the marriage. Lori received her associate's degree in education during the marriage. Lori had two additional years of college credit that she previously earned towards a marketing degree, but she chose not to pursue that degree and later pursued her degree in education. TR-29-30; TR-57-58. Lori was aware that she chose a career field in which her income would be lower than in other fields. TR-66. Lori chose not to pursue additional college credit available to her while she and Gary were living together (stationed in the Navy) in Iceland. TR-113. She also testified that she could have stayed locally and finished her four year education degree rather than go with Gary to Iceland. TR-58-59; TR-114.

Gary presently works for a civilian contractor at the Stennis Space Center. He is not a government employee. Lori works as an assistant schoolteacher in the Biloxi, Mississippi school system, where she has worked for more than nine years. TR-19. Their daughter graduated from high school and was not enrolled in classes for the semester beginning in January 2014. TR-200-202. As of the date of the hearing on Gary's post trial motion in December 2014, she still was not enrolled in classes and was working two jobs. She previously had a child that was placed for adoption. TR-53.

Gary worked throughout the marriage, either in the Navy or in his present job, and Lori worked throughout the marriage as well, with the exception of two one-year periods after the birth of each of the parties' children. TR-19; TR-31.

Gary testified at trial that he had had an extra-marital affair. TR-37. The couple sought marriage counseling after Lori learned of the affair. Unable to reconcile their differences, the parties separated in November 2010 when Gary moved from the marital residence. TR-38. The couple continued to have a sexual relationship after Lori learned of the affair. TR-42.

Subsequently, the mortgage on the parties' residence was foreclosed. TR-156. The parties paid $217,000 for their residence, but a market analysis showed that it was valued at $144,000. TR-62; TR-156 The testimony in the record reflects that following their separation, Gary was still depositing substantial sums in their joint account from November 2010 until April 1, 2013, at which time he paid her $1400.00 per month for support, which continued until the Court's bench ruling. TR-80, TR-90. RE-98 (Post Trial Motion Hearing Exhibit 2a -

Spreadsheet). The amounts reflected on this exhibit were more than the amounts that were considered by the Chancellor as stated in the Judgment of Divorce.

The Court initially determined that the assets assigned (not awarded) to each party would be as follows:

a) Assets assigned to Lori:

i. $6145.00 equity in Lexus vehicle;

ii. $11,056.28 cash value of PERS retirement;

iii. $7493.07 case value of Lori's life insurance policy

Total value: $24,694.35

b) Assets assigned to Gary:

i. $10,000.00 equity in Jeep Wrangler vehicle;

ii. $6398.00 equity in motorcycle;

iii. $8473.97 cash value of Gary's life insurance policy

Total value: $24871.97

The Chancellor determined the following to be the marital debt:

i. $15,665.00 owed to Sears that the parties agreed would be Lori's responsibility;

ii. $9500.00 owed to Keesler Federal Credit Union that the parties agreed would be Gary's responsibility;

iii. $13,880.00 owed on the Lexus vehicle that the parties consented to a Court division of the debt

RE-19.

As a result of taking into consideration the value of the assets assigned to each party and the debt on the Sears and Keesler Federal Credit Union accounts, the Chancellor initially determined that each party's net worth would be as follows:

i. Lori: $9,029.35

ii. Gary: $15,371.97

In dividing and awarding the marital assets, the Chancellor equitably divided the marital estate and ordered as follows:

A. Marital Assets (not counting one half of monthly military retirement and VA disability) awarded to **Lori Mosher** totaling $33,168.32:

i. $6145.00 equity in Lexus vehicle;

ii. $11,056.28 cash value of PERS retirement;

iii. $7493.07 cash value of Lori's life insurance policy;

iv. $8473.97 cash value of Gary's life insurance policy

B. Marital Assets (not counting one half of monthly military retirement and VA disability) awarded to **Gary Mosher** totaling $16,398.00:

i. $10,000.00 equity in Jeep Wrangler vehicle;

ii. $6398.00 equity in motorcycle

RE-40-41.

In dividing the marital debt, the Chancellor determined that Lori would pay the Sears debt in the amount of $15,665.00, and pay one half the debt on the Lexus in the amount of $6940.00. Gary would pay the Keesler Federal Credit Union debt in the amount of $9500.00, and Gary would also pay one half of the debt on

the Lexus in the amount of $6940.00. Lori would be responsible for debts in the total amount of $22,605.00, and Gary would be responsible for debts in the total amount of $16,400.00. The Court did not address the fact that Gary's payment of one half of the debt on the Lexus would increase the equity in the Lexus vehicle awarded to Lori. The Chancellor's judgment reflected that after considering the assets and liabilities assigned to each party from the marital estate, that Gary was left with an estate worth (negative) -$42.00 and Lori was left with an estate worth of $10,563.32. RE-44-45.

The Chancellor determined the cash value of Gary's life insurance policy, which was $8473.97, to be lump sum alimony. Earlier in the judgment, however, it states that it is a marital asset to be equitably divided and the Chancellor placed it on Lori's side of the ledger. RE-40.

The Chancellor determined that Gary's gross military retirement pay is $2522.00, which included his monthly military retirement pay from the Navy, and his non-taxable VA disability benefit (recalculated by the court to be $400.93 per month). RE-27; RE-29. The evidence showed that Gary had been approved to receive the monthly VA disability benefit since March 2009, long before the parties' separation. TR-223-224.

However, the Chancellor determined that Lori should receive an amount equal to 50% of Gary's "full military retirement benefit," which she concluded would include the VA disability pay. RE-27. The Chancellor noted that DFAS would only divide and pay directly to the former spouse 50% of the retiree's disposable retirement pay. RE-27. The Chancellor did not consider income taxes

and health insurance premiums that are being deducted from Gary's Navy Retirement, which are legitimate expenses when determining net disposable income, instead deciding the issue on gross pay only, with deduction for the SBP premium only.

Therefore, to accomplish the aim of the decision, from the $2522.00 amount, the Court deducted the $164.09 survivor's annuity premium that Gary is to maintain for Lori, and the $400.93 for VA disability, leaving $1956.98. The Chancellor determined that 50% of $1956.98 is $978.50 (it is actually $978.49). RE-30. The Chancellor then determined that because Lori would receive only $978.50 from DFAS due to this amount being the maximum 50% DFAS would withhold from the retiree's disposable retirement pay, that an additional 50% of the $400.93 (which the Chancellor determined to be $200.46) would be paid from Gary's VA disability benefit directly by Gary to Lori. The total amount awarded to Lori each month is $1178.95.

To state it another way, the Chancellor awarded to Lori 60.24% of Gary's "disposable retired pay." ($2522.00 – $164.09 = $2357.91 divided by 2 = $1178.95). RE-29-30. The Chancellor separately decided that the survivor's benefit annuity (a premium charged to guarantee the continuation of the Navy Retirement pay in case of Gary's death) would be taken "off the top" before the total gross pay (Navy and VA disability) would be divided. RE-30.

Lori's gross income per month from her employment was determined to be $1808.98. Based upon the award of $1178.95 from Gary's military and VA disability and the child support award of $775.85, her gross income, prior to the

alimony award, was determined to be $3760.81. Her adjusted gross income, after deducting $305.25 for state and federal taxes, was determined to be $3455.56. Gary was also ordered to pay Lori $100.00 per month towards the indebtedness on Lori's vehicle until their daughter emancipated, resulting in adjusted gross income of $3555.56. RE-38-39. Lori's monthly expenses were determined to be $3310.00 per month. RE-39

The Court determined Gary's monthly-adjusted gross income (after taxes) to be $5541.81, which constituted his salary from his employment and $1178.00 in income from his military retirement and VA disability. The Court determined Gary's monthly expenses (regular expenses of $2400.00 plus $775.85 in child support and $100.00 per month on the judgment award) to be $3275.85. The Court determined that Lori had a monthly surplus of $245.56 and that Gary had a monthly surplus of $2265.96.

In determining monthly expenses, the Chancellor did not take into consideration that Gary at some point in the future would need to live in something other than a camper, as his monthly rental income (as stated in his monthly expenses) at the time of the divorce was only $350.00. (Trial Exhibit 6). As part of her regular monthly expenses, Lori was credited with a monthly rental payment of $750.00. (Trial Exhibit 2).

In the judgment of divorce, the Chancellor ordered Gary to pay child support in the amount of $775.85 per month, awarded Lori the right to claim the minor child as a dependent each year for income tax purposes, awarded Lori 60.24% of Gary's "Navy Retirement," awarded a judgment to Lori against Gary in the

amount of $6940.00 for one half of the balance of the debt on her vehicle, awarded Lori $1300.00 per month as periodic alimony, and awarded Lori lump sum alimony in the form of the cash value of Gary's life insurance policy in the amount of $8473.97. Gary was ordered to pay $100.00 per month to Lori towards the indebtedness on the vehicle until such time as the minor child turns twenty-one years of age, at which time he would pay the sum of $775.00 per month until the judgment amount is paid in full. The Chancellor also determined that Gary shall maintain Lori as beneficiary of his military retirement survivor's benefit annuity. RE-58-63.

Subsequently, in the Chancellor's January 2, 2015 Order, which followed the hearing on Gary's Motion for New Trial or in the Alternative to Alter or Amend the Judgment, the Court altered the periodic alimony and reduced the monthly amount to $1000.00 per month, and altered the amount that Gary would pay towards the judgment amount on the indebtedness on Lori's vehicle, following their daughter's emancipation, from $775.00 a month to $459.00 per month. RE-RE-76-80.

SUMMARY OF THE ARGUMENT

I

THE CHANCELLOR ERRED IN AWARDING LORI MOSHER A GREATER CHILD SUPPORT AMOUNT THAN THE PARTIES HAD AGREED TO IN THEIR CONSENT TO ADJUDICATE

The parties entered into a voluntary, written and signed consent to adjudicate pursuant to the provisions of M.C.A. Section 93-5-2(3), and agreed to the appropriate child support obligation for Gary. This was not an issue submitted to the Court for adjudication, but the Chancellor increased the child support obligation without authority. The issue is whether the Chancellor can disregard the agreement of the parties in their consent to adjudicate and revise the agreement unilaterally, and insert a different amount than what the parties agreed would be the appropriate child support obligation in this case. The Appellant would show that the Chancellor had no authority to decide this issue, as it was never among the issues left to the Chancellor to be decided at trial. As a result, the parties' agreement was thwarted by the Court's decision to revisit this issue. The Court's decision occurred after the parties submitted their proof during the trial of this matter. Gary and Lori were never given the opportunity to show the Court why this was the appropriate amount to be paid for child support, as they believed issues relating to child support were not to be tried.

II.

THE CHANCELLOR ERRED IN AWARDING LORI MOSHER A GREATER PERCENTAGE OF GARY MOSHER'S MILITARY RETIREMENT PAY THAN THE PARTIES HAD AGREED TO IN THEIR CONSENT TO ADJUDICATE

The parties entered into a voluntary, written and signed consent to adjudicate pursuant to the provisions of M.C.A. Section 93-5-2(3). and agreed to the percentage of Gary's military retirement that Lori would receive. This was not an issue submitted to the Court for adjudication, but the Chancellor increased the percentage that Lori would receive without authority. The issue is whether the Chancellor can disregard the agreement of the parties in their consent to adjudicate and revise the agreement unilaterally, and insert a different percentage than what the parties agreed would be the appropriate percentage of Gary's military retirement pay that Lori would receive in this case.

III.

THE CHANCELLOR ERRED IN ORDERING A DISPROPORTIONATE SHARE OF THE PARTIES' MARITAL ESTATE TO LORI MOSHER

The Appellant contends that there was no legal or factual basis for awarding Lori $10,563.32 more than what was awarded to Gary of the parties' net worth. The Court noted this discrepancy and stated that equitable distribution alone is not sufficient to meet Lori's needs with regard to why alimony would still be awarded, but utterly failed to explain the discrepancy itself as to why Lori was being awarded a disproportionate share when applying the *Ferguson factors* in the first instance. Indeed, under *Ferguson*, 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 would have provided

a basis for the Court to deny periodic alimony payments to Lori, or awarding a lesser amount than what was ultimately awarded, but not in the reverse. The Court ordered periodic alimony payments anyway, which negates any justifiable explanation as to why there was not an equitable distribution in the property and debt dissolution.

IV.

THE CHANCELLOR ERRED IN ORDERING PERIODIC ALIMONY TO LORI MOSHER AS IT WAS UNECESSARY TO MEET HER NEEDS AND THE MONTHLY AMOUNT ORDERED DEPRIVED GARY MOSHER OF A REASONABLE AND DECENT STANDARD OF LIVING

The Court's award of alimony to Lori is in error for two reasons. First, there was not a disparity between the separate estates of the parties following equitable distribution. As stated in Section III above, Lori was awarded $10,563.32 in equity more than what was awarded to Gary. In addition to this award, Lori still had an income surplus each month before any alimony was awarded. Second, the amount of periodic alimony awarded to Lori has deprived Gary of a decent standard of living. Gary was basically left with only a camper as his residence. If Gary had an apartment that even had a monthly rental payment of $750.00 per month, identical to what Lori is paying for her apartment, it would have increased his monthly expenses by $400.00 per month. The Court could have accounted for this by reducing Gary's periodic alimony accordingly, which would have been reasonable under the circumstances. Essentially, Gary was punished in the alimony award as a result of his living in a camper at the time of trial. With the Court's apparent desire to equalize the parties' monthly net

surplus, no consideration was given to Gary's ability to have a reasonable standard of living.

ARGUMENT

I.

THE CHANCELLOR ERRED IN AWARDING LORI MOSHER A GREATER CHILD SUPPORT AMOUNT THAN THE PARTIES HAD AGREED TO IN THEIR CONSENT TO ADJUDICATE

In their consent to adjudicate, the parties agreed that Gary's child support obligation for the remaining minor child, their daughter, would be $727.00 per month. It stated as follows, "13. That both parties hereby agree the Defendant shall pay monthly child support unto the Plaintiff in the amount of $727.00 per month, beginning on the first day of the month after a Judgment of Divorce is entered in this matter." RE-95.

The Chancellor determined that this amount was "slightly inconsistent with the statutorily required minimum of 14% of Gary's adjusted gross income (AGI) of $5541.81 which the Court recalculated as set forth *infra*." RE-17-18.

In the judgment, the Chancellor made no mention that the $727.00 amount, agreed to by the parties, was not an issue to be decided by the Chancellor, and was not among the specific unresolved issues to be decided by the Court. The undecided issues to be decided by the Court were contained in Paragraph 14 of the consent to adjudicate. RE-96.

The issue is whether the Chancellor can disregard the agreement of the parties in their consent to adjudicate and revise the agreement unilaterally, and insert a different amount than what the parties agreed would be the appropriate

child support obligation in this case. The Appellant would show that the Chancellor had no authority to decide this issue, as it was never among the issues left to the Chancellor to be decided at trial. As a result, the consent to adjudicate was thwarted by the Court's decision to revisit this issue and Gary was denied due process. The Court's decision occurred after the parties submitted their proof during the trial of this matter. Gary and Lori were never given the opportunity to show the Court why this was the appropriate amount to be paid for child support, as they believed issues relating to child support were not to be tried.

Several factors could have gone into the parties' consideration when agreeing to the child support amount contained in their consent to adjudicate, including the fact that Lori would be claiming the child as a dependent for tax purposes, the fact that Gary was providing other support for the child in addition to the child support obligation (TR-93), Gary's income being near the threshold for which the guidelines are not presumed to apply, the fact that the child was not in college and was employed, and other legitimate factors. The parties believed this issue was settled, and therefore evidence was never presented to the Court regarding this matter.

It is important to point out that this was not a case in which the parties had a disagreement as to what the child support obligation should be. This was not a case in which there was no consent to adjudicate and all issues were left up to the Chancellor for decision. The consent to adjudicate in the present case met the statutory requires as set out in Mississippi Code Annotated Section 93-5-2(3),

as it was in writing, signed by both parties personally, and stated that the parties voluntarily consented to the issues to be decided by the Court. The consent specifically listed the issues to be decided by the Court, and specifically listed the issues for which the parties had reached an agreement that would not be presented to the Chancellor for adjudication. Indeed, Lori testified at trial that the amount contained in the consent to adjudicate is the amount that she was requesting for support. TR-72

The Chancellor was bound to honor the parties' agreement with regard to this issue. If the Chancellor was not going to honor the parties' agreement, then the judge should have informed the parties in advance and given them the opportunity to recess the trial and revisit the entirety of their agreement, or to decide that they would submit all issues to the Court for resolution.

Section 93-5-2(3) of the Mississippi Code, states as follows:

> (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.

(Emphasis Supplied).

The focus of this statute is that parties may consent to a divorce and permit the court to decide the issues upon which they cannot agree. The issues to be decided by the Court are only those set forth in the consent document. In the present case, the parties did not set forth the issue of child support as one to be decided by the Chancellor. That fact is clear and indisputable. RE-94-96.

In *Gordon v. Gordon*, 126 So. 3d 922 (Miss. App. 2013), the Court of Appeals examined an issue similar to the facts at bar. In that case, the Appellant argued that the Chancellor should have adjudicated issues that were not contained in the parties' consent to adjudicate. The consent to adjudicate in that case only involved one issue to be decided by the Chancellor, whether the wife had misappropriated marital funds. On appeal, she argued that the Court should have adjudicated the issue of her entitlement to part of the husband's military retirement, among other things. *Id*. at 923-924.

As set out in *Gordon*, the standard of review in domestic relations cases is the substantial evidence/manifest error rule. *Id*. at 925. Citing *Stigler v. Stigler*, 48 So. 3d 547, 551 (Miss. App. 2009). "We will not disturb the chancellor's opinion when it is supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal

standard was applied." *Id*. at 925. "However, we review questions of law de novo." *Id*. (Emphasis Supplied).

The Court in *Gordon* stated, "that was the sole issue that Wanda and Charles asked the chancellor to resolve. Because Wanda never asked the chancellor to divide Charles' military retirement, there is no merit to Wanda's claim." *Id.* at 926. In the present case, the parties did not ask the Chancellor to resolve the issue of the appropriate child support amount, and the Chancellor had no authority to deviate from the parties' written agreement. The Chancellor's decision to deviate from the parties' written agreement and adjudicate an issue that had not been submitted to the court for decision constitutes reversible error for the reasons cited herein.

II.

THE CHANCELLOR ERRED IN AWARDING LORI MOSHER A GREATER PERCENTAGE OF GARY MOSHER'S MILITARY RETIREMENT PAY THAN THE PARTIES HAD AGREED TO IN THEIR CONSENT TO ADJUDICATE

In their consent to adjudicate, the parties agreed that Lori would receive one half of Gary's military retirement. It stated as follows, "7. That both parties hereby agree the Plaintiff shall receive one-half (½) of the Defendant's military retirement." RE-95.

At the time of the separation of the parties, Gary had been receiving his monthly military retirement pay and an additional monthly amount representing his VA disability benefit. Gary was approved to receive his VA disability benefit in March 2009, long before the parties' decided to separate. TR-223-224. (Exhibit 3a). Gary and Lori both understood at the time of the execution of the

consent to adjudicate that Gary was receiving both forms of payment each month. Yet, they specifically decided that Lori would receive 50% of the monthly military retirement pay only. In spite of the parties' agreement, the Chancellor again decided to revisit an issue that was not among the issues to be decided by the Court. Again, the parties were not given the opportunity to put on any proof whatsoever relating to this issue as they did not believe that this was an issue to be tried. Only after the Chancellor rendered the final judgment in this case did it become evident that the parties' agreement was disregarded.

In the Judgment of Divorce, the Chancellor stated that "even though the parties did not address the V.A. disability waiver already in place in their written agreement, it is clear from the testimony at trial, the parties agreed that Lori was to be receiving temporary spousal support based upon her one-half share of Gary's military pension prior to trial." RE-24-25. There was nothing in the testimony at trial that suggested that Lori believed she was to receive part of Gary's VA disability benefit. The Chancellor went on to say that the "Court finds that the agreement of the parties is not consistent with Lori sharing in less than a full one half of the military retirement pension either presently or in the future." RE-26.

The Chancellor essentially admitted that she did not agree with the parties' agreement and decided to revisit the issue. Gary's gross military retirement pay (excluding his monthly VA disability payment of $400.93) was determined to be $2121.07. His monthly survivor's annuity premium was determined to be $164.09, leaving his monthly military retirement pay at $1956.98. The parties

agreed for Lori to receive 50% of this amount, which was determined to be $978.50. Yet, the Court ordered Gary to pay this amount and $200.46, representing one half of his monthly VA disability pay, totaling $1178.95 (actually $1178.96).

The Chancellor determined that Gary's gross military retirement pay is $2522.00, which included his monthly military retirement pay from the Navy, and his non-taxable VA disability benefit (recalculated by the court to be $400.93 per month). RE-27; RE-29. The Chancellor determined that Lori should receive an amount equal to 50% of Gary's "full military retirement benefit," which she concluded would include the VA disability pay. RE-27. The Chancellor noted that DFAS would only divide and pay directly to the former spouse 50% of the retiree's disposable retirement pay. RE-27. The Chancellor did not consider income taxes and health insurance premiums that are being deducted from Gary's Navy Retirement, which are legitimate expenses when determining net disposable income, instead deciding the issue on gross pay only, with deduction for the SBP premium only. Therefore, to accomplish the aim of the decision, from the $2522.00 amount, the Chancellor deducted the $164.09 survivor's annuity premium that Gary is to maintain for Lori, and the $400.93 for VA disability, leaving $1956.98. The Chancellor determined that 50% of $1956.98 is $978.50 (it is actually $978.49). RE-30. The Chancellor then determined that because Lori would receive only $978.50 from DFAS due to this amount being the maximum 50% DFAS would withhold from the retiree's disposable retirement pay, that an additional 50% of the $400.93 (which the Chancellor determined to

be $200.46) would be paid from Gary's VA disability benefit directly by Gary to Lori. The total amount awarded to Lori each month is $1178.95.

To state it another way, the Chancellor awarded to Lori 60.24% of Gary's "disposable retired pay." ($2522.00 – $164.09 = $2357.91 divided by 2 = $1178.95). RE-29-30. The Chancellor separately decided that the survivor's benefit annuity (a premium charged to guarantee the continuation of the Navy Retirement pay in case of Gary's death) would be taken "off the top" before the total gross pay (Navy and VA disability) would be divided. RE-30.

In the judgment, the Chancellor did not address the issue of whether the Court had the authority to revisit this issue, which was not submitted for adjudication. The issue is whether the Chancellor can disregard the agreement of the parties in their consent to adjudicate and revise the agreement unilaterally, and require Gary to pay more then the parties' agreed for him to pay.

The Appellant would show that the Chancellor had no authority to decide this issue, as it was never among the issues left to the Chancellor to be decided at trial. As a result, the consent to adjudicate was thwarted by the Court's decision to revisit this issue and denied Gary due process. The Court's decision occurred after the parties submitted their proof during the trial of this matter.

Several factors could have gone into the parties' consideration when agreeing to the percentage of military retirement pay only, including the fact that at the time of the divorce, Lori and Gary had <u>not</u> been married to each other for the entirety of Gary's career. In fact, Gary had been in the United States Navy for five years before he and Lori were married, yet he agreed to pay her fifty

percent of his monthly military retirement pay. TR-76. Another valid consideration was that Gary might need the additional VA disability income in order to have the additional funds to pay for a decent dwelling, as he was living in a camper at the time of the divorce trial, and other valid considerations that were never presented to the Court because the parties believed this issue was settled, and therefore evidence was never presented to the Court regarding this matter.

It is important to point out that this was not a case in which the parties had a disagreement as to how a marital asset would be divided. This was not a case in which there was no consent to adjudicate and all issues were left up to the Chancellor for decision. The consent to adjudicate in the present case met the statutory requires as set out in Mississippi Code Annotated Section 93-5-2(3), as it was in writing, signed by both parties personally, and stated that the parties voluntarily consented to the issues to be decided by the Court. Those issues were specifically listed therein, and the consent to adjudicate specifically listed the issues that the parties agreed would not be presented to the Chancellor for adjudication.

The Chancellor was bound to honor the parties' agreement with regard to this issue. If the Chancellor was not going to honor the parties agreement, then the judge should have informed the parties in advance and given them the opportunity to recess the trial and revisit the entirety of their agreement, or to decide that they would submit all issues to the Court for resolution.

Section 93-5-2(3) of the Mississippi Code, states as follows:

> (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.

(Emphasis Supplied).

The focus of this statute is that parties may consent to a divorce and permit the court to decide the issues upon which they cannot agree. The issues to be decided by the Court are only those set forth in the consent document. In the present case, the parties did not set forth the issue of military retirement as one to be decided by the Chancellor. That fact is clear and indisputable.

In *Gordon v. Gordon*, 126 So. 3d 922 (Miss. App. 2013), the Court of Appeals examined an issue similar to the facts at bar. In that case, the Appellant argued that the Chancellor should have adjudicated issues that were not contained in the parties' consent to adjudicate. The consent to adjudicate in that case only involved one issue to be decided by the Chancellor, whether the wife had misappropriated marital funds, an issued which the husband later waived. On appeal, the wife argued that the Court should have adjudicated the issue of her

entitlement to part of the husband's military retirement, among other things. *Id*. at 923-924.

As set out in *Gordon*, the standard of review in domestic relations cases is the substantial evidence/manifest error rule. *Id*. at 925. Citing *Stigler v. Stigler*, 48 So. 3d 547, 551 (Miss. App. 2009). "We will not disturb the chancellor's opinion when it is supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Id*. at 925. "However, we review questions of law de novo." *Id*. (Emphasis Supplied).

The Court in *Gordon* stated, "that was the sole issue that Wanda and Charles asked the chancellor to resolve. Because Wanda never asked the chancellor to divide Charles' military retirement, there is no merit to Wanda's claim." *Id.* at 926. In the present case, the parties did not ask the Chancellor to resolve the issue of military retirement, and the Chancellor had no authority to deviate from the parties' written agreement and substitute her judgment for the voluntary agreement of the parties. The Chancellor's decision to deviate from the parties' written agreement and adjudicate an issue that had not been submitted to the court for decision constitutes reversible error for the reasons cited herein.

III.

THE CHANCELLOR ERRED IN ORDERING A DISPROPORTIONATE SHARE OF THE PARTIES' MARITAL ESTATE TO LORI MOSHER

The case of *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994) established the guidelines that chancellors are to consider when deciding issues of marital property division. In that case, the Court directed "chancery courts [to] consider

the following guidelines, where applicable, when attempting to effect an equitable division of marital property:

> Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows: (1) Direct or indirect economic contribution to the acquisition of the property; (2) 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 (3) Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
>
> The Court should consider the following individual guidelines in dividing the assets:

a. 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.
b. The market value and the emotional value of the assets subject to distribution.
c. 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;
d. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
e. 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;
f. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and
g. Any other factor, which in equity should be considered.

In the present case, the Court, without explanation, ordered a disproportionate distribution of the marital estate to Lori. In dividing and awarding the marital assets, the Chancellor equitably divided the marital estate and ordered as follows:

A. Marital Assets (not counting one half of monthly military retirement and VA disability) awarded to **Lori Mosher** totaling $33,168.32:

iv. $6145.00 equity in Lexus vehicle;

v. $11,056.28 cash value of PERS retirement;

vi. $7493.07 case value of Lori's life insurance policy;

v. $8473.97 cash value of Gary's life insurance policy

B. Marital Assets (not counting one half of monthly military retirement and VA disability) awarded to **Gary Mosher** totaling $16,398.00:

iii. $10,000.00 equity in Jeep Wrangler vehicle;

iv. $6398.00 equity in motorcycle

RE-40-41.

In dividing the marital debt, the Chancellor determined that Lori would pay the Sears debt in the amount of $15,665.00, and pay one half the debt on the Lexus in the amount of $6940.00. Gary would pay the Keesler Federal Credit Union debt in the amount of $9500.00, and Gary would also pay one half of the debt on the Lexus in the amount of $6940.00. Lori would be responsible for debts in the total amount of $22,605.00, and Gary would be responsible for debts in the total amount of $16,400.00.

The Court did not address the fact that Gary's payment of one half of the debt on the Lexus would increase the future equity in the Lexus vehicle awarded to Lori. The Chancellor's judgment reflected that after considering the assets and liabilities assigned to each party from the marital estate, that Gary was left with an estate worth (negative) -$42.00 and Lori was left with an estate worth of $10,563.32.

The Chancellor determined the cash value of Gary's life insurance policy, which was $8473.97, to be lump sum alimony. Earlier in the judgment, however,

it states that it is a marital asset to be equitably divided and placed on Lori's side of the ledger. Regardless, the Chancellor's judgment clearly reflects that Lori was being awarded a larger value of the equity in the parties' net marital estate by $10,563.32. In addition, as detailed in Section I above, the Chancellor also awarded Lori more than the fifty percent of Gary's military retirement pay by also ordering him to pay to Lori fifty percent of his monthly VA disability benefit. The Chancellor also ordered Gary to pay Lori $1000.00 per month for periodic alimony.

The Appellant contends that there was no legal or factual basis for awarding Lori $10,563.32 more than what was awarded to Gary of the equity in the parties' marital estate. While the Chancellor's decision is quite lengthy (56 pages), there is a dearth of explanation regarding why she believed that this was equitable. The Chancellor's *Ferguson* analysis appeared to only touch on issues that postdated their separation with little regard to Gary's contributions to the marital estate during the parties' long marriage. The Chancellor's findings as contained in the Judgment do nothing to explain the disparity. RE-34-47 (Pages 27-40 of the Judgment of Divorce).

The Court noted this discrepancy and stated that equitable distribution alone is not sufficient to meet Lori's needs with regard to why alimony would still be awarded, but utterly failed to explain the discrepancy itself, as to why Lori was being awarded a disproportionate share when applying the *Ferguson factors* in the first instance. RE-47. Indeed, under *Ferguson*, "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" would have provided a basis for the Court to deny periodic alimony payments to Lori, or awarding a lesser amount than what was ultimately awarded, but not in the reverse. The Court ordered periodic alimony payments anyway, which negates any justifiable explanation as to why there was not an equitable distribution in the property and debt dissolution. *See Thompson v. Thompson*, 815 So. 2d 466, 469 (Miss. App. 2002)(unequal division eliminated the necessity of continuing support payments to the wife).

It is important to note that in the Chancellor's earlier bench ruling following the conclusion of the trial, that Gary was not ordered to pay one half of the debt secured by Lori's Lexus. RE-82-93. The Judgment states, "after further analysis, the Court hereby modifies its Bench Ruling and also awards Lori a Judgment in the amount of $6940.00 representing one-half of the remaining $13,880.00 debt owed on her Lexus vehicle. This award is added to the other awards listed previously from the Bench Ruling. The Court's analysis *infra* sets forth its reasoning for awarded this subsequent Judgment amount to Lori." RE-17.

In addition, the parties were in disagreement as to the issue of keeping each other as a beneficiary on his and her respective life insurance policies and submitted the issue to the Court as part of the consent to adjudicate. RE-96. Instead, the Chancellor awarded Lori the $8473.97 cash value of Gary's life insurance policy as lump sum alimony. This was clearly a marital asset that could have been awarded to a party as part of equitable division rather than be

categorized as alimony. Gary again is left to question why an asset that should have been placed on his side of the ledger was awarded to Lori.

The facts suggest that the Chancellor was correct in its earlier bench ruling that Gary should not have been required to pay one half of the Lexus debt as an equitable distribution would have closer to being equitable if the entirety of this debt had stayed on Lori's side of the ledger. Or, in the alternative, Gary should have been awarded the cash value of his life insurance policy. The issue of awarding Lori the cash value of Gary's policy was not included in the parties' consent to adjudicate, and the Court should not have revisited this issue by awarded the cash value of Gary's policy to Lori.

IV.

THE CHANCELLOR ERRED IN ORDERING PERIODIC ALIMONY TO LORI MOSHER AS IT WAS UNECESSARY TO MEET HER NEEDS AND THE MONTHLY AMOUNT ORDERED DEPRIVED GARY MOSHER OF A REASONABLE AND DECENT STANDARD OF LIVING

The following factors were to be considered by the Chancellor in making findings of fact and conclusions of law regarding alimony: (1) the income and expenses of the parties; (2) the health and earning capacities of the parties; (3) the needs of each party; (4) the obligations and assets of each party; (5) the length of the marriage; (6) the presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care; (7) the age of the parties; (8) the standard of living of the parties, both during the marriage and at the time of the support determination; (9) the tax consequences of the spousal support order; (10) fault or misconduct; (11) wasteful dissipation of assets by either party; or (12) any other factor deemed by

the court to be "just and equitable" in connection with the setting of spousal support. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993); *Hammonds v. Hammonds*, 597 So. 2d 653, 655 (Miss. 1992). *Accord*, *Gray v. Gray*, 745 So. 2d 234, 238 (Miss. 1999).

As stated herein, the Chancellor originally awarded Lori periodic alimony in the amount of $1300.00 per month, which was later reduced by the Court in the Order addressing Gary's post trial motion, as a result of the monthly amount that Lori was to pay on the Sears account being subsequently reduced from $500.00 per month to @$200.00 per month. RE-78-79. The Chancellor determined that Lori was left with an overall financial disparity and that equitable distribution alone was not sufficient to meet Lori's needs. After considering the factors as set out in *Armstrong*, the Chancellor determined that Lori was in need of alimony. RE-53.

The Chancellor conducted an analysis of the parties' income and expenses in an effort to determine the appropriate alimony to be awarded. Lori's gross income per month from her employment was determined to be $1808.98. Based upon the award of $1178.95 from Gary's military and VA disability and the child support award of $775.85, her gross income, prior to the alimony award, was determined to be $3760.81. Her adjusted gross income, after deducting $305.25 for state and federal taxes, was determined to be $3455.56. Gary was also ordered to pay Lori $100.00 per month towards the indebtedness on Lori's vehicle until their daughter emancipated, resulting in adjusted gross income of $3555.56. Lori's monthly expenses were determined to be $3310.00 per month.

The Court determined Gary's monthly-adjusted gross income (after taxes) to be $5541.81, which constituted his salary from his employment and $1178.00 in income from his military retirement and VA disability. The Court determined Gary's monthly expenses (regular expenses of $2400.00 plus $775.85 in child support and $100.00 per month on the judgment award) to be $3275.85. The Court determined that Lori had a monthly surplus of $245.56 and that Gary had a monthly surplus of $2265.96.

Based upon the alimony award of $1000.00 per month, Lori would then have a present monthly surplus of $1245.56 and Gary would have a present monthly surplus of $1265.96.

In examining monthly expenses, the Chancellor did not take into consideration that Gary at some point in the future would need to live in something other than a camper, as his monthly rental income (as stated in his monthly expenses) at the time of the divorce was only $350.00. As part of her regular monthly expenses, Lori was credited with a monthly rental payment of $750.00.

The Court's award of alimony to Lori is in error for two reasons. First, there was not a disparity in Lori's estate following equitable distribution. As stated in Section III above, Lori was awarded $10,563.32 more than what was awarded to Gary of the parties' net equity. In addition to this award, Lori still had an income surplus each month before <u>any</u> alimony was awarded. She was able to pay her debts and meet her needs without an alimony award.

Second, the amount of periodic alimony awarded to Lori has deprived Gary of a decent standard of living. Gary was basically left with only a camper as his residence. TR-88; TR-39. Lori stated her sympathy for Gary having to live in a camper. TR-74. If Gary had an apartment that even had a monthly rental payment of $750.00 per month, identical to what Lori is paying for her apartment, which is a reasonable, and not an extravagant amount to pay for a dwelling space, it would have increased his monthly expenses by $400.00 per month. The Court could have accounted for this by reducing Gary's periodic alimony accordingly, which would have been more appropriate under the circumstances. Essentially, Gary was punished in the alimony award as a result of his living in a camper at the time of trial. With the Court's desire to equalize the parties' monthly net surplus. no consideration was given to Gary's ability to have a reasonable and decent standard of living.

If a disparity in income exists but the lower-income spouse is able to meet reasonable expenses, no alimony should be awarded. *Graham v. Graham*, 767 So. 2d 277, 280 (Miss. App. 2000), and *Osborn v. Osborn,* 724, So. 2d 1121, 1127 n. 7 (Miss. App. 1998)(wife's resources were only $140.00 short of listed expenses). (Emphasis Supplied). As stated above, before the alimony award, Lori did not have an income deficit after all of her expenses were paid and she was able to pay all of her expenses.

As a result of the alimony award, Gary was not left with sufficient income to meet his reasonable expenses and basic needs. *See Russell v. Russell*, 733 So.

2d 858, 861-862 (Miss. App. 1999) and *McEachern v. McEachern*, 605 So. 2d 809, 814-815 Miss. 1992).

CONCLUSION

For the reasons stated above, this Court should reverse the Chancellor's judgment regarding the child support and military retirement amount and percentage and reinstate the amount and percentage as agreed upon by the parties, and further should reverse the Chancellor's decision regarding the unequal net equity division, and further should reverse the Chancellor's award of periodic alimony, all as more fully requested above.

RESPECTFULLY SUBMITTED, on this 6th day of July 2015.

GARY MOSHER

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CERTIFICATE OF SERVICE

I, Kelly Michael Rayburn, counsel of record for the Appellant herein, do certify that I have this day filed electronically through the MEC filing system, a true and correct copy of the above and foregoing Brief of Appellant, and have this day mailed by United States Mail with postage prepaid a true and correct copy of the above and foregoing Brief of Appellant to the following persons at their regular mailing addresses:

1) Lori Mosher
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2) Hon. Jennifer Schloegel
   Chancellor
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   Gulfport, MS 39502-0986

So certified on this 6th day of July 2015.

/s/ Kelly Michael Rayburn
Kelly Michael Rayburn