

No. 26-\_\_\_\_\_

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SUPREME COURT OF THE UNITED STATES

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JOSEPH S. McFALL,

*Petitioner,*

vs.

BERNADINE McFALL OSBORNE,

Respondent.

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On Petition for Writ of Certiorari to  
the Mississippi Supreme Court

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**APPENDIX TO THE  
PETITION FOR WRIT OF CERTIORARI**

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**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2023-CT-01234-SCT**

***JOSEPH S. MCFALL***

***Appellant/Petitioner***

***v.***

***BERNADINE MCFALL OSBORNE***

***Appellee/Respondent***

**ORDER**

Now before the Court en banc is the Petition for Writ of Certiorari filed by Joseph S. McFall and the letter of supplemental authority by McFall pursuant to Mississippi Rule of Appellate Procedure 28k.

After due consideration, the Court finds the petition should be denied.

IT IS THEREFORE ORDERED that the Petition for Writ of Certiorari is hereby denied.

SO ORDERED.

ALL JUSTICES AGREE.

DIGITAL SIGNATURE

Order#: 260584

Sig Serial: 100011468

Org: SC

Date: 12/10/25

s/ James D. Maxwell, II, \_\_\_\_\_

James D. Maxwell, II, Justice

Electronic Document      Aug-26-2025 13:29:01.  
2023-CA-01234-COA      Pages: 1

**Supreme Court of Mississippi**  
**Court of Appeals of the State of Mississippi**  
*Office of the Clerk*

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August 26, 2025

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 26th day of August, 2025.

Court of Appeals Case # 2023-CA-01234-COA  
Trial Court Case # 30CH1:06-cv-01745-MAM

Joseph S. McFall v. Bernadine McFall Osborne

The motion for rehearing is denied. Westbrook, J., not participating.

\*NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS \*

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you,

please advise this office in writing immediately.

**Please note: Pursuant to MRAP 45©, amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's web site at: <https://courts.ms.gov>, and selecting the appropriate date the opinion was rendered under the category "Decisions."**

**IN THE COURT OF APPEALS OF  
THE STATE OF MISSISSIPPI**

**NO.2023-CA-01234-COA**

**JOSEPHS.McFALL**

**APPELLANT**

**v.**

**BERNADINE McFALL OSBORNE**

**APPELLEE**

DATE OF JUDGMENT: 10/13/2023  
TRIAL JUDGE: HON. MARK ANTHONY MAPLES  
COURT FROM  
WHICH APPEALED: JACKSON COUNTY CHANCERY  
COURT  
ATTORNEY FOR  
APPELLANT: STEPHEN J. MAGGIO  
ATTORNEY FOR  
APPELLEE: OTTIS B. CROCKER, III  
NATURE OF CASE: CIVIL- DOMESTIC RELATIONS  
DISPOSITION: AFFIRMED- 04/08/2025  
MOTION FOR REHEARING FILED:

**BEFORE BARNS, C.J., McCARTY AND ST. PE',  
JJ.**

**ST. PE', J., FOR THE COURT:**

¶1. Bernadine McFall Osborne and Joseph McFall were granted a divorce and property settlement in 2010, which was modified in 2021 upon Bernadine's motion. Neither Bernadine nor Joseph appealed the 2021 modification judgment, and it became final. Seven months after the judgment, Bernadine petitioned the chancery court to hold Joseph in contempt for failure to abide by the 2021 judgment. Joseph filed a motion

under Mississippi Rule of Civil Procedure 60(b), arguing that the chancellor’s 2010 judgment and the subsequent 2021 judgment were preempted by federal law. After a hearing, the chancellor denied Joseph’s motion, and he appealed.

¶2. For the reasons addressed, we find no error and affirm.

### **FACTS AND PROCEDURAL HISTORY**

#### *2010 Judgment of Divorce and Property Settlement*

¶3. In February 2010, the Jackson County Chancery Court entered a judgment of divorce for Bernadine McFall and Joseph McFall. Bernadine and Joseph had agreed to a divorce on the grounds of irreconcilable differences and stipulated several issues for the chancellor to determine, including the equitable division of “all the marital assets and liabilities of the parties accumulated during the marriage.” Of particular import to this case, the judgment ordered that Bernadine should receive “a sum equal to one-half of all future military retirement payments” received by Joseph. Neither party appealed the judgment or division of assets.

#### *2021 Judgment of Modification / Clarification*

¶4. In May 2020, Bernadine filed a “Complaint for Modification, and/or for Clarification.” Bernadine alleged that Joseph “had his future benefits deemed as disability benefits” rather than retirement benefits and that by doing so, he had “thwarted” the 2010 judgment. Bernadine asked the chancery court to modify Joseph’s support obligation to provide her one-half of the benefits as contemplated by the 2010 judgment. Joseph answered the complaint and argued that there had been no material change in circumstances since the February 2010 divorce and that he was not receiving retirement benefits from the military.

¶5. In October 2021, following a hearing, the chancellor<sup>1</sup> found that the original chancellor intended Bernadine to receive money equal to half of whatever Joseph’s military retirement payments would be and that the chancellor had

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<sup>1</sup> By this time, a new chancellor was on the bench.

not awarded Bernadine a portion of Joseph’s actual military retirement.<sup>2</sup> The chancellor found that the language of the original judgment“ does not foreclose Bernadine’s ability to collect on Joseph’s military retirement but rather allows the parties to calculate an estimated amount of Joseph’s retirement through the use of actuarial tables and the like. ”The chancellor then ordered that Bernadine receive \$800 per month from Joseph. Neither party filed any post-trial motions or appealed the chancellor’s judgment.

*2023 Judgment Denying Rule 60(b) Relief*

¶6. In May 2022, Bernadine filed a complaint for contempt, claiming that Joseph had not made any of the \$800 payments as ordered in the 2021 judgment. Four months later, Joseph filed a “Motion for Relief from Judgment” attacking the **2010 judgment**, arguing that the chancellor erred by granting Bernadine any interest in military retirement because he did not receive military retirement benefits and never would. Joseph also sought Rule 60(b) relief from the October 2021 judgment, arguing that the chancery court lacked jurisdiction to divide a VA disability payment under federal law and that the chancellor improperly modified the 2010 judgment because Bernadine never filed post-trial motions or appealed the 2010 judgment.

¶7. In October 2023, the chancellor denied Joseph’s Rule 60(b) motion. The chancellor found that neither party had filed post-trial motions after the 2021 judgment or appealed

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<sup>2</sup> The chancellor raised sua sponte the issue of a state court’s ability to divide military retirement or disability; neither party addressed it in their motions or at the hearing. The chancellor cited *Mansell v. Mansell*, 490 U.S. 581 (1989); *Mallard v. Burkart*, 95 So. 2d 1264 (Miss. 2012); and *Howell v. Howell*, 581 U.S. 214 (2017), concluding that “military disability pay is exempt when it comes to division of assets, particularly military retirement, in divorce cases.” The chancellor concluded that the 2010 judgment did not violate this principle because it did not give Bernadine “a portion of Joseph’s military retirement but rather a sum equal to one-half of his future military retirement.”

from the 2021 judgment and that the 2021 judgment was therefore final. The chancellor also found that Joseph had willfully failed to comply with the 2021 judgment and owed Bernadine \$18,500. The chancellor held Joseph in contempt, ordered him to serve a sixty-day sentence over thirty consecutive weekends, and ordered him to pay Bernadine \$2,000 in attorney’s fees.

¶8. Joseph filed a notice of appeal. On appeal, Joseph asserts five issues,<sup>3</sup> but they can be condensed into these three: did the chancellor err by denying Joseph’s Rule 60(b) motion challenging the 2021 judgment; did the chancellor err in 2021 by modifying the 2010 judgment; and did the chancellor err by holding Joseph in contempt? We find no error and affirm.

## ANALYSIS

### I. Rule 60(b) Denial

¶9. Joseph argues that the chancellor “was unequal” when he denied the September 2022 Rule 60(b) motion because he had previously modified the 2010 judgment following Bernadine’s 2020 motion for modification. As addressed *infra*, the chancellor may modify an award of spousal support

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<sup>3</sup> Joseph’s arguments follow: “Whether the Supremacy Clause and federal preemption prohibited the subsequent Chancellor from dividing Joseph McFall’s military disability benefits in his Judgment of October 22, 2021?”; “Whether res judicata prohibited the subsequent Chancellor’s modification in October of 2021 of the property division made eleven years previous by the original Chancellor in his February 12, 2010, Final Judgment of divorce to award Bernadine McFall one-half of Joseph McFall’s military disability payments?”; “Whether it was proper in October of 2021 for the successor Chancellor to overrule the property division done by the original Chancellor in February of 2010?”; “Whether the subsequent Chancellor erred in his October 23, 2023, Judgment by denying Joseph McFall’s Rule 60 motion for relief?”; and “Whether the subsequent Chancellor erred in his October 23, 2023, Judgment holding Joseph McFall in contempt for not paying Bernadine a portion of his VA disability payments and whether it was error to order his incarceration for non-payment of the VA disability benefits and/or property settlement payments?”

where there is a material change in circumstances. Bernadine’s motion for modification or clarification was not a motion under Rule60(b).<sup>4</sup>

¶10. Appellate courts review the grant or denial of Rule 60(b) motions for an abuse of discretion. *Smith v. Doe*, 268 So. 3d 457, 461 (¶7) (Miss. 2018). In doing so, “we ask first if the court below applied the correct legal standard. If so, we then consider whether the decision was one of those several reasonable ones which could have been made.”*Id.*(quoting *Burkett v. Burkett*, 537 So. 2d 443, 446 (Miss. 1989)). However, where a jurisdictional question is raised as it relates to a Rule60(b) motion, we view the issue de novo. *Indymac Bank, F.S.B. v. Young*, 966 So.2d1286, 1288(¶5) (Miss. Ct. App. 2007) (citing *Trustmark Nat’l Bank v. Johnson*, 865 So.2d 1148, 1150 (¶8) (Miss.2004)).

¶11. Under Rule 60(b), a party can move for relief from judgment for the following reasons:

- (1) fraud, misrepresentation, or other misconduct of the adverse party;
- (2) accident or mistake;
- (3) newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
- (6) any other reason justifying relief from judgment.

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<sup>4</sup> Joseph’s claim of “unequal” treatment is based on a misunderstanding of chancery practice. Pages 33 through 43 of Joseph’s opening appellate brief focus singularly on the 2021 judgment, not on the denial of his own Rule 60 motion. We devote more time to this argument in Part II of this opinion.

M.R.C.P. 60(b). The Rule also provides that motions for Rule 60(b) relief must “be made within a reasonable time, and for reasons (1), (2) and (3)[,] not more than six months after the judgment, order, or proceeding was entered or taken.” *Id.* The party seeking Rule 60 relief has the burden of persuasion. *See Roberts v. Lopez*, 148 So. 3d 393, 400 (¶16) (Miss. Ct. App. 2014); *Collins v. Collins*, 188 So. 3d 581, 585 (¶7) (Miss. Ct. App. 2015). “[A] Rule 60 motion does not concern the merits of the underlying claim, only whether the movant is entitled to relief from the judgment for one of the limited grounds permitted by the rule.” *In re Est. of Wylie*, 226 So. 3d 114, 120 (¶16) (Miss. Ct. App. 2017).

¶12. In his Rule 60(b) motion, Joseph asserted that the chancery court “lacked jurisdiction” to divide his VA disability payments and that federal law preempted any state court attempt to divide those benefits.<sup>5</sup> Much of his motion was an attack on the facts, which he had already argued in his response to Bernadine’s motion to modify.<sup>6</sup> At the hearing on his Rule 60(b) motion, Joseph again primarily attacked the facts and whether he was receiving military or disability benefits.

¶13. The ink Joseph spilled arguing over the merits of the chancellor’s decision suggests he is using his Rule 60(b)

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<sup>5</sup> He also argued that the chancellor “improperly modified” the 2010 judgment, again misunderstanding that Bernadine had not filed a Rule 60(b) motion.

<sup>6</sup> At no point in Joseph’s 2020 response to Bernadine’s motion to modify did he argue that the trial court lacked jurisdiction under federal law to divide the VA or military benefits. He argued simply that he did not have military retirement benefits, only disability. However, at the hearing on his Rule 60(b) motion, Joseph’s counsel argued briefly that the chancellor could not divide his disability benefits under federal law. He had not been Joseph’s attorney for the 2021 judgment, and he told the chancellor that “the distinction [between retirement and disability] was [not] made clear to the Court when it entered the order in 2021.” This statement is a clear attempt to relitigate the prior issue of modification.

motion as a way to relitigate what could have been appealed in 2021. That is not a ground for Rule 60(b) relief. This Court cannot review the merits of an underlying judgment following the denial or grant of a Rule 60(b) motion. See *Wylie*, 226 So. 3d at 120 (¶16); *Brackin v. Burton*, 755 So. 2d 462, 465 (¶15) (Miss. Ct. App. 1999). To the extent that Joseph sought relief from the 2021 judgment based on the merits of the chancellor's modification, the chancellor properly denied Rule 60(b) relief.

¶14. While Joseph's primary focus appears to have been on the merits of the division, his Rule 60(b) motion does mention that the chancellor "lacked jurisdiction to divide the VA disability payments [because] Federal law is controlling and preemptive." His motion provides no further support for this statement. At the hearing, Joseph's counsel's argument focused mainly on the classification of benefits and argued that he could collaterally attack the 2010 and 2021 judgments, citing a Nebraska Supreme Court case, *Ryan v. Ryan*, 257 N.W.2d 739 (Neb. 1999).

¶15. *Ryan* held that a husband could collaterally attack a support award that divided VA disability benefits on a theory of federal preemption. *Id.* at 744-45. However, the Nebraska Supreme Court overruled *Ryan* in 2023, noting that "[i]t has been widely held...that if the military benefits are initially divided by a state court in violation of federal preemption, but the service member fails to file a proper appeal, the decision is final and the benefits at issue are divided in accordance with the initial award." *Parish v. Parish*, 991 N.W.2d 1,8 (Neb. 2023) (citing *Martin v. Martin*, 520 P.3d 813 (Nev. 2022); *Foster v. Foster*, 983 N.W.2d 373 (Mich. 2022); *In re Marriage of Kaufman*, 485 P.3d 991 (Wash. Ct. App. 2021); *Shelton v. Shelton*, 78 P.3d 507 (Nev. 2003); *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (1989)). Joseph cited no Mississippi case law to support his claim that he could collaterally attack the earlier judgments.

¶16. This Court has faced a similar issue before. In *Manley*

*v. Manley*, 378 So. 3d 390 (Miss. Ct. App. 2023), a chancellor incorporated a property settlement agreement into a divorce order, which provided that the parties would “equally divide (50/50) [the husband’s] military retirement. It is further agreed and understood that...the actual estimated monthly distribution to each party shall be \$821.50, but in all instances payment to [wife] shall be exactly 50% of the retirement pay.” *Id.* at 394 (¶7). After the husband failed to make payments, the wife initiated contempt proceedings, and the husband argued that the division did not include VA disability benefits, only military retirement pay. *Id.* at (¶8).

¶17. In our opinion upholding the chancellor’s finding of contempt, we recognized that “state courts are precluded from ordering distribution of military disability benefits contrary to federal law.” *Id.* at 395( ¶13) (quoting *Mallard*, 95 So.3d at1266(¶21)). The husband had not argued that the property settlement was void under federal law, and we declined to raise the issue sua sponte. *Id.* at (¶14). But we noted that many states have held that a judgment dividing marital property is not void or subject to collateral attack if the state court had subject matter jurisdiction. *Id.* at n.5. Put plainly, if the trial court has subject matter jurisdiction to divide marital property, then its judgment—while it may be erroneous—is not void. *See also Harvey v. Stone Cnty. Sch. Dist.*, 982 So. 2d 463, 468 (¶9) (Miss. Ct. App. 2008)(“A judgment cannot be set aside simply because it is erroneous.”). We thus concluded in *Manley* that the federal provisions that prohibited a state court’s division of military or disability benefits were “not jurisdictional in the sense that they should or must be raised sua sponte by an appellate court.” *Id.* at 395-96 (¶15).

¶18. In *Burgess v. Williamson*, 270 So. 3d 1031 (Miss. Ct. App. 2018), we dealt with a collateral attack on an allegedly erroneous judgment: a father filed a custody action in chancery court, the chancery court found that it had jurisdiction and awarded custody to the father, and the

mother did not appeal the judgment. *Id.* at 1033, 1037 (¶¶4-6, 18). But the mother later tried to attack the court’s subject matter jurisdiction in a contempt proceeding. *Id.* at 1035-36 (¶¶17-18). On appeal, this Court held that “once a case is litigated to a final judgment, and no appeal is taken, a party who participated in the original litigation cannot collaterally attack the court’s jurisdiction in a later proceeding.” *Id.* at 1036 (¶17) (citing *Phillips v. Kelley*, 72 So. 3d 1079, 1084 (¶18) (Miss. 2011) (“[S]ubject matter jurisdiction may not be attacked collaterally.”); *Dep’t of Hum. Servs. v. Shelnut*, 772 So.2d 1041, 1045 (¶13) (Miss. 2000) (“The principles of res judicata apply to questions of jurisdiction . . . whether the questions relate to jurisdiction of the subject matter or jurisdiction of the parties.”)).

¶19. Finally, we note that a Rule 60(b)(4) motion for relief due to a void judgment can only be granted where the court lacked jurisdiction or acted without due process. *Overbey v. Murray*, 569 So.2d 303, 306 (Miss. 1990); *B.E.G. v. R.C.*, 363 So. 3d 777, 783 (¶25) (Miss. Ct. App. 2019); *Clark v. Clark*, 43 So. 3d 496, 501 (¶21) (Miss. Ct. App. 2010).

¶20. The chancery court had jurisdiction to equitably divide Joseph and Bernadine’s marital property, including any retirement sums. Neither the 2010 judgment awarding Bernadine a portion of Joseph’s retirement pay nor the 2021 judgment modifying the division of property were appealed, and both became final judgments. Because the chancellor had jurisdiction to divide the marital property and later to modify it, the 2010 and 2021 judgments are not void, and Joseph was not entitled to Rule 60(b) relief on that ground. Similarly, Joseph cannot collaterally attack the chancery court’s jurisdiction after he failed to appeal any judgment beyond his Rule 60 motion. The chancellor did not err in denying Rule 60(b) relief.

## **II. Modification of the 2010 Judgment**

¶21. Joseph argues that the chancellor erred in his 2021 judgment by allowing modification of the 2010 judgment

because Bernadine had not filed a post-trial motion or appeal from the 2010 judgment. Joseph asserts that the modification was based on an “unspecified procedural remedy” and that res judicata prevented the chancellor from modifying the 2010 judgment. He also argues that the modification was based on erroneous findings of fact.

¶22. Generally, matters ruled on and not appealed within thirty days are res judicata, and parties are procedurally barred from attempting to revive them on appeal. *See Lane v. Lane*, 850 So. 2d 122, 125 (¶6) (Miss. Ct. App. 2002); M.R.A.P. 4. Ironically, Joseph’s attack on the merits of the 2021 judgment is barred by res judicata. Joseph did not appeal the 2021 judgment, and it became final when the time for post-trial motions and an appeal had passed. M.R.A.P. 4. The 2021 judgment became final after Joseph failed to file any post-trial motions or a timely notice of appeal to the Supreme Court. He is procedurally barred from attacking the merits of the 2021 judgment, and we will not address his claims.

### **III. Contempt**

¶23. Chancellors have “substantial discretion in deciding contempt matters,” and the question of contempt should “be decided on a case-by-case basis.” *Gilliland v. Gilliland*, 984 So. 2d 364, 369-70 (¶19) (Miss. Ct. App. 2008). “[T]he inquiry in a contempt proceeding is limited to whether or not the order was violated, whether or not it was possible to carry out the order of the court, and if it was possible, whether or not such violation was an intentional and willful refusal to abide by the order of the court.” *Ellis v. Ellis*, 840 So. 2d 806, 811 (¶18) (Miss. Ct. App. 2003) (quotation mark omitted). “The only defenses to a contempt violation include an inability to comply with the court order or that the court order was unclear.” *Id.* (citations omitted). It is not a “defense . . . that the contemnor does not agree with the previous order and considers the order of the court decree to be wrong, even [if his] motives in so doing are based upon pure moral sentiment.” *Id.* at (¶19) (quotation mark omitted). “A party must file a motion and

obtain a modification of the judgment . . . rather than simply ignore its provisions.” *Brown v. Hewlett*, 281 So.3d 189, 199 (¶37) (Miss. Ct. App. 2019).

¶24. Substantial evidence supports the chancellor’s finding of contempt. Joseph admitted that he had made no payment to Bernadine since the October 2021 judgment. Although he claimed he did not know about the order until May 2022, even after that date, Joseph continued to refuse to pay Bernadine benefits as ordered. The chancellor did not clearly err or abuse his discretion by finding that Joseph’s failure to pay was “willful contempt.”

### CONCLUSION

¶25. We affirm the chancellor’s denial of Joseph’s Rule 60(b) motion, as the chancellor had subject-matter jurisdiction to make the underlying judgment, and it was therefore not void. Joseph presents no other ground for Rule 60(b) relief.<sup>7</sup> We

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<sup>7</sup> Joseph argues that his Rule 60(b) motion was timely under Rule 60(b)(5) or Rule 60(b)(6), but the chancellor made no finding on the timeliness of the motion, and that was not the ground upon which he denied relief. Furthermore, Joseph did not argue those reasons under Rule 60(b) to the chancellor, nor does he make a meaningful argument on those grounds to this Court. But to be sure, we find no reason that Joseph would be entitled to relief for those reasons either.

Relief under Rule 60(b)(5) may be granted where the underlying judgment has been satisfied, released, discharged, or otherwise reversed or if the judgment “is no longer equitable” going forward. M.R.C.P. 60(b)(5). Joseph may cite this rule, but he makes no argument to support his claim for relief.

Relief under Rule 60(b)(6) may be granted for “any other reason justifying relief from the judgment.” Motions under Rule 60(b)(6) “are meant for ‘exceptional and compelling circumstances, such as for fraud upon the court.’” *Collins*, 188 So. 3d at 585 (quoting *Trim v. Trim*, 33 So. 3d 471, 475 (¶7) (Miss. 2010)). Joseph has argued no exceptional circumstance and instead has attempted to relitigate the case. “Rule 60(b) is not an escape hatch for litigants who had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies.” *City of Jackson v. Jackson Oaks Ltd. P’Ship*, 792 So. 2d 983, 986 (¶5) (Miss. 2001).

cannot address Joseph's claims attacking the merits of the underlying judgment because that judgment became final after Joseph failed to appeal it. Finally, we affirm the chancellor's finding Joseph in contempt for failure to pay Bernadine as ordered in the 2021 judgment.

¶26. **AFFIRMED.**

**BARNES,C.J., CARLTON AND WILSON, P.JJ.,  
McDONALD, LAWRENCE, McCARTY, EMFINGER  
AND WEDDLE, J.J., CONCUR. WESTBROOKS, J., NOT  
PARTICIPATING.**

Case: 30CH1:06-cv-01745-MAM  
Filed: 10/13/23

Document #: 131

**IN THE CHANCERY COURT  
OF JACKSON COUNTY, MISSISSIPPI**

---

**FILED  
OCT 13 2023  
JOSH ELDRIDGE, CLERK  
BY s/ Kristy M. Todd**

**BERNADINE MCFALL (OSBORNE)                      PLAINTIFF**

**V.    CAUSE NO. 2006-1745-MAM**

**JOSEPH A. MCFALL                                      DEFENDANT**

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**JUDGMENT**

Bernadine McFall Osborne (hereafter "Bernadine") filed her Complaint for Contempt, MEC #112 May 23, 2022. Joseph A. McFall (hereafter "Joseph") filed his Motion to Set Aside Judgment of this Court (MEC #110) September 27, 2022 (MEC #123). A hearing occurred October 11, 2023. Bernadine and Joseph appeared with their Counsel. Following the hearing, this Court rendered a bench ruling, now reduced to writing as follows:

1. MEC #110 (Judgment) was issued October 22, 2021.
2. No post-trial pleadings were filed.
3. No request for relief from MEC #110 was filed.
4. No appeal of MEC #110 was perfected.
5. MEC #110 became a Final Judgment.
6. Joseph's Rule 60 Motion to Set Aside MEC #110 is DENIED.
7. Joseph failed to pay Bernadine pursuant to his obligations of MEC #110.
8. Pursuant to MEC #110 Joseph owes Bernadine

\$18,500.00.

9. Bernadine paid \$2,000.00 to retain legal counsel to seek this Court's enforcement of MEC #110.
10. Prior to and since entry of MEC #110, Joseph has been and remains gainfully employed with the Mississippi Highway Patrol.
11. Joseph is in WILLFUL CONTEMPT for his non-compliance with MEC #110.

**It is therefore ORDERED, ADJUDGED AND DECREED** Joseph's Motion to Set Aside MEC #1 10 [MEC #123] is DENIED.

**It is further ORDERED, ADJUDGED AND DECREED** Bernadine is entitled to a Judgment of Eighteen Thousand Five Hundred Dollars and Zero Cents (\$18,500.00) due to Joseph's non-compliance with MEC #1 10. Bernadine is awarded attorney fees of \$2,000.00, for a total judgment granted to Bernadine against Joseph of \$20,500.00.

**It is further ORDERED, ADJUDGED AND DECREED** Joseph is in WILLFUL CONTEMPT of this Court.

**It is further ORDERED, ADJUDGED AND DECREED** Joseph shall be and is sentenced to sixty (60) days in the custody of the Jackson County Sheriff, to be housed at the Jackson County Adult Detention Center. Joseph shall serve this sixty-day sentence by serving thirty (30) consecutive weekends from Friday until Sunday, beginning Friday, October 20, 2023, at 6:00 P.M. there to remain until Sunday, October 22, 2023, at 6:00 P.M. Joseph shall report each consecutive Friday thereafter until his sixty (60) day sentence has been served. Joseph may purge himself of this contempt by tendering the sum of \$4,500.00 to Bernadine before 12:00 noon on October 20, 2023 and making each additional payment as set forth hereinafter. Failure to pay the purge amount shall result in Joseph's surrendering himself to the ADC on October 20, 2023 by 6:00 PM.

If Joseph tenders the purge amount of \$4,500.00, his

balance shall be \$16,000.00. This balance shall be paid at the rate of \$500.00 per month beginning December 1, 2023 with a like payment to be paid on the first of each consecutive month thereafter until this balance is paid in full. Joseph remains under his obligations of MEC #1 10 to pay \$800.00 per month. His next \$800.00 payment becomes due November 1, 2023.

**It is further ORDERED, ADJUDGED AND DECREED** any other request for relief of the parties not addressed hereinabove is hereby DENIED.

**SO ORDERED, ADJUDGED AND DECREED** on this the 13 day of October, 2023.

s/ Mark A. Maples  
CHANCELLOR MARKA. MAPLES

**IN THE CHANCERY COURT OF  
JACKSON COUNTY, MISSISSIPPI**

**BERNADINE MCFALL OSBORNE                      PLAINTIFF**

**V.    CAUSE NO. 2006-1745MM**

**JOSEPH S. MCFALL                                      DEFENDANT**

**MOTION FOR RELIEF FROM JUDGMENT**

COMES NOW, Joseph S. McFall, by and through his attorney, STEPHEN J. MAGGIO, and files this his Motion for Relief from Judgment [110], and in support thereof would show the following, to-wit:

1. That the parties to this matter are Bernadine McFall Osborne, [hereinafter "Bernadine"] and Joseph S. McFall, [hereinafter "Joseph"].
2. The parties are married on May 2, 1980. They separated on October 20, 2004. Bernadine filed for divorce on August 21, 2006. *See* [1]. She obtained a Final Judgment of Divorce on August 15, 2008 (*see* [10]), which was set aside by Order [33] entered on March 25, 2009.
3. The parties filed their Consent to Divorce on Grounds of Irreconcilable Differences and Permission for the Court to Decide Issues Upon Which the Parties Cannot Agree [43] on February 1, 2010. Thereafter, the parties were divorced on the grounds of irreconcilable differences by Final Judgment of Divorce [44] entered on February 12, 2010.
- 4.. As the parties were not able to agree upon the equitable distribution of the marital estate, the

Chancellor undertook an analysis pursuant to the principles outlined in *Hemsley* and *Ferguson*. Beginning at page 7 of the Final Judgment [44] the Chancellor listed the items of real and personal property which were included in the marital estate. This listing included, "(5) Bernadine's retirement account .... (11) Joseph's military retirement; (12) Joseph's disability payments " *Id.* The Court found that the -point of demarcation" as to the acquisition of marital assets was August 21, 2006. *See* Final Judgment [44] at page 8. The Chancellor determined that neither party would be entitled to alimony from the other. The Chancellor found that Joseph was, at that time, receiving disability payments for a service related injury he sustained in Iraq, but the Chancellor did not award Bernadine any of these payments. The Chancellor did award Bernadine, "... [O]ne-half of all future military retirement payments received by ... [Joseph] ... including one-half of all cost of living increases." *See* Final Judgment [44] at page 14. However, at the time of the divorce, Joseph was not serving in the military, nor had he, at that time, completed twenty years of creditable military service. As such, he had not earned, at that time, the right to receive any military retirement payments and, in fact, was receiving none. In the years following the divorce, he did not re-enlist nor did he accrue twenty years of creditable military service. Thus, he was not and is not entitled to receive retired military pay.

5. At the time of the divorce, Joseph was receiving disability payments, these were not, however, disability payments from the Veteran's Administration (VA). These were temporary disability payments from the United States Army related to his injury suffered in Iraq. After the divorce, Joseph quit receiving the disability payments from the Army. Subsequent to the

Final Judgment [44], he received a disability rating from the VA and he began receiving VA disability payments. He did not, contrary to Bernadine's assertion, waive his military retirement in lieu of receiving the VA disability payments. He certainly did not waive military retirement in lieu of VA disability payments in an effort to thwart Bernadine from receiving 50% of any future military retirement payments. In fact, Joseph has never received a military retirement nor will he ever receive one. He did not serve the twenty years which would entitle him to such.

6. More than ten years after the Final Judgment, Bernadine filed her Complaint for Modification and/or for Clarification [82]. In her Motion [82] she sought to have the Court award her 50% of the disability payments being received by Joseph. It is clear that he was not receiving military retired pay.
7. Joseph filed his Answer [82] on July 27, 2020 and raised, as a defense, that this Court was prohibited by preemptive Federal law from dividing VA disability payments.
8. On October 22, 2021, this Court entered its Judgment granting Bernadine 50% of Joseph's VA disability payments.
9. Aggrieved, Joseph moves for relief from the Judgment [110] under MRCP 60 on the basis that the Court lacked jurisdiction to divide the VA disability payments and the Federal law is controlling and preemptive. Additionally, he moves for relief under MRCP 60 as the Court improperly modified a property settlement distribution which Bernadine had neither filed a proper post-trial motion and/or appeal for relief from the original Judgment [44].

WHEREFORE, PREMISES CONSIDERED, Joseph S. McFall prays that this Court will grant this her Motion for Relief.

Dated: Tuesday, September 27, 2022.

s/ Stephen J. Maggio  
STEPHEN J. MAGGIO  
MSB No. 8377

THE MAGGIO LAW FIRM, PC  
2201 24<sup>th</sup> Ave.  
Gulfport, MS 39501  
Telephone: (228) 863-9111  
Facsimile: (228) 863-9191  
Email: stephen@sjmaggio.com

**MEC CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing.

Dated: Tuesday, September 27, 2022.

s/Stephen J. Maggio

**IN THE CHANCERY COURT OF  
JACKSON COUNTY, MISSISSIPPI  
FILED  
MAY 23 2022  
JOSH ELDRIDGE, CLERK  
BY: s/ Savannah Collin**

**BERNADINE MCFALL OSBORNE                      PLAINTIFF**

**VERSUS    CAUSE NO.: 2006-1745MM**

**JOSEPH S. MCFALL                                      DEFENDANT**

**COMPLAINT FOR CONTEMPT**

COMES NOW, BERNADINE MCFALL OSBORNE, and files this her Complaint for Contempt, against JOSEPH S. MCFALL, and for cause would show unto the Court, follows:

1.

BERNADINE MCFALL OSBORNE is an adult resident citizen of the State of Mississippi.

2.

JOSEPH S. MCFALL is an adult resident citizen of the First Judicial District of Harrison County, State of Mississippi whose street and post office address is 10323 Butter Road, Gulfport, Mississippi 39503 where he may be personally served with process.

3.

The Court has continuing jurisdiction in this matter.

4.

The parties were divorced by this Court February 12, 2010. Further, on October 22, 2021 this Court entered a

Judgment that BERNADINE MCFALL OSBORNE was entitled to \$800.00 per month from JOSEPH S. MCFALL commencing December 1, 2021.

5.

BERNADINE MCFALL OSBORNE respectfully asserts that JOSEPH S. MCFALL is in willful, and contumacious contempt for his failure to pay her the \$800.00 per month. He has paid no payments since the date of the Judgment.

6.

BERNADINE MCFALL OSBORNE requests a Judgment against JOSEPH S. MCFALL in the amount of the unpaid payments, and she further requests an award of attorney fees as sanctions for JOSEPH S. MCFALL'S failure to pay.

WHEREFORE, PREMISES CONSIDERED, BERNADINE MCFALL OSBORNE prays that upon the filing of this her Complaint for Contempt, that process will be issued to the defendant, as by law provided, commanding him to appear before the Chancery Court of Jackson County, Mississippi, then and there to answer or plead otherwise to the Complaint for and in the manner and time required by law; that upon a hearing hereon, this honorable Court will grant unto your plaintiff the relief prayed for herein.

Plaintiff further prays for general relief that in equity he may be entitled.

Respectfully submitted,  
BERNADINE MCFALL OSBORNE  
s/ Ottis B. Crocker, III  
OTTIS B. CROCKER, III, Attorney

STATE OF MISSISSIPPI  
COUNTY OF HARRISON

PERSONALLY appeared before me, the undersigned authority, in and for the aforesaid jurisdiction, BERNADINE MCFALL OSBORNE, who, after first being duly sworn stated on her oath that she is the plaintiff in the above styled Complaint and that all matters and things averred therein

are true and correct as stated.

s/ Bernadine McFall Osborne  
BERNADINE MCFALL OSBORNE

SWORN TO and SUBSCRIBED before me, this the 4  
day of May, 2022.

s/ Shannon Crocker  
NOTARY PUBLIC

My Commission Expires: 1/20/2023

State of Mississippi

Notary Public

ID # 53866

Shannon Foster

Crocker

Commission Expires

Jan. 30, 2023

Harrison County

Ottis B. "Chip" Crocker, III

MS Bar #8836

Crocker Law

1907 Pass Road

Suite B Biloxi, MS 39531

Telephone: (228) 233-3600

Facsimile: (228)233-3605

chip@obcrockerlaw.com



Counterclaim for Contempt against Bernadine. (Doc. 86).

As stated above, Bernadine's Complaint for Modification and/or for Clarification was filed May 20, 2020. (Doc. 82). In this particular Complaint, Bernadine references language found in the 2010 divorce judgment, wherein it stated, in pertinent part, as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, BERNADINE MCFALL, is entitled to and is hereby awarded a sum equal to one-half of all future military retirement payments received by the Defendant, JOSEPH S. MCFALL, including one-half of all cost of living increases....

(Doc. 44, p. 14).

The 2010 divorce judgment went on to address other real property and items of personal property, but this award to Bernadine of a portion of Joseph's military retirement payments is the main issue presently before this Court.

Joseph was a career military person. He was injured in approximately 2005 and was vested with a partial disability rating, which had been awarded by the military.

In entering his Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court, then-Chancellor Bordis acknowledged that he awarded Bernadine one-half of Joseph's military retirement so that "she will not lack any financial security" in the years following the divorce (Doc. 44, p. 13). The Court acknowledged that both parties at that time had comparable earning capacities and specifically found that with the award of a portion of Joseph's military retirement to Bernadine, neither party would thereafter be entitled to any form of alimony. (Doc. 44, pp. 13-14).

During the divorce hearing, Joseph was considered partially disabled and had separated from active military service. Joseph was then employed with the Mississippi Highway Patrol, a job he retained as of the date of the hearing held June 23, 2021. Joseph's income with the Mississippi

Highway Patrol has significantly increased, and his 8.05 Financial Statement reveals gross monthly income from the Mississippi Highway Patrol in the amount of \$5,857.65 and from his military/Veterans Administration disability income of \$2,044.18. After taking into account allowable deductions, Joseph's monthly adjusted gross income totals \$6,381.13.

Other than the payment of military benefits as discussed hereinabove, both parties have held each other to the terms of that Judgment.

### I.

The crux of the issue before this Court is whether the final divorce judgment, wherein Bernadine was awarded a portion of Joseph's military retirement, should be modified to take into account Joseph's increased disability rating and thus lower the monthly amount owed to Bernadine. The issue of military retirement and military disability as it pertains to divorce actions has been addressed by both the Mississippi Supreme Court and the United States Supreme Court. In *Mansell v. Mansell*, 490 U.S. 581 (1989), the United States Supreme Court held that federal law preempted state law in domestic relations matters when the question arose as to whether state courts may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits. Specifically, the Court held that "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594-95.

Several years later, the Mississippi Supreme Court, in *Mallard v. Burkart*, 95 So. 3d 1264 (Miss. 2012), faced the issue of federal preemption of state law in the division of military retirement and military disability in divorce actions. In this matter, Mallard and Burkart were divorced by way of a final divorce judgment with an incorporated property settlement agreement. *Id.* at 1266. Part of the terms of the agreement provided that forty percent (40%) of Mallard's

"disposable military retirement pay" was awarded to Burkart for ten years. *Id.* at 1267. However, sometime after the divorce judgment and property settlement agreement were entered, Mallard elected to adopt a sixty percent (60%) disability rating as part of his retirement pay. *Id.* Soon thereafter Mallard filed a modification petition in chancery court to lower his payments under the property settlement agreement to reflect the disability benefits election. *Id.* Burkart filed a counter petition, arguing Mallard had structured his military retirement to defeat the forty percent awarded to her pursuant to the property settlement agreement. *Id.* The chancery court ruled in favor of Burkart, finding that her interest in Mallard's total retirement pay, including disability benefits, vested as of the time of entry of the final divorce judgment and the properly-adopted and incorporated property settlement agreement. *Id.* at 1267-68.

However, the Mississippi Supreme Court reversed and remanded the ruling of the chancery court. In its analysis, the Court discussed the history of military retirement benefits, including disability benefits, and the interplay of such benefits in state law domestic matters. Ultimately, the Court found that "state law is preempted by federal law, and thus, state courts are precluded from ordering distribution of military disability benefits contrary to federal law." *Id.* at 1272. Further, the Court found the United States Supreme Court holding in *Mansell*, supra., applied, even though the "harsh reality of this holding is that former spouses.. .can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because [the military spouse] elects to increase his after-tax income by converting a portion of that pay into disability benefits." *Id.*

A few years later, the United States Supreme Court handed down its decision in *Howell v. Howell*, 137 S.Ct. 1400 (2017), wherein the Court was tasked with deciding whether a state court can order a military veteran to indemnify a divorced spouse for a loss in their portion of the veteran

spouse's retirement pay when the veteran spouse waived a portion of their retirement pay to receive disability benefits. The parties in this matter, John Howell and Sandra Howell, divorced in 1991 while John was still in the military. *Id.* at 1404. The divorce decree awarded Sandra fifty percent (50%) of John's future retirement pay "as her sole and separate property." *Id.* John retired from the military in 1992 and he began receiving military retirement, half of which went to Sandra pursuant to the divorce decree. *Id.* However, approximately 13 years later, John was found to be 20% disabled by the Department of Veterans Affairs for a service-related shoulder injury. *Id.* John elected to receive the disability benefits in lieu of a portion of his retirement, which resulted in a \$125.00 reduction in monthly payments to Sandra. *Id.* Sandra filed in the Arizona family court a request to enforce the terms of the divorce. *Id.* The Arizona court sided with Sandra, finding the "divorce decree had given Sandra a 'vested' interest in the prewaiver amount of that pay" and ordered that John make sure Sandra received the full fifty percent of his military retirement despite the disability. *Id.* Once the Arizona Supreme Court affirmed the lower court's decision, the matter ultimately came to the United States Supreme Court. In reversing and remanding the Arizona Supreme Court's decision, the United States Supreme Court held that Arizona's argument that the waivable portion had "vested" was invalid, as "[s]tate courts cannot 'vest' that which (under governing federal law) they lack the authority to give." *Id.* at 1405. The Supreme Court found that "while the divorce decree might be said to 'vest' Sandra with an immediate right to half of John's military retirement pay, that interest is, at most, contingent, depending for its amount on a subsequent condition: John's possible waiver of that pay." *Id.* at 1405-06. As for the lower courts requiring John to indemnify/reimburse Sandra, the Supreme Court held that "such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the

purposes and objectives of Congress. All such orders are thus pre-empted." *Id.* at 1406. Noting the "hardship that congressional pre-emption can sometimes work on divorcing spouses," the Supreme Court held that family courts are free to take into account the contingency of a possible military retirement waiver in favor of military disability. *Id.*

## II.

The cases described hereinabove stand for the proposition that military disability pay is exempt when it comes to division of assets, particularly military retirement, in divorce cases.

Making determinations of disability and/or retirement are matters beyond the ability of this Court to understand. It is unknown whether Joseph could elect to receive benefits as retirement and thus pay Bernadine one-half, or if he is obligated and required to accept his pension under the umbrella of disability and therefore defeat Bernadine from receiving the one-half envisioned by the trial court at the time of the divorce.

While this Court never had the opportunity to serve in active military service, it is well known that society owes a debt of gratitude to all who have served to defend the freedoms of this Country. This appreciation extends to Joseph as well.

In fairness to Bernadine, and the indirect service to our Country she provided by being married to Joseph and supporting him in all of his military endeavors, she was awarded income from this Court in the amount of "a sum equal to one-half of all future military retirement payments received by Joseph."

The question then becomes whether Joseph can defeat his obligation to his ex-wife of 29 years, who the Court, in its final divorce judgment, acknowledged that her receiving a portion of this military income would ensure that "she will not lack any financial security" moving forward.

## III.

"Equity will not suffer a wrong without a remedy." Griffith, *Mississippi Chancery Practice*, 2d Ed., 1950, § 35, p. 38. "Equity delights to do complete justice and not by halves." Griffith, § 37, p. 39. "[E]quity must follow the law." *Joel v. Joel*, 43 So. 3d 424,427 (Miss. 2010). "But where the law provides no remedy, equity may do so." *Id.*

#### IV.

This Court has performed exhaustive research on the issue presented in this matter. The cases of *Mansell*, *Mallard* and *Howell*, *supra.*, are relatively clear that military disability benefits received by a veteran spouse are exempt from being awarded to a non-military spouse in a divorce proceeding. This is based on the preemption of federal law over state law. The exemption extends to those benefits that were converted by the veteran spouse following a divorce decree from retirement to disability. However, the wording used by the prior chancellor who prepared and entered the final divorce judgment is key to the current Chancellor's ultimate decision in this matter. The prior chancellor ordered that Bernadine was entitled to and shall receive "a *sum* equal to one-half of all future military retirement payments received by the Defendant, JOSEPH S. MCFALL, including one-half of all cost of living increases..." (emphasis added). The case presently before this Court is distinguishable from earlier cases touching on this same subject. The prior chancellor did not award Bernadine a portion of Joseph's retirement in and of itself, as was the case in *Mallard* and *Howell*, *supra.*<sup>8</sup> Instead, the prior chancellor made it clear in his Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court entered February 12, 2010, that Bernadine needed and was

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<sup>8</sup> In *Mallard*, the property settlement agreement entered into by the parties stated as follows: "(D) Wife is awarded 40% of Husband's *disposable military pay* for ten (10) years unconditional..." (emphasis in original). In *Howell*, the parties' divorce decree awarded Sandra Howell, the non-military spouse, "as her sole and separate property FIFTY percent (50%) of John's military retirement when it begins." (emphasis in original).

entitled to financial support from Joseph. The measuring stick the prior chancellor used was Joseph's compensation from the military pursuant to the 8.05 Financial Statement submitted to the Court at that time. Further, the prior chancellor did not award Bernadine a portion of Joseph's military retirement but rather "a sum equal to one-half of his future military retirement payments. Whether this wording was used intentionally by the prior chancellor is unknown to this Chancellor. However, the wording is central to what sets this case apart from earlier cases addressing the issue of military retirement and disability payments in divorce matters. Here, the language used by the prior chancellor does not foreclose Bernadine's ability to collect on Joseph's military retirement but rather allows the parties to calculate an estimated amount of Joseph's retirement through the use of actuarial tables and the like. While the Court understands such calculations would very likely be time intensive and somewhat speculative, doing so would follow the intention of the prior chancellor of ensuring that Bernadine "will not lack any financial security" in the years following the divorce and ensure that the "harsh reality" mentioned by the Court in *Mallard, supra.*, does not come to fruition.

**It is therefore ORDERED, ADJUDGED AND DECREED** that Bernadine is entitled to an award of Eight Hundred Dollars and Zero Cents (\$800.00) per month from Joseph. These payments shall begin on December 1, 2021 and continue thereafter until further order of this Court.

**It is further ORDERED, ADJUDGED AND DECREED** that all other requests for relief of the parties not addressed hereinabove are hereby denied.

**SO ORDERED, ADJUDGED AND DECREED** on this the 22 day of Oct., 2021.

s/ Mark A. Maples  
CHANCELLOR MARKA. MAPLES

on disability, the VA will provide medical care for his IED injuries, as well as his knee.

MR. CROCKER: And that may well be true, but what that case is saying is that you waive you retirement benefits, as opposed to the VA saying, no, you can't get retirement benefits. You waive it, and you waive it for reasons, probably, as you suggest that benefit him and related to his medical disability.

But what we're asking the Court to do is to -- is to find a way to have him comply with Judge Bordis' order, any way that the Court can do it, because, obviously, Judge Bordis contemplate that he pay her some money out of his military retirement. In fact, he specifically addressed that in his -- in his decision not to award her any alimony. He said, Because of the equitable distribution situation with regard to him paying half of the military retirement, I'm not going to award alimony.

THE COURT: He wasn't drawing retirement at that time. He was drawing disability.

MR. CROCKER: Right. But it contemplated in the future that when he drew retirement, which he has now chosen not to do, that he pay her half . . . .

YULUNDAR D. MARSHALL, CSR, RPR

OFFICIAL COURT REPORTER

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Filed: 02/23/2024

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HEADQUARTERS US ARMY MEDICAL DEPARTMENT  
CENTER & SCHOOL AND FORT SAM HOUSTON  
FORT SAM HOUSTON, TEXAS 78234-5018

ORDERS 057-0106

26 February 2007

MCFALL, JOSEPH STEPHEN -8375 MSG MEDICAL  
R E T E N T I O N  
CTR,(W6CHM1) BROOKE  
ARMY MEDICAL CENTER,  
FORT SAM HOUSTON, TX  
78234-6200

You are released from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit your placement on the Temporary Disability Retired List.

Effective date of retirement: 02 March 2007  
Date placed on retirement list: 03 March 2007  
Retired grade of rank: MSG  
Authorized place of retirement: FORT SAME HOUSTON  
TC (W2DN1A) BROOKE  
ARMY MEDICAL CENTER,  
FORT SAM HOUSTON, TX  
78234-6200  
Requested place of retirement: N/A  
Percentage of disability: 30  
DOB: 03 March 1959  
Sex: M  
Retirement type and allotment: TEMP DISABILITY/8  
Component: USAR  
Statute authorizing retirement: 1372

Other eligible laws: 1202  
Disability retirement: 13 years, 3 month, 12 days  
Section 1405: 15 years, 3 months, 28 days  
Basic Pay: 25 years, 8 months, 20 days  
Computed over 4 years of active service as Enl or WO: Y  
Disability is based on injury or disease received in LOF as a  
direct Result of Armed Conflict or caused by instrumentality  
of war and incurred in the LOD during a war period as  
defined by law: No  
Member of an Armed Force on 24 Sep 75: No  
Significant awards: Not applicable  
18 year act Federal svc on 1 Nov 81: Not applicable  
HOR: BILOXI MS US  
Place EAD or OAD: BILOXI MS US  
MDC: 7BE7  
Additional instructions: a. You are authorized of  
household goods to home of  
selection. b. Dependents: Yes.

PEED: Not applicable  
Format: 610  
FOR THE COMMANDER:

\*\*\*\*\*  
\* OFFICAL \*  
\* USAMEDDC&S & FSH \*  
\*\*\*\*\*  
EARNEST C. BRIDGES  
CHIEF, HUMAN RESOURCES  
AND ADMINISTRATION

DISTRIBUTION  
MSG MCFALL (1)  
Cdr MEDICAL RETENTION CTR (W6CHM1) (1)  
CDR BAMC, ATTN MCHE-HRM-P (1)

EXHIBIT  
2(E)  
/s YDM

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Filed: 02/23/2024

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EXB # 2 ID  EVD   
County: JC  GRN  GEO   
Cause # 06-CV-1745-MAM  
Yulundar D. Marshall, CCR, RPR  
Date: 06/23/21

Case: 30CH1:06-cv-01745-MAM Document #: 86  
Filed: 01/27/2020

IN THE CHANCERY COURT OF  
JACKSON COUNTY, MISSISSIPPI

BERNADINE MCFALL OSBORNE PLAINTIFF

VERSUS CAUSE NO: 30CH1:06-cv-01745-MAM

JOSEPH S. MCFALL DEFENDANT

**ANSWER TO [82] COMPLAINT FOR  
MODIFICATION, AND/OR FOR  
CLARIFICATION AND COUNTERCLAIM  
FOR CONTEMPT**

COMES NOW Joseph S. McFall, by and through his attorney of record, William B. Atchison, and would answer the [82] Complaint For Modification, and/or for Clarification filed by the Plaintiff, Bernadine McFall Osborne, and would show as follows:

**FIRST DEFENSE**

The Complaint fails to state a claim upon which relief can be granted.

**SECOND DEFENSE**

The Plaintiff, Bernadine McFall Osborne, comes before the Court with unclean hands and is not entitled to the relief sought in the Complaint or to any relief whatsoever.

**THIRD DEFENSE**

Plaintiff, Bernadine McFall Osborne's claims are barred by the applicable statute of limitations.

**FOURTH DEFENSE**

The condition precedent to which Plaintiff seeks relief

for has not occurred.

### **FIFTH DEFENSE**

There has been no material and substantial change since the entry of the Final Judgment of February 12, 2010.

1. The allegations set forth in Paragraph 1 of the Complaint are admitted.
  2. The allegations set forth in Paragraph 2 of the Complaint are admitted.
  3. The allegations set forth in Paragraph 3 of the Complaint are admitted.
  4. Regarding Paragraph 4, it is admitted the parties were divorced February 12, 2010, and that the Findings of Fact and Conclusions of Law and Judgment states Plaintiff is awarded one-half of all future military retirement payments received by Defendant Joseph S. McFall. The remaining allegations set forth in Paragraph 4 of the Complaint are denied. Defendant, Joseph S. McFall, affirmatively states he has not received any military retirement. Defendant is and has been on the injured disability list since he separated from the military, on March 2, 2007. Joseph S. McFall did not choose his military separation. He was injured in the line of duty prior to the divorce and placed on the disabled list by the United States military.
  5. The allegations set forth in Paragraph 5 of the Complaint are denied.
  6. Regarding the last unnumbered paragraph beginning "Wherefore, Premises Considered..." of the prayer for relief, the Defendant would deny that the Plaintiff is entitled to the relief requested or to any relief whatsoever.
- AND NOW, having fully answered the Complaint paragraph by paragraph, the Defendant, Joseph S. McFall, prays that the same be dismissed and all costs thereof assessed against the Plaintiff, and the Defendant files this Counterclaim for Contempt, and in support thereof, would

show as follows:

**COUNTERCLAIM FOR CONTEMPT**

Comes now, Joseph S. McFall by and through his attorney of record, William B. Atchison, and would file this Counterclaim for Contempt, against Plaintiff/Counter-Defendant, Bernadine McFall Osborne, and would show as follows:

I.

Joseph S. McFall is an adult resident citizen of Harrison County, Mississippi.

II.

Bernadine McFall Osborne is an adult resident citizen of Jackson County, Mississippi, and may be served with process in the form and manner provided by law.

III.

This Court has jurisdiction of the subject matter and the parties in this cause of action.

IV.

Counter-Defendant, Bernadine McFall Osborne is in contumacious contempt of this Court's [44] *Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court* page 14, by her willful, repeated, failure to timely satisfy the indebtedness owing on the marital home and real estate, and by failing to hold Joseph S. McFall harmless as to the indebtedness. Exhibit "A" attached hereto is a copy of said Judgment. Exhibit "B" attached hereto is a copy of the mortgage statements.

V.

Counter-Defendant, Bernadine McFall Osborne is in willful, contumacious contempt of this Court's Judgment and should be so adjudicated and if the Court deems appropriate in the circumstances incarcerated in jail until she purges herself of contempt.

VI.

WHEREFORE, PREMISES CONSIDERED, Joseph

S. McFall prays that this Answer to [82] Complaint for Modification and/or for Clarification and Counterclaim For Contempt, be received and filed and process be served upon Counter-Defendant, Bernadine McFall Osborne requiring her to answer or plead to the Counterclaim For Contempt, and that the Court will set the matter for hearing at its earliest convenience, and upon hearing, enter an Order finding Counter-Defendant, Bernadine McFall Osborne in contemptuous contempt of this Court's Judgment. Joseph S. McFall further requests that the Court assess all costs and reasonable attorney's fees unto Bernadine McFall Osborne and he prays for such other, further and/or more general relief to which he may be entitled.

Respectfully submitted this 27<sup>th</sup> the July day of, 2019  
s/ Joseph S. McFall  
JOSEPH S. MCFALL

STATE OF MISSISSIPPI  
COUNTY OF HARRISON

PERSONALLY CAME AND APPEARED BEFORE ME the undersigned authority, JOSEPH S. MCFALL, who by me being first duly sworn, does hereby state on oath that the facts, matters and allegations contained in the above and foregoing document are true and correct to his knowledge and belief.

s/ Joseph S. McFall  
JOSEPH S. MCFALL

SWORN TO AND SUBSCRIBED BEFORE ME on this the 27 day of July, 2020.

s/ Yvonne D. Ray  
NOTARY PUBLIC  
State of Mississippi  
Yvonne D. Ray  
Notary Public  
ID No. 55759  
Commission Expires

April 12, 2023  
Harrison County

Prepared by:  
s/ William B. Atchison  
WILLIAM B. ATCHISON  
Atchison Law Firm, PLLC  
MS Bar No. 9774  
1092 Acadian Dr., Suite 1  
Gulfport, MS 39507  
Telephone (228) 875-1234  
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Filed: 05/19/2020

Document #: 82

FILED  
MAY 19, 2020  
JOSH ELDRIDGE, CLERK  
By s/ Angie Miller

**IN THE CHANCERY COURT  
OF JACKSON COUNTY, MISSISSIPPI**

**BERNADINE MCFALL OSBORNE                      PLAINTIFF**

**VERSUS    CAUSE NO.: 2006-1745MM**

**JOSEPH S. MCFALL                                      DEFENDANT**

**COMPLAINT FOR MODIFICATION  
AND/OR FOR CLARIFICATION**

COMES NOW, BERNADINE MCFALL OSBORNE and files this, her Complaint for Modification, and/or for Clarification 'against JOSEPH S. MCFALL, and for cause would show unto the Court as follows:

1.

BERNADINE, MCFALL OSBORNE is an adult resident citizen of the State of Mississippi.

2.

JOSEPH S. MCFALL is an adult resident citizen of the First judicial District of Harrison County, State of Mississippi whose street and post office address is 10323 Butter Road, Gulfport, Mississippi 39503 where he may be personally served With process.

3.

The Court has continuing jurisdiction in this matter.

4.

The parties were divorced by this Court February 12, 2010. In the Findings of Fact, and Conclusions of Law, and Judgment the Court ordered in pertinent part that BERNADINE MCFALL OSBORNE would be entitled to receive "a sum equal to one-half of all fixture military retirement payments received by Defendant, JOSEPH S. MCFALL including one half of all cost of living increases." (page 14). The Court specifically notes in the Judgment that because she is receiving this benefit "she will not lack financial security." (page 13). In doing so he denied other spousal support.

5.

Based on information and belief, JOSEPH S. MCFALL left the military in 2006. When he left the military, he had his future benefits deemed as disability benefits, and not retirement benefits.

6.

In doing so he thwarted the Judge's ruling and left BERNADINE MCFALL OSBORNE without the financial security contemplated by the Court's Judgment. Accordingly, BERNADINE MCFALL OSBORNE requests that the Court modify the support obligation to provide that JOSEPH S. MCFALL pays her, her one-half share of the benefits as contemplated by the Court. This can be accomplished either by deeming it spousal support, or by clarification that the language of "a sum equal to one-half of all future military payments" means that he has to pay her the benefits he would receive based on his separation/retirement from the military. In either case she requests that the payments be retroactive to his date of separation from the military.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that upon the filing of this her Complaint for Modification, and/or Clarification that process will be issued

to the defendant, as by law provided, commanding him to appear before the Chancery Court of Jackson County, Mississippi, then and there to answer or plead otherwise to the Complaint for and in the manner and time required by law; that upon a hearing hereon, this honorable Court will grant unto your plaintiff the relief prayed for herein.

Plaintiff further prays for general relief that in equity she may be entitled.

Respectfully submitted,  
s/ Bernadine McFall Osborne  
BERNADINE MCFALL OSBORNE

s/ Ottis B. Crocker, III  
OTTIS B. CROCKER, III, Attorney

STATE OF MISSISSIPPI  
COUNTY OF HARRISON

PERSONALLY appeared before me, the undersigned authority, in and for the aforesaid jurisdiction, BERNADINE MCFALL OSBORNE, who, after first being duly sworn stated on her oath that she is the plaintiff in the above styled Complaint and that all matters and things averred therein are true and correct as stated.

s/ Bernadine McFall Osborne  
BERNADINE MCFALL OSBORNE

SWORN TO and SUBSCRIBED before me, this the 15 day of May, 2020.

s/ Shannon Crocker  
NOTARY PUBLIC  
My Commission Expires: 1/20/23

State of Mississippi  
Notary Public  
ID # 53866  
Shannon Foster Crocker  
Commission Expires

Jan. 30, 2023  
Harrison County

Ottis B. "Chip" Crocker, III  
Crocker Law  
1907 Pass Road, Suite B  
Biloxi, MS 39531  
(228) 233-3600  
Bar #8836

IN THE CHANCERY COURT OF  
JACKSON COUNTY, MISSISSIPPI

JOSEPH S. McFALL PLAINIFF

VS NO.2006-1745CB

BERNADINE McFALL OSBORNE DEFENDANT

**FILED**  
FEB 12 2010  
MB 735 PG 26296  
**TERRY MILLER CLERK**  
By: /s Angie Miller

**FINDINGS OF FACT, CONCLUSIONS OF LAW**  
**RULING AND JUDGMENT OF THE COURT**

THIS CAUSE came on for trial on August 18, 2009, and February 1, 2010, with both parties appearing in court and being represented by legal counsel and the Court, after reviewing the file and considering evidence and testimony on behalf of each party, does hereby enter its Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court as follows:

I.

**PROCEDURAL HISTORY**

This action was commenced with the filing of a Complaint for Divorce by BERNADINE MCFALL on August 21, 2006. In her Complaint she alleged that she was entitled to a divorce of and from JOSEPH S. MCFALL on the grounds of Adultery, Habitual Cruel and Inhuman Treatment, or in the alternative, Irreconcilable Differences. She requested lump-sum, periodic, and transitional alimony as well as one-half of the Defendant's retirement account. Finally, she sought reimbursement of her attorney's fees. On February 26, 2008,

BERNADINE MCFALL filed an Amended Complaint for Divorce whereby she alleged that she was entitled to a divorce of and from JOSEPH S. MCFALL on the grounds of Adultery, Habitual Cruel and Inhuman Treatment, or in the alternative, Irreconcilable Differences. In the Amended Complaint, she sought exclusive use and possession of the marital home and household furnishings located at 3200 N. 10<sup>th</sup> Street, Ocean Springs, Mississippi. In the alternative, she asserted that she was entitled to and should be awarded an equitable share of the value of the marital home. Again she sought lump-sum, periodic, and transitional alimony, as well as, an equitable share of the Defendant's retirement account. She also sought a division of personal property. On August 15, 2008, a Judgment of Divorce was entered by Chancellor D. Neil Harris, Sr.; however, an Order setting aside the August 15, 2008, Final Judgment of Divorce was entered on March 4, 2009. Subsequently, JOSEPH S. MCFALL filed an Answer and Counterclaim on April 24, 2009. He denied that BERNADINE MCFALL was entitled to the relief being sought. He claim that he is entitled to a divorce of and from BERNADINE MCFALL on the grounds of Adultery, Habitual Cruel and Inhuman Treatment, Wilful, Continued and Obstinate Desertion for the Space of One Year, or in the alternative, on Irreconcilable Differences. Mr. McFall seeks an equitable distribution of the marital estate and debts, as well as attorney's fees. The parties were married on May 2, 1980, and they separated on or October 20, 2004. Prior to the trial on February 1, 2010, the parties executed a Consent to a Divorce on Grounds of Irreconcilable Differences and Permission for the Court to Decide The Issues Upon Which The Parties Cannot Agree. This document was signed by both parties and contained the following stipulations:

- (1) The Court should grant a divorce to the parties on the grounds of Irreconcilable Differences;
- (2) Neither party should be required to pay to the other

any sum as attorney's fees and/or litigation expenses;

(3) All children born of the marriage are beyond the age of majority and there are no issues regarding child custody, visitation, or child support to be paid.

The document also submitted the following issues to the Court for adjudication;

(A) The parties desire that the Court equitably divide all the marital assets and liabilities of the parties accumulated during the marriage of the parties. As part of the division of the marital assets and liabilities, the parties agree that the Court can decide whether or not any particular assets or liability constitutes a marital asset or liability.

(B) Whether any party shall be required to pay to the other party any sums as alimony.

This document was executed by the parties pursuant to Mississippi Code Annotated §93-5-2(3) and Massingill v. Massingill, 594 So.2d 1173 (Miss. 1992).

Both parties meet the residency requirements necessary for this Court to exercise personal and subject matter jurisdiction as both were residents of Jackson County, Mississippi, for more than six (6) months prior to the filing of the Complaint for Divorce. The Court finds that the marriage of the parties herein is irretrievably broken and they should be granted a divorce. Therefore, BERNADINE MCFALL and JOSEPH S. MCFALL are hereby granted a divorce, each from the other, on the statutory grounds of Irreconcilable Differences and the bonds of matrimony existing between the parties are hereby set aside, cancelled, and held for naught. All pleadings which contest the divorce being granted, as well as, all contested grounds pled are withdrawn. Two (2) children were born of the marriage, namely, Joseph M.L. McFall, a male child born on October 5, 1979, and Anthony S. McFall, a male child born March 3, 1981. Both children have obtained the age of majority and are emancipated. Therefore, there are no issues of child support, custody or visitation to be adjudicated.

## II.

### EQUITABLE DISTRIBUTION

The Mississippi Supreme Court has pronounced the law of dividing marital assets subsequent to a divorce. The process this Court must follow is described as follows: “Division of marital assets is now governed under the law as stated in Hemsley v. Hemsley and Ferguson v. Ferguson.” First, the character of the parties assets, i.e., marital or nonmarital, must be determined pursuant to Hemsley. The marital property is then equitably divided, employing the Ferguson factors as guidelines, in light of each party’s non-marital property. If there are sufficient marital assets which, when equitably divided and considered with each spouse’s non-marital assets will adequately provide for both parties, no more need be done. If the situation is such that an equitable division of marital property considered with each party’s non-marital assets leaves a deficit for one party, then alimony based on the value of the non-marital assets should be considered. This process does not require divestiture of inherited or gift-acquired non-marital property. Johnson v. Johnson, 650 So.2d 1281 (Miss. 1994). In Hemsley v. Hemsley, 639 So.2d 1281 (Miss. 1994), the Court held that assets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown by proof that such assets are attributable to one of the party’s separate estates prior to the marriage or outside of the marriage. Further, the Court opined that we define marital property for the purposes of divorce as being any and all property acquired or accumulated during the marriage. Assets so acquired during the court of the marriage are marital assets and are subject to equitable distribution by the Chancellor. We assume for divorce purposes that the contributions and efforts of the marital partners whether economic, domestic or otherwise are of equal value.

Finally, once the nature of the asset is determined, subject to distribution or not, the Court must then equitably

divide the marital estate as follows:

Although this listing is not exclusive, the Court suggests that Chancery Courts consider the following guidelines where applicable, when attempting to affect the equitable distribution of marital property.

(1) Substantial contribution to the accumulation of property. Factors to be considered in determining contribution is as follows:

A) Direct or indirect economic contribution to the acquisition of the property;

B) Contribution to the stability and harmony of the marital family relationships as measured by quality, quantity of time spent on family duties in the duration of he marriage; and,

C) Contribution to the education, training and other accomplishments bearing on the earning power of the spouse accumulating the assets.

(2) The degree of which each spouse has expended, withdrawn or otherwise exposed the marital assets in any prior distribution of such assets by agreement, decree or otherwise;

(3) The market value and emotional value of the assets subject to distribution;

(4) The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought into the marriage by the parties and property acquired by inheritance or inter vivos gifts by or to an individual spouse;

(5) Tax and other economic consequences, and contractual or legal consequences to third parties of the proposed distribution;

(6) 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;

(7) The needs of the parties for financial security with

regard to the contribution, assets, income, and earning capacity;

(8) Any other factor which in equity should be considered. Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994).

It is important to keep in mind that divorcing parties have no right to equal distribution even when the parties jointly accumulated the property. Pierce v. Pierce, 648 So.2d 523 (Miss. 1994). Further, Mississippi is not a community property state.

The disputed items of personal and real property as represented to the Court by the parties include the following:

- (1) 2003 Ford Expedition;
- (2) 1995 boat, motor and trailer;
- (3) 2007 Suzuki motorcycle;
- (4) Coin collection;
- (5) Bernadine's retirement account;
- (6) 2005 Chevrolet Impala;
- (7) Guns;
- (8) Washer and dryer;
- (9) Bedroom set with dresser;
- (10) Table and chairs with china cabinet;
- (11) Joseph's military retirement;
- (12) Joseph's disability payments; and
- (13) The real estate and improvements which constitute the marital home situated at 3200 N. 10<sup>th</sup> Street, Ocean Springs, Mississippi.

The Complaint for Divorce was filed on August 21, 2006. On the date of filing, there was no remaining spark left in the marriage. Prior to the filing, the parties started the process of living separate lives. Each party acquired assets subsequent to the date upon which the Complaint was filed. The acquisition of the assets resulted from purchases solely with funds earned by the parties subsequent to the filing. In this case, the Court finds that August 21, 2006, is the point of demarcation with respect to the parties and their estates. See

Godwin v. Godwin, 258 So.2d 384 (Miss. 1999).

Joseph obtained the 2007 Suzuki and 1995 Impala after the Complaint was filed and Bernadine obtained the 2005 Chevrolet Impala after the Complaint was filed. These items of personal property are deemed non-marital assets. The remaining assets are deemed marital assets which are subject to an equitable distribution.

The martial home which is situated at 3200 N. 10<sup>th</sup> Street, Ocean Springs, Mississippi has a value of \$166,000.00 pursuant to the appraisal which was offered into evidence. The outstanding balance of the loan which serves as a lien upon the property amounts to \$99,000.00. Therefore, the parties have accumulated \$67,000.00 equity in the home.

The account maintained by JOSEPH S. MCFALL at the Mississippi Highway Safety Patrol Federal Credit Union amounted to \$110,129.00 on the date the Complaint was filed. Joseph shall retain the balance of this account.

Subsequent to the filing of her Complain for Divorce, Bernadine withdrew her retirement of more than \$12,000.00. The retirement account had been accumulated during the marriage and constituted a marital asset. The sum of slightly more than \$12,000.00 was actually the amount received by Bernadine after penalties and taxes were withheld.

The Financial Declaration of Bernadine does not list the items of furniture. Joseph's Financial Declaration lists the value as \$5,000.00. The Court accepts the \$5,000.00 value placed upon the items by Joseph.

Joseph has a Public Employee Retirement System (PERS) account which is based upon his years of service with the Mississippi Highway Patrol. The account has a value of \$2,400.00. The account is a marital asset. As part of the equitable distribution of marital assets, JOSEPH S. MCFALL, shall pay the sum of \$2,400.00 to Bernadine within sixty (60) days.

### III. ALIMONY

With regard to the issue of spousal support in the form of alimony, this Court has reviewed the legal authorities and the factors to be considered as follows:

- (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; and
- (12) Any other fact deemed by the Court to be just and equitable in connection with the setting of support. Hammonds v Hammonds, 597 So.2d 653 (Miss. 1992), Brabham v. Brabham, 226 Miss. 165, 84 So.2d 147 (1955).

JOSEPH S. MCFALL is fifty-two (52) years of age, while BERNADINE MCFALL is fifty (50) year of age. JOSEPH S. MCFALL received an injury while serving in the military in Iraq. He currently receives a disability payment which result from his injuries. The injuries received in Iraq did not prohibit JOSEPH S. MCFALL from being employed by the Mississippi Highway Patrol. Other than the injury suffered in Iraq, JOSEPH S. MCFALL appears to be in good health. BERNADINE MCFALL appears to be in good health with no testimony or evidence which indicated she suffered

from any illness or infirmity. She is a registered nurse and is capable of working. She was previously employed by Gulfport Memorial Hospital until September of 2009. She is currently working for Nurse Management Services on a part-time basis; however, Bernadine states that she will soon return to employment as a registered nurse. Bernadine's sole source of income at this time amounts to earning from employment. She has testified that with her earnings she is able to satisfy the monthly house note, utilities, and other expenses without assistance from JOSEPH S. MCFALL. JOSEPH S. MCFALL's income is derived from disability payments that he receives in the sum of \$1,400.00 per month, in addition to salary and wages earned through his employment with the Mississippi Highway Patrol. Mr. McFall currently has a net monthly income of \$3,836.29. He is able to meet all of his monthly expenses. BERNADINE MCFALL has the ability to earn a net monthly pay of \$3,366.92 when employed as a registered nurse. With that income, she is able to satisfy all of her monthly expenses. The parties have been married for twenty-nine (29) years which is considered a lengthy marriage. As previously stated, the children born to the marriage have been emancipated by age and are self-sufficient. Neither party is burdened with the expense of a minor child in the home. The Court finds that both are guilty of misconduct during the marriage. The bank account of JOSEPH S. MCFALL exceeded \$100,000.00 at times during the marriage. He was unable to provide the Court with a legitimate explanation for the use of these funds. He claims that his brother provided him with substantial funds to hold in trust while he began an electrical business. JOSEPH S. MCFALL was unable to provide any documentation as proof of how the funds were expended. Therefore, the Court finds that Mr. McFall dissipated assets. The parties are able to meet their monthly needs with income earned. Mrs. McFall testified that she was able to meet her monthly needs without assistance from Mr. McFall. Based upon the above and

foregoing and after consideration of the equitable division of assets made herein, the Court concludes that neither party should be required to pay the other any form of spousal support. The Court has also considered whether not either party should be entitled to lump-sum alimony. The factors for lump-sum alimony are:

(1) Substantial contribution to accumulation of the total wealth of the other party or either by quitting a job to become a housewife or by assisting the spouse's business. Tutor v. Tutor, 494 So.2d 362;

(2) A long marriage, Jankins v. Jankins, 278 So.2d 446 (Miss. 1973);

(3) Where recipient spouse has no separate income or the separate estate is meager by comparison;

(4) Without the lump-sum award, the receiving spouse would lack any financial security. Abshiare v. Abshiare, 459 So.2nd 802 (Miss. 1984);

A closer analysis of these cases reveals that the single most important factor in determining lump-sum is undoubtedly the disparity of the separate estates. See Cheatham v. Cheatham, 537 So.2d 435 (Miss. 1998).

The Court finds that neither party is entitled to lump-sum alimony. The equitable division of the marital assets as set forth herein leaves each with comparable estates. Furthermore, with Bernadine receiving one-half of the military retirement of Joseph in years to come, she will not lack any financial security. The two parties also have comparable earning capacities. The Court has also considered rehabilitative or transitional alimony. Rehabilitative or transitional alimony is focused on providing interim assistance to allow a party a fresh start and not judicially redistribute assets. Rehabilitative alimony is not intended as an equalizer between the parties but is for the purpose of allowing the less able party to start anew without being destitute in the interim. See Carnathan v. Camathan, 722 So.2d 1248 (Miss. 1998). Since the parties have comparable

earning capacities and comparable estates after an equitable division of assets, the Court finds that neither is entitled to rehabilitative or transitional alimony.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the parties are granted a divorce, each and from the other, on the grounds of Irreconcilable Differences.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, BERNADINE MCFALL, shall be entitled to and is hereby awarded exclusive, use, possession and ownership of the marital home and real estate situated at 3200 N. 10th Street, Ocean Springs, Mississippi, free and clear of any claim of the Defendant, JOSEPH S. MCFALL. The Plaintiff, BERNADINE MCFALL, shall be solely responsible for timely satisfying the indebtedness owing on the marital home and real estate together with taxes and insurance and shall hold the Defendant, JOSEPH S. MCFALL, harmless as to the same. The Defendant, JOSEPH S. MCFALL, shall execute a good and valid Quitclaim Deed conveying all of his right, title and interest in and to the marital home and real estate to the Plaintiff, BERNADINE MCFALL, within ten (10) days from the date of this Judgment. The Plaintiff, BERNADINE MCFALL, shall make a good-faith effort to refinance the indebtedness owing on the marital home and real estate within one (1) year from the date of this Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, BERNADINE MCFALL, is entitled to and is hereby awarded a sum equal to one-half of all future military retirement payments received by the Defendant, JOSEPH S. MCFALL, including one-half of all cost of living increases. Each party shall be responsible for taxes on their respective shares of the military retirement accounts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, BERNADINE MCFALL, is entitled to and is hereby awarded exclusive use, possession

and ownership of the 2005 Impala and she shall be responsible for satisfying any indebtedness owing thereon.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, JOSEPH S. MCFALL, is entitled to and is hereby awarded exclusive, use, possession and ownership of the 2007 Suzuki motorcycle, 2003 Ford Expedition and 1995 boat, motor and trailer.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party is entitled to any form of alimony.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that with the exception of the Defendant's military retirement, each party shall be entitled to the use and ownership of their bank accounts, savings accounts, pension plans, 401(k) accounts, disability payments, and retirement accounts, free and clear of any claim of the other. The Defendant, JOSEPH MCFALL, shall be entitled to his disability payments resulting from personal injuries received during his service. The Plaintiff, BERNADINE MCFALL, shall be entitled to her retirement funds that were withdrawn by her.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant shall pay unto the Plaintiff the sum of \$2,400.00 within sixty (60) days from the date of this Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that BERNADINE MCFALL shall be entitled to the use, possession and ownership of the washer, dryer, bedroom set with dresser, table and chairs, china cabinet and any computer in her possession.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that JOSEPH S. MCFALL shall be entitled to the use, possession and ownership of the coin collection, guns and his computer. In the event that BERNADINE MCFALL shall locate any coin collection or guns, she shall immediately return the same to JOSEPH S. MCFALL.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each shall be responsible for their own debts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Findings of Fact, Conclusions of Law, Ruling and Judgment shall constitute the Final Judgment of the Court. The time for filing post-trial motions and/or appeals shall be calculated from the date of this Judgment.

SO ORDERED, ADJUDGED AND DECREED this the 12<sup>th</sup> day of February, 2010.

s/ G. Charles Bordis, IV  
CHANCELLOR