

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

**NO. 2006-TS-01283**

**DENIS FARIS CARLSON**

**APPELLANT**

**VERSUS**

**KATHRYN MYRA MATTHEWS (CARLSON)**

**APPELLEE**

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Appeal from the Chancery Court of Harrison County, Mississippi

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**BRIEF OF APPELLEE**

WOODROW W. PRINGLE, III  
MSB NUMBER: [REDACTED]  
2217 PASS ROAD  
GULFPORT, MS 39501  
(228) 868-8355 (PHONE)  
(228) 868-8433 (FAX)

## 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 representatives are made in order that the Court may evaluate possible disqualification or recusal:

1     *Appellant:*

Denis Farris Carlson

2.     *Appellees:*

Kathryn Myra Matthews Carlson

3.     *Attorneys for Appellants:*

James F. Thompson, Esq.  
1904 22nd Avenue  
Gulfport, MS 39501  
228-864-0233


G. Eric Geiss, Esq.  
P. O. Box 593  
Gulfport, MS 39502  
228-863-5329

4.     *Attorney for Appellee:*

Woodrow W. Pringle, III, Esq.  
2217 Pass Road  
Gulfport, MS 39501  
228-868-8355

5.     *Lower Court Judge:*

Hon. Carter O. Bise  
Harrison County Chancery Court Judge  
P. O. Box 1542  
Gulfport, MS 39502

  
\_\_\_\_\_  
WOODROW W. PRINGLE, III

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### **ORAL ARGUMENT**

The Appellee does not request oral argument.

### **SUMMARY OF THE ARGUMENT**

The Appellant waived any alleged defect in process.

The QDRO was entered to secure payment of child support and not to give Kathy an interest in a retirement benefit that she waived during the divorce.

## FACTS

The parties were divorced by decree entered May 25, 1993. (SRE 1-20). Pursuant to the decree, Denis was ordered to pay Kathy child support for the parties' three children, provide medical insurance and pay the deductible amounts not paid by insurance. Subsequently, Kathy filed a Motion for Contempt and Modification and Denis filed an Answer. A Judgment was entered July 6, 2001. (SRE 11-15). Denis was found in arrears in payment of medical bills. The Court also modified the child support amount, increasing same.

November 14, 2001, Kathy filed a Motion seeking to attach funds of Denis in order to secure payment of future child support. (SRE 16-17). November 29, 2001, Denis filed a Motion for Modification seeking to terminate or reduce his child support. (SRE 18-19). December 10, 2001, Kathy filed an Answer to Denis's Motion and filed a Counter Claim alleging Denis had failed to pay certain sums required under the previous Orders of the Court and requesting that he be held in contempt and certain funds of Denis be seized to ensure payment of the sums owed and future costs. February 13, 2002, Kathy filed a Motion alleging that Defendant had received \$33,000.00 and failed to pay his obligations to the children. (SRE 20-21). The Motion also alleged that he had retirement benefits valued at \$234,000.00 available to meet his obligations. Kathy requested that a lien be impressed against the retirement benefits to ensure payment of all sums owed by Denis, past, present and future.

May 28, 2002, the matter came before the Court upon Denis's Motion for Modification, Kathy's Answer and Counter Claim and Kathy's Motion to impress lien upon retirement benefits. A Judgment was entered September 4, 2002. (SRE 22-26). The Court found Denis in contempt and found he had an opportunity to receive a lump sum payment in excess of \$2000,000.00. The Court directed that Denis exercise his option to fulfill his obligations, both

past and future, or he should be required to show cause as to why he should not be incarcerated. The Court determined Kathy was entitled to a Judgment and ordered that the Judgment be served upon Bell South and be impressed as a lien against Denis's retirement benefits. The Court held the punishment for contempt in abeyance pending Denis's cooperation and performance to see that the Judgment was fulfilled.

October 18, 2002, Kathy filed a Motion alleging that Mr. Carlson had not complied with the Court's Judgment. (SRE 27-28). Kathy requested that a Qualified Domestic Relations Order be entered. January 17, 2003, Kathy filed a Motion seeking to enforce the contempt findings by the Court. (SRE 32). Even though the Qualified Domestic Relations Order had been entered, Bell South did not honor same. Kathy filed a Motion March 10, 2003, seeking to require Bell South to enforce the Orders of the Court. (SRE 33-34). November 25, 2003, Kathy filed a Motion seeking a Judgment against Denis for all amounts owed under the previous Orders of the Court and finding that he be held in contempt and she be awarded attorney fees. (SRE 35-36). February 11, 2004, counsel for Denis forwarded to the Chancellor an authorization for release of information, a proposed Judgment and proposed Qualified Domestic Relations Order. (SRE 37-38).

March 16, 2004, a Judgment was entered. The Judgment (SRE 39-41). reflects a hearing was conducted February 4, 2004. The Judgment indicates that the Appellee, her counsel, the Appellant, and his two counsel were present. The Court determined that Denis was in arrears in payment of child support and interest in the sum of \$34,319.61 and that attorney fees in the sum of \$5,000.00 should be awarded. The Court directed that a Third Amended Qualified Domestic Relations Order be issued to Bell South to pay the sums owed and to ensure payment of future

sums by Denis. The future sums were to be deposited into the registry of the court and paid on a monthly basis to Kathy. (Denis did not appeal the Order nor did he file a post trial motion.)

Judgment was entered June 15, 2006. (SRE 42-43). The Judgment provided that the Motion filed by Denis to reconsider the \$5,000.00 attorney fees was denied. Further, Kathy was awarded additional judgment against Denis in the sum of \$5,579.00. The Court also directed that the taxes paid by Kathy as a result of receiving the retirement benefits would not be credited against Denis's child support obligation. Denis filed a Notice of Appeal July 10, 2006, appealing the Judgment entered June 6, 2006. (SRE 44).

During a hearing conducted May 28, 2002, Denis's deposition was admitted as evidence. During the hearing, Denis's counsel argued that the Court should consider the deposition for purposes of determining that Denis had lost his job but did not have the ability to pay his support. Counsel argued, "The deposition's in, he's in, she testified, there is testimony. And I think the Court needs to look at it. I disagree that there is nothing in the record. There is." (SRE 58). Included in the deposition were the following provisions: (SRE 46-49).

- Q. Your retirement benefits from Bell South are separate from your 401K, aren't they?
- A. Yes sir.
- Q. What's the status of your 401K?
- A. I took it out.
- Q. How much was in there?
- A. It was \$44,000.00. After penalty and taxes it was \$33,000.00.
- Q. When did you take it out?
- A. November, about the first week in November.
- Q. When's the last time that you paid child support to Kathy Matthews?
- A. September, I believe.
- Q. And do you know what your retirement benefit will be?
- A. Not right now I don't. I know as of December of 2000 it was going to be \$234,000.00.

Between January 2002 and approximately January 2004, Denis left the state of Mississippi without any communication with the children or Kathy. A hearing was conducted

February 4, 2004. Present were Kathy and her counsel, Denis and his counsels. During this hearing, counsel for Denis argued that neither he nor Denis were present at the last hearing and that they just learned of the Order entered thereafter. However, the Court found that at the last hearing the Court proceeded on Denis's Motion for Modification and the Answer and Counter Claim filed by Kathy. It was set for hearing and continued by agreement of counsel twice. Counsel for Denis was present at the hearing and stated that the date was set by the lawyers' offices. The Court determined Denis was present through his counsel. Denis moved to Idaho in the beginning of 2002. He resided in Idaho most of the calendar year 2003. He withdrew \$33,000.00 from his 401K but did not pay child support. He received a total of \$53,000.00 from Bell South. From that \$53,000.00, Denis paid no child support. Denis also "checked into" cashing his retirement with Bell South. He learned there was a lien against his account which prohibited him from cashing his retirement. The account had at least \$200,000.00 in it. Denis knew of the lien against his retirement account approximately one year prior to the February 4, 2004, hearing. After hearing the evidence, the Court determined that another Amended Qualified Domestic Relations Order would be entered setting out the current arrearage and interest in child support and unpaid medical expenses. The Court also determined that future child support should be determined through Cory's 21<sup>st</sup> birthday. The Court ordered that the retirement funds be paid into the registry of the Court to pay the arrearage and to ensure future payment of child support. The Court directed that the funds be paid into the registry of the Court because of Denis's decision to leave the state of Mississippi for two years and while he was earning income, made no payments. (SRE 70-71).

## ARGUMENT

March 16, 2004, Judgment was entered determining that Denis was in arrears in payment of child support in the sum of \$34,319.61. Denis and his two counsel were present during the hearing. While Denis argues that other Qualified Domestic Relations Orders were entered without notice to him, the March 16, 2004, Judgment was entered with Denis present. The Court directed that a Third Qualified Domestic Relations Order be issued to BellSouth. It is this Order that ultimately lead to the payment of the sums into the registry of the Court. No other Qualified Domestic Relations Orders were effective nor did BellSouth obey same. Denis did not file an appeal with this Court nor did he file a post trial motion. As a result of Denis's failure to appeal the Judgment or to file a post trial motion, the March 16, 2004, Judgment is *collateral estoppel*, *Smith v. Malouf*, 826 So.2d 1256 (Miss. 2002) as to any issues Denis attempts to now raise with this Court concerning entry of the Qualified Domestic Relations Order. Appellate courts are not required to address issues that are not objected to at trial and preserved for appeal. An Appellant may waive the opportunity to relitigate any issues regarding the validity of the Divorce Judgment by failing to appeal the Judgment. *Chasez v. Chasez*, 2004-CP-01956-COA (February 13, 2007).

Denis and his counsel were present for the hearing conducted February 4, 2004, the basis for the March 16, 2004, Judgment. Any objections to service of process may be waived if an individual appears in an action without raising the objection in the initial pleadings. *Chasez*, supra; *Bailey v. Fischer*, 946 So.2d 404 (Miss. 2006). Denis did not raise the issue of process in his Motion for Modification upon which the Court proceeded during the February 2004 hearing. Denis was also present and did not waive the issue of service of process.

In the event this Court determines that it will consider the issues raised by Appellant, the only relevant issue is whether or not the Court had the authority to enter a QDRO in order to

enforce Denis's past, present and future child support obligations. There is no doubt that Denis failed to pay child support as ordered. Further, Denis left the state of Mississippi for a period of two years without any contact with the children or Kathy. The proof establishes that Denis cashed in his 401K account and attempted to cash in his retirement account with BellSouth. But for the lien placed on the BellSouth retirement account by the Court, Denis would have obtained these funds while living out of state. The proof establishes that the Court had the basis to try to find a remedy in order to enforce Denis's child support obligations. The issue is whether or not the QDRO was the proper remedy.

Appellant's citation of authority answers this question. 29 U.S.C. § 1056 (d)(3)(B)(ii) (1974) provides that a QDRO may be entered pursuant to the state domestic relations law in *relate to provision of child support, alimony and marital property rights to a spouse, former spouse, child or other dependents of a plan participant.*

The Amended Qualified Domestic Relations Order entered pursuant to the March 12, 2004, hearing was for the benefit of the children and to secure payment of *child support*. There is adequate legal authority for the entry of the QDRO. It does not matter that a QDRO was entered after the divorce. There were no other assets available to secure payment of support for the three children. The QDRO was entered to secure payment of child support. It was not entered in order to give Kathy an interest in a retirement fund that she had waived in the divorce.

**CONCLUSION**

Entry of the Judgment by the Court was proper in all respects and the Court should deny the appeal and relief sought by Appellant.

**RESPECTFULLY SUBMITTED**, this the 12 day of April, 2007.

KATHRYNMYRA MATTHEWS CARLSON

BY:

  
WOODROW W. PRINGLE, III

**CERTIFICATE OF SERVICE**

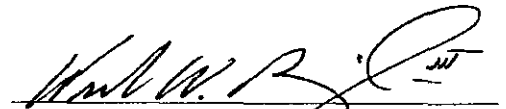
I, WOODROW W. PRINGLE, III, certify that I have this date forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing APPELLEE'S BRIEF to the following at his usual mailing address:

James F. Thompson, Esq.  
1904 22nd Avenue  
Gulfport, MS 39501  
228-864-0233

G. Eric Geiss, Esq.  
P. O. Box 593  
Gulfport, MS 39502  
228-863-5329

Hon. Carter O. Bise  
Harrison County Chancery Court Judge  
P. O. Box 1542  
Gulfport, MS 39502

**SO CERTIFIED THIS** the 17 day of April, 2007.

  
WOODROW W. PRINGLE, III

WOODROW W. PRINGLE, III  
MSB NUMBER: [REDACTED]  
2217 PASS ROAD  
GULFPORT, MS 39501  
(228) 868-8355 (PHONE)  
(228) 868-8433 (FAX)