IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CA-01283

DENIS FARRIS CARLSON — APPELLANT

versus

KATHRYN MYRA MATTHEWS CARLSON — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evalute possible disqualification or recusal.

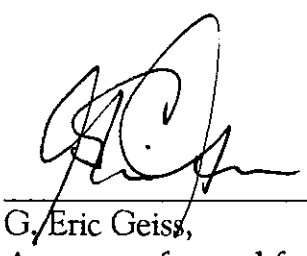
Denis Faris Carlson, Appellant

James F. Thompson, Attorney for Appellant

G. Eric Geiss, Attorney for Appellant

Kathryn Myra Matthews [Carlson], Appellee

Woodrow W. Pringle, III, Attorney for Appellee



G. Eric Geiss,
Attorney of record for Appellant

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STATEMENT OF ISSUES

THE TRIAL COURT WAS IN ERROR IN FIRST ALLOWING, AND IN THEN ORDERING, THE ENTRY OF A QUALIFIED DOMESTIC RELATIONS ORDER WHICH TRANSFERRED AN INTEREST IN DENIS CARLSON"S RETIREMENT INCOME TO KATHRYN CARLSON

THE TRIAL COURT WAS IN ERROR IN PROCEEDING WITH THE MAY 28, 2002 HEARING IN THE ABSENCE OF PROPER RULE 81 SERVICE OF PROCESS UPON DENIS CARLSON, AND THUS THE QDRO SHOULD NOT HAVE BEEN ENTERED

THE TRIAL COURT WAS IN ERROR IN ALLOWING THE QDRO TO BE FILED FOLLOWING THE MAY 28, 2002 HEARING AS IT WAS PREPARED WITHOUT AUTHORITY AND AS SUCH SHOWED OVER-REACHING AND IN EQUITABLE CONDUCT ON THE PART OF THE APPELLEE

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

Denis and Kathryn Carlson were married on August 27, 1983. They had three children during the marriage: Amanda Jane Carlson, born December 9, 1983; Adam Ross Carlson, born October 19, 1983; and, Cory Edward Carlson, born February 4, 1989 [R-1]. Throughout the marriage Mr. Carlson was employed by Bell South Telecommunications.

The marriage eventually foundered. The Carlsons filed a Joint Bill of Complaint citing the statutory ground of Irreconcilable Differences, and their union and was dissolved pursuant to a Final Decree of Divorce entered by the Chancery Court in and for the First Judicial District of Harrison County on May 25, 1993 [R-1-2].

Under the terms of the Final Decree, and the attendant and incorporated Property Settlement Agreement, Kathryn Carlson was granted the "full and complete" or "paramount"custody of the children [R-4,8], subject to the right of Denis Carlson to "see and visit said children at all reasonable times and under all reasonable circumstances" [R-4,8].

The Property Settlement Agreement than went on to make a more specific designation of Denis Carlson's visitation rights, to include every other weekend, alternating major holidays, and two weeks each summer, in addition to the reference to "reasonable times" set forth in the Final Decree [R-8]. In contrast to the "paramount custody" vested in Ms. Carlson in the Final Decree, the Property Settlement Agreement vested both parties with "joint legal custody" of the children, specifying that they "share in the decision making rights, responsibility and authority" regarding the children's health education and welfare, and imposed upon both the obligation to share information with one another in reaching those decisions [R-8]. Further, with regard to the children, and of particular significance to this appeal, Mr. Carlson was required to pay the sum of Six Hundred Dollars ($600.00) each month toward the support and maintenance of the children, maintain the then extant medical insurance obtained from his employer and pay the required deductible amounts [R-9].

In affecting a division of their joint and several properties, the parties agreed to the following:

* the marital home was to be sold, and the proceeds equally divided [R-6], with Mr. Carlson to pay the mortgage, utilities and other costs of maintenance until the property was sold [R-7];

* a disposition of the motor vehicles operated by each party;

* a mutually agreed upon division and disposition of household goods, furnishings and

other personal property [R-8];

* Ms. Carlson received the proceeds of the parties savings account, after payment of the fees and costs incurred in the divorce proceeding [R-8];

* they both acknowledged that they had "divided all other funds held by them, and that neither party has any claim to any funds held in the name of the other party" [R-8].

The Property Settlement Agreement went on the specify the following:

"Upon the execution of such conveyances and assignments as may be necessary to carry out the purposes and intent of this agreement as set forth hereinabove, the Husband relinquishes any and all claims which he might have as to any property of the Wife, and the **Wife relinquishes any and all claims which she might have a to the property of the Husband, and it is not contemplated that any alimony will be paid by Husband to Wife and the above division of property will constitute a full, final and complete Property Settlement Agreement between the parties...** " [R-9-10] [emphasis added].

Less than four months after the entry of the Final Decree and Property Settlement agreement in this cause, on September 7, 1993, Ms. Carlson filed A "Petition to Modify Final Decree of Divorce and Property Settlement Agreement [R-12/RE-12]. Following the Petition for Modification the Chancery Court entered a Decree which provided that, pursuant to the purported agreement of the parties, Kathryn Carlson was to be granted the exclusive use, title and possession of the former marital home, accomplished via the execution of a Quit Claim Deed by Denis Carlson. The Decree also provided that, "in the

event" the property should sold by Kathryn Carlson, Mr. Carlson would be entitled to receive one-half of the proceeds or $10,000, whichever sum should be less [R-18-19/RE-18-19].

On January 16, 2001, Kathryn Carlson filed a Motion for contempt and for modification of the Final Decree. (Since entry of the Final Decree, both parties had re-married, Ms. Carlson assuming her new husband's sur-name of Matthews. For clarity, and because by the time of this appeal she has divorced Mr. Matthews and changed her name back to Carlson, the name "Matthews" shall not be used herein. In her Motion, Ms. Carlson sought, *inter alia*, the following:

* have Denis Carlson held in civil and criminal contempt for failure to pay certain medical/dental bills incurred on behalf of the children;

* have a Wage Withholding Order enforced;

* have Denis Carlson's obligation to pay child support increased;

* require that Mr. Carlson pay a portion of the children's auto and automobile insurance costs;

* require that Mr. Carlson annually pay a sum for the children's clothing and school supplies;

* specify a time at which Mr. Carlson should pick up and return the children for exercise of his visitation rights;

* determine the amount for which each party should be responsible tp pay the college expenses of the children; and,

* if Mr. Carlson should be deemed in contempt, assess attorney's fees [R-21-23].

In the Defendant's Response to Plaintiff's Motion, Mr. Carlson substantially denied Ms. Carlson's allegations, but elected not to file a counter-claim [R-25-26].

From the testimony adduced at the subsequent hearing, held on July 5, 2001, the trial court entered a Judgment on July 6, 2001, in which it was determined that Kathryn Carlson was entitled to a judgment for un-paid medical/dental bills in the amount of $773.00, but that Mr. Carlson was not in contempt. Mr. Carlson's obligation to pay child support was increased to $880.00 per month, based upon the court's determination that this amount constituted 22% of his net monthly income. It was determined that at the appropriate time Ms. Carlson ***shall*** (emphasis by the court), along with the children, apply for any and all financial aid which might be available, advise Mr Carlson accordingly, and seek his assistance. The parties were both ordered to pay one-half of the college expenses. Finally, the court directed that a Wage Withholding Order be presented. All other was denied [R-33-34].

On or about October 1, 2001, Denis Carlson was terminated by Bell South Telecommunications following the occurrence of a one car accident in a BellSouth vehicle he was driving, resulting in his being charged with violating the Implied Consent Law

* * *

On November 14, 2001, Kathryn Carlson filed a second Motion, asking that unspecified "funds" belonging to Denis Carlson be attached and placed into an interest

bearing account to secure payment of the judgment of July 6, 2001, and allowing the use of such funds for the payment of child support [R-36].

Denis Carlson filed his own Motion on November 29, 2001, alleging a material and substantial change in circumstances and requesting a modification of his child support and other financial obligations. In response, Kathryn Carlson filed a Motion asking that Denis Carlson be held in contempt for failing to pay his child support and other financial obligations. Her Motion on this occasion sought seizure of Denis Carlson's 401K account "and any other funds" [R-50]. Yet another Motion filed by Kathryn Carlson, on February 13, 2002, sought the imposition of a lien against Denis Carlson's retirement funds alleging this to be the "only method to ensure future payments" [R-53].

A hearing was had on May 28, 2002 [T-117]. A question was raised as to whether or not Denis Carlson was aware of or had been advised of the setting, insofar as his counsel had not had any contact since about mid-February [T-118]. The court queried whether Mr. Carlson had been served a Rule 81 Notice of the hearing. Kathryn Carlson's counsel claimed that Denis Carlson had filed the initial action for modification [T-118]. Denis Carlson's attorney pointed out, however, that Ms. Carlson had actually filed the initiating Motion on November 12, followed Mr. Carlson's filing on November 29 [T-119]. Mr. Carlson's counsel went on to state that in answer to the Chancellor's question, he hadn't noticed Mr. Carlson, he knew the court hadn't noticed him, and that was the only response he could give [T-119-20]. Counsel opposite stated that Mr. Carlson's attorney had received the Notice T-120].

The trial court elected to proceed. (Following the Notice of Appeal, the Court Reporter was unable to locate the court file in this matter, and had to assemble a reconstruction. No Rule 81 Summons or other notice of this hearing addressed to Mr. Carlson, other than through his attorney, who as stated was unable to contact him, was made part of the record in this appeal.) In her testimony at the hearing Ms. Carlson stated that she had not been paid any child support since October of 2001 [T-121]. Furthermore, Ms. Carlson testified that the medical insurance previously provided by Mr. Carlson's employer had lapsed [T-122]. She alleged that she had incurred medical and dental expenses, and that Mr. Carlson had not paid, including child support, some $7,442.78 since November of 2001. This sum including the $523.00 left unpaid from the previous judgment [T-123]. Ms. Carlson sought to have admitted in evidence the Deposition of Denis Carlson taken on February 8, 2002, for consideration of the court on her issues [T-128]. Mr. Carlson's counsel objected to its admission because it was specifically stated that Mr. Carlson requested he be allowed to read and sign the deposition, but that it was never received by Mr. Carlson's attorney, and Mr. Carlson had left shortly thereafter. The court admitted the deposition [T-128]. During cross-examination, Ms. Carlson testified she was aware in November of 2001 that Mr. Carlson was no longer employed by Bell South, and was unaware if he had become employed elsewhere and was refusing to pay the child support. She also testified as to her knowledge that he former husband had sought a modification of his financial obligations because he had lost his job with Bell South [T-135-36].

On September 4, 2002, the Chancellor entered a Finding and Judgment which deemed Mr. Carlson to have "unclean hands" based upon the admission in his deposition that he had cashed in his 401K but failed to pay child support. On that basis the court denied any relief to Mr. Carlson by way of modification of his child support or other financial obligations [T-58]. The court went on to grant Kathryn Carlson a judgment for $7,443.78 as the total owed to her for child support and unpaid insurance premiums and non-covered medical expenses. The court further directed that the Judgment be served upon the BellSouth Human Resources Specialist and act as a lien upon Mr. Carlson's retirement benefits. In closing, the court directed that Mr. Carlson's request for modification would be considered after he had brought his financial obligations current, and retained jurisdiction pending his cooperation in satisfying the judgment [T-58].

On October 18, 2002, Ms. Carlson filed yet another Motion, this time alleging that Mr. Carlson had not cooperated. The Motion also stated that the Judgment of September 4, 2002, contained a provision for "payment of back child support and future support" and that "past, present and future support be secured by Defendant's retirement benefits [T-60]. This court has available the judgment of September 4, 2002, and can observe for itself that the judgment makes no provision for "present and future" support to be secured by a lien. It refers to Mr. Carlson's potential receipt of some $200,000 from his retirement plan, but the only mention of securing any funds refers specifically to the judgment of $7,443.78 plus interest [R-58]. According to the Motion, Ms. Carlson herself contacted BellSouth and

prepared or (had prepared for her) a Qualified Domestic Relations Order, (QDRO) which was submitted to the court, pursuant to which it was stated that "Kathryn M. Matthews is entitled to $98,083.78" [R-64].

On September 26, 2002, in a letter to Kathryn Carlson's attorney, Woodrow Pringle, BellSouth advised that the "Chancery Court Order"which presumably was the order of September 4, 2002, did not meet the requirements for a QDRO [R-66]. An Amended QDRO was filed on December 4, 2002 [R-71].

Yet another Motion by Kathryn Carlson was filed on January 17, 2003 [R-74]. In it she sought to have Denis Carlson incarcerated for contempt. It might be noted that Notice was to be had upon Mr. Carlson at an address in Priest River Road, Idaho.

Another hearing was held on February 4, 2003 [R-141]. In her direct testimony, Ms. Carlson stated that she had not seen or heard of Denis Carlson until the previous January (2002), and that to her knowledge he had not been in Mississippi in September of 2002 [T-144]. The only knowledge of Mr. Carlson's whereabouts with Kathryn Carlson could testify to was his seeing the youngest child in Gulfport in July of 2003 T-146].

The question again arose regarding whether the trial court had properly proceeded in the May 28 hearing in the absence of Mr. Carlson. The court stated it was of the opinion that he had been served with process [T-152]. Following a brief recess the court stated it had been wrong, and that following review of the court file there was no Rule 81 service of process to Mr. Carlson pertaining to the hearing [T-153]. The court expressed the opinion that the

failure of Rule 81 service of process upon Mr. Carlson was cured by the presence of counsel [T-153]. In cross-examination, Ms. Carlson confirmed that the September order had granted her a judgment of some $7,400.00 [T-156]. She then confirmed that on November 21st she submitted to the court a Qualified Domestic Relations Order pursuant to which she was to receive $98,083.78 from Mr. Carlson's retirement [T-157]. That QDRO was followed by an Amended and then by a Second Amended Qualified Domestic Relations Order [T-157]. Questioned as to how the $7,443.78 judgment had grown to her being granted $98,083.78, Ms. Carlson could only defer to her attorney, who maintained it was based upon the language of page four of the judgment, noting that Mr. Carlson (retirement funds) he could receive and that he should use those funds to satisfy his financial obligations [T-58]. Because of the later significance of the language in this and the following two paragraphs of the order, they are related here *in toto*.

> **ORDERED AND ADJUDGED** Denis Faris Carlson is found to be in contempt of this Court's Judgment, he has however shown a present inability to pay the arrearage and therefore will not be incarcerated at this time. The evidence showed Mr. Carlson has an opportunity to receive a lump sum payment in excess of $200,000.00. He shall exercise that option and fulfill his obligations both past and future or he shall be required to show cause as to why he should not be incarcerated. It is further:
>
> **ORDERED AND ADJUDGED** Kathryn Myra Matthews is hereby granted a judgment from and against Denis Faris Carlson in the amount of $7,443.78, plus interest, as well as all costs incurred herein. This Judgment shall be immediately served upon BellSouth's Human Resources Specialist and shall act as, and be a lien upon Mr. Carlson's retirement benefits. The Court holds Mr. Carlson's for contempt in abeyance pending his cooperation and performance to see this Judgment is fulfilled as soon as possible. The Court retains jurisdiction should he be shown to have purposefully interfered in this process.

Finally, it is;

> **ORDERED AND ADJUDGED** any and all relief requested and not granted herein is denied. More specifically, Mr. Carlson's Motion for Modification is denied and dismissed at this [time] due to his unclean hands. Once Mr. Carlson becomes current in his obligations the Court will then consider his change of circumstances.
>
> [R-58]

Under further cross-examination, Ms. Carlson admitted that no hearing was had subsequent to the Finding and Judgment of September 4, 2002, to increase the judgment from $7400 to $98,000. She further agreed that she had not been granted any portion of Mr. Carlson's retirement in the original divorce decree, and that all matters (at least pertaining to property rights) pending between the parties at that time had been settled. She further admitted that the $98,000.00 amount had been arrived at based on certain assumptions [T-160].

In his testimony, Mr. Carlson conceded that further arrearage had accrued [T-166-67].

He also testified that he had, until the date of tat hearing, no knowledge of what had transpired while he was absent from the state [T-169-70]. He had inquired as to his retirement account, but was advised of the lien on the account and, because he lacked some "code" was generally unable to obtain information about his retirement account [T-170]. Mr. Carlson was, at the hearing, also shown a copy of a criminal affidavit initiated by Kathryn Carlson, seeking to have him arrested for failing to pay child support. Mr. Carlson had been,

in fact, arrested and charged and required to post bond [T-173]. In further testimony, Mr. Carlson related that following his termination he found that he was being denied his retirement funds, that he and the union had filed a grievance upon which they eventually prevailed. And so it was 2003 before Mr. Carlson was even allowed access to his retirement funds, and that it was then that he learned of the court-ordered lien [T-174].

In his ruling, the Chancellor deemed Mr. Carlson in arrears in the amount of $31,993.98,

plus interest. The court then directed that a new QDRO be prepared, to include not only all arrearage but also a computation all future child support through the youngest child's 21st birthday, with the amount of arrearage "funneled directly to Ms. Carlson" [T-179]. Ms. Carlson was awarded $5000.00 in attorney's fees "due to the effort of Ms. Matthews to locate Mr. Carlson and obtain payment" [T-179]. The court stated that by doing as now directed, Mr. Carlson would purge himself of contempt, which would enable his seeking modification [T-179]. Finally, the court directed that the criminal affidavit be withdrawn [T-179].

On February 11, 2004, Mr. Carlson's attorney filed, and directed to the trial court, a proposed QDRO and a copy of an Authorization for Release of Information, executed by Denis Carlson and pertaining to his pension, directed to BellSouth Benefits Service Center, along with a proposed Judgment regarding the February 4 hearing [R-85-94].

On March 16, 2004, a Judgment was filed encompassing the rulings of the February 4 hearing [R-98]. That same day, a Third Amended Qualified Domestic Relations Order was

filed, this one providing that "Kathryn Carlson is entitled to $72,097.24" [R-96]. These latter instruments were executed by the Chancellor.

On August 9, 2004, the court entered and Order, stating that funds had been received from BellSouth, and directing that Ms. Carlson be authorized to retain $31,939.98 in past due child support and other sums related to the children's maintenance; $837.65 in prejudgment interest and $6,160.00 for child support from February 1, 2004 through August 1, 2004. The judgment for attorney's fees was :reserved for further proof. The remaining funds received by Ms Carlson was ordered to be placed in the Court Registry, in trust [R-103].

On August 24, 2004, Ms. Carlson filed another Motion, demanding payment of the $5000.00 paid into the registry of the court. Furthermore, because the payment of taxes on the retirement funds had reduced the amount Ms. Carlson received, she demanded another judgment from Mr. Carlson for the difference. A Motion filed by Ms. Carlson renewed her demand, stating that BellSouth's requirements resulted in her incurring tax liability, which she now demanded that Mr. Carlson pay.

At a hearing had on June 1, 2006, Ms. Carlson stated that she had contacted the IRS regarding the tax liability, and was informed that they deemed the payment from Mr. Carlson's retirement to be taxable income [T-198].

In a Judgment entered on June 15, 2006, the court denied the motion to reconsider the judgment to Ms. Carlson for 5,000.00 in attorney's fees. The court went on to grant a judgment to Ms. Carlson in the sum of $5,579.00 for the income tax incurred and paid by Ms.

Carlson. An M.R.C.P. §54(b) certificate was ordered regarding this cause, and Denis Faris Carlson, being aggrieved of rulings and orders of the court perfected this appeal.

In something of a parting shot, the day following entry of the June 15 Judgment, Ms. Carlson filed a Motion to Dismiss Denis Carlson's request for Modification.

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SUMMARY OF ARGUMENT

Kathryn Carlson initiated a contempt action against her ex-husband Denis Carlson, which eventuated in the entry of a Qualified Domestic Relations Order. The entry of the QDRO was improper, and thus manifestly erroneous for a number of reasons. The parties had, as part of their property settlement, waived any and all interests in each others property. Furthermore, the QDRO was entered in violation of the statutory time period of seven years allowed for litigating financial interests stemming from a domestic order.

The trial court proceeded with a hearing in which the Appellant had not been afforded the requisite service of process under Rule 81.

The trial court was manifestly in error in apparently allowing the Appellee, through her attorney, to supplant the judgment of the trial court without apparent authority, and to adjudge future child support without notice to the Appellant.

Thus Kathryn Carlson was not rightfully entitled to benefit from the QDRO.

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ARGUMENT

THE TRIAL COURT WAS IN ERROR IN FIRST ALLOWING, AND IN THEN ORDERING, THE ENTRY OF A QUALIFIED DOMESTIC RELATIONS ORDER WHICH TRANSFERRED AN INTEREST IN DENIS CARLSON"S RETIREMENT INCOME TO KATHRYN CARLSON

Private retirement plans are, as a general rule, governed by federal law, specifically the Employee Retirement Income Security Act of 1974, Pub.L. 93-406, 88 Stat. 829 1974, or ERISA 29 U.S.C. §§ 1001-1461 (1974). ERISA, in its original incarnation, prohibited, or preempted regulation of ERISA qualified pensions by the individual states. Pursuant to 29 U.S.C. §§ 1056(d)(1)-(d)(3)(A) (1974), an employee was prohibited from assigning pension benefits to a third person. In the years following enactment of ERISA, several courts held that the anti-assignment clause prohibited state courts in making a full division of marital assets upon divorce. Therefore, ERISA was amended in 1984 by the Employee Retirement

Income Security Act of 1974, Pub.L. 93-406, 88 Stat. 829 1974, or ERISA 29 U.S.C. §§ 1001-1461 919740.. Through the REA, trial courts may, upon divorce, divide ERISA qualified plan benefits through the use of a Qualified Domestic Relations Order or QDRO. The REA also provided some protection for the employee's family by requiring that pensions provide for benefits payable for the lives of both the employee and the employee's spouse.

Deferred distribution of rights in and to private pension plans must be accomplished through a QDRO complying with 29 U.S.C. § 1056(d)(3)(B)(ii) (1974); I.R.C. § 401 (a)(13)(B). To qualify as a QDRO under these federal regulations a court order, judgment, or decree must:

(1) be made pursuant to state domestic relations law;

(2) relate to the provision of child support, alimony or marital property rights to a spouse, former spouse, child, or other dependents of a plan participant;

(3) create or recognize the existence of an alternate payee's right to or assign to an alternate payee, a portion of a participant's benefits under the plan;

(4) contain certain identifying information identifying the plan and how the alternate payee's portion is to be determined; and

(5) not require a plan to provide a benefit not otherwise available nor require the payment of increased benefits nor may the order require the payment of benefits which are required to be paid under a previously issued QDRO.

26 U.S.C.A. §414(p)(1)-(3) (Supp.1993); 29 U.S.C.A. §1056(d)(3)(Supp.1993).

As a general statement, the standard of review applicable to the division and distribution of marital property is that the findings of a Chancellor will not be disturbed unless "manifestly wrong," "clearly erroneous," or an "erroneous legal standard was applied." ***Bell v. Parker,***563 So.2d 594, 596-97 (Miss.1990); **Crow v. Crow,** 622 So.2d 1226, 1228 (Miss.1993); ***Faries v. Faries,*** 607 So.2d 1204, 1208 (Miss.1992).

In **Parker v. Parker,** 641 So.2d 1133, 1138) (Miss.1994), it is stated "that a chancellor may order a fair division of jointly accumulated property **incident to divorce**, consistent with the equities and all other relevant facts and circumstances, is far from novel to this Court" [emphasis added]. ***Brown v. Brown,*** 574 So.2d 688, 690-91 (Miss.1990) (citing **Brendal v. Brendal,** 566 So.2d 1269, 1273 (Miss.1990); **Robinson v. Irvin,** 546 So.2d 683, 685 (Miss.1989); **Jones v. Jones,** 532 So.2d 574, 580-81 (Miss.1988); **Regan v. Regan,** 507 So.2d 54,56 (Miss.1987); **Watts v. Watts,** 466 So.2d 889, 891 (Miss. 1985); **Clark v. Clark,** 293 So.2d 447, 450 (Miss. 1974). ***Parker v. Parker*** also sets forth the proposition that, in the absence of a QDRO, a divorce and the settlement of all marital property rights extinguishes all enforceable rights of an individual against and ERISA-covered pension plan in which the individual's former spouse is participating. ***Parker,*** 641 So.2d at 1136.

In **Parker,** 641 So.2d at 1138 this Court further stated that "profit sharing plans acquired during the course of the marriage are marital assets **subject to adjudication by the chancery court granting a divorce**, depending upon the facts and circumstances of each particular case.

With particular regard to the above emphasized language in ***Parker***, indicating that, as a general rule, a valid QDRO is an instrument contemporaneous, or nearly contemporaneous, with the decree and/or agreement of which it is part and parcel. Appellant would draw the Court's attention to the following specific provisions of Denis and Kathryn Carlson's divorce decree:

They both acknowledged that they had "divided all other funds held by them, and that neither party has any claim to any funds held in the name of the other party" [R-8].

And again, the following language in their Property Settlement Agreement:

"Upon the execution of such conveyances and assignments as may be necessary to carry out the purposes and intent of this agreement as set forth hereinabove, the Husband relinquishes any and all claims which he might have as to any property of the Wife, and the **Wife relinquishes any and all claims which she might have a to the property of the Husband, and it is not contemplated that any alimony will be paid by Husband to Wife and the above division of property will constitute a full, final and complete Property Settlement Agreement between the parties...** " [R-9-10][emphasis added].

With some exceptions, property settlements incorporated in a divorce decree are not subject to modification. ***East v. East,*** 493 So.2d 927, 931-32 (Miss. 1986). Property settlement agreements are similar to and deemed to be as any other contract. The fact that such agreements are between individuals engaged in a divorce proceeding, and that such agreements are incorporated into a decree granting a divorce does not change the agreements

character as a contract. ***East,*** 493 So.2d at 931-32. Even though created in the process of the termination of a marriage by divorce such agreements are "made by the parties, upon consideration acceptable to each of them, and the law will enforce them." ***Lewis v. Lewis,*** 586 So.2d. 740,745 (Miss.1991); ***McManus v. Howard,*** 569 So.2d 1213, 1215 (Miss. 1990). One view would have it that divorce decrees are "quasi-contracts" ***Grier v. Grier,*** 616 So.2d. 337,340 (Miss. 1993). In ***Grier***, the Court makes reference to Miss. Const. Art. IV, § 94 as authority for the proposition that a properly drafted agreement may be binding on the parties but the chancellor is within his discretion to modify the terms in a divorce decree where he finds it necessary to protect the parties because the courts are not tools "for implementing unconscionable contracts which are not fair to either party," ***Grier,*** 616 So.2d at 340.

The holding in ***Grier*** points out, in keeping with the general principles of contract law regarding the means of avoidance of contractual terms, one of the few grounds which would invade the preemptive prohibitions of ERISA and the ERA and the time-proscriptive elements of Mississippi law [Mississippi imposes a seven year statute of limitations on actions based upon domestic judgments]. One basis for overcoming the legal barrier for modification would, obviously, be a party who hides or secretes assets which would otherwise be subject to division and distribution by the court. Another example of an exception to the application of a proscription can be found in ***Carite v. Carite,*** 841 SO.2d 1148 (Miss.2002), where the parties had divorced more than ten years previously, at which time the wife had been awarded a one/third interest in the husband's pension and profit-sharing plans. Following a decision in

Ms. Carite's favor Mr. Carite appealed. Among his arguments was a claim that Ms. Carite should have taken steps to protect her own interests, and that the seven year statutory limitation now barred the relief granted by the court. Ms. Carite was able to establish that here ex-husband's employer has advised that only he could initiate a request to apportion the pension.

Finally, as regards Kathryn Carlson being designated recipient of retirement funds pursuant to the QDRO at issue in this appeal, it must be noted that the action taken was well outside the statute of limitations. The exception to this statute of limitation is child support cases. Even though the instant action may have been predicated upon recovery of past due child support, the interest in Mr. Carlson's retirement was vested in Kathryn Carlson, not the parties children. Who were only designated as alternate payees in the event of her death.

So it can be seen that under certain circumstances the "rules" can be superceded.

Denis Carlson would respectfully submit that the instant situation is not one of those narrow exceptions, and that there is no proper basis upon which Kathryn Carlson herself can maintain any lawful claim to any portion of Denis Carlson's retirement plan.

The alternate payee's interest in a pension plan vests only after (1) a chancellor has determined that an equitable of the marital assets requires awarding some portion of one spouse's pension or profit plan to the other spouse and (2) a QDRO is entered and accepted and accepted as qualified. In other words, if apportionment of one spouse's pension or profit sharing plan is not equitable, based on the facts aned circumstances presented, no right in

such a plan in favor of the other spouse can *ever* vest [emphasis by the court]. ***Parker v. Parker,*** 641 So.2d at 1139.

THE TRIAL COURT WAS IN ERROR IN PROCEEDING WITH THE MAY 28, 2002 HEARING IN THE ABSENCE OF PROPER RULE 81 SERVICE OF PROCESS UPON DENIS CARLSON, AND THUS THE QDRO SHOULD NOT HAVE BEEN ENTERED

At the hearing held on May 28, 2002 [T-117]. A question was raised as to whether or not Denis Carlson was aware of or had been advised of the setting, insofar as his counsel had not had any contact since about mid-February [T-118]. The court queried whether Mr. Carlson had been served a Rule 81 Notice of the hearing. Kathryn Carlson's counsel claimed that Denis Carlson had filed the initial action for modification [T-118]. Denis Carlson's attorney pointed out, however, that Ms. Carlson had actually filed the initiating Motion on November 12, followed by Mr. Carlson's filing on November 29 [T-119]. Mr. Carlson's counsel went on to state that in answer to question from the Chancellor, he hadn't noticed Mr. Carlson, he knew the court hadn't noticed him, and that was the only response he could give [T-119-20]. Counsel opposite stated that Mr. Carlson's attorney had received the Notice of this hearing [T-120]. The trial court elected to proceed. (Following the Notice of Appeal, the Court Reporter was unable to locate the court file in this matter, and had to assemble a reconstruction. No Rule 81 Summons or other notice of this hearing specifically

addressed to Mr. Carlson, other than through his attorney, who as stated was unable to contact him, was made part of the record in this appeal.)

Rule 81(d) enumerated certain matters which require thirty days notice and some which require seven days notice by summons to a specific time and place. A Motion for contempt as is encompassed in that which eventuated in the May 28, 2002, hearing requires a Rule 81 summons.

In ***Serton v. Serton,*** 819 So.2d 15 (Miss. Ct. App. 2000), one of the issues before the Chancellor was his facing contempt charges for failure to pay child support. Despite the fact that Mr. Serton was present at the hearing, the appellate court did not allow a contempt hearing to stand because Mr Serton **had not been properly served.** Unless there is requisite service of process under Rule 81 which will enable the court to act, any further progress of a hearing should be barred. ***Caples v. Caples,*** 686 So.2d 1071 (Miss. 1996); ***Sanghi v. Sanghi,*** 759 So.2d 1250 (Miss Ct. App. 2000).

THE TRIAL COURT WAS IN ERROR IN ALLOWING THE QDRO TO BE FILED FOLLOWING THE MAY 28, 2002 HEARING AS IT WAS PREPARED WITHOUT AUTHORITY AND AS SUCH SHOWED OVER-REACHING AND IN EQUITABLE CONDUCT ON THE PART OF THE APPELLEE

On September 4, following the May 28, 2002 hearing, the trial court entered a Judgment, the relevant part of which in this instance states as follows:

ORDERED AND ADJUDGED Denis Faris Carlson is found to be in contempt of this Court's Judgment, he has however shown a present inability to pay the arrearage and therefore will not be incarcerated at this time. The evidence showed Mr. Carlson has an opportunity to receive a lump sum payment in excess of $200,000.00. He shall exercise that option and fulfill his obligations both past and future or he shall be required to show cause as to why he should not be incarcerated. It is further:

ORDERED AND ADJUDGED Kathryn Myra Matthews is hereby granted a judgment from and against Denis Faris Carlson in the amount of $7,443.78, plus interest, as well as all costs incurred herein. This Judgment shall be immediately served upon BellSouth's Human Resources Specialist and shall act as, and be a lien upon Mr. Carlson's retirement benefits. The Court holds Mr. Carlson's for contempt in abeyance pending his cooperation and performance to see this Judgment is fulfilled as soon as possible. The Court retains jurisdiction should he be shown to have purposefully interfered in this process. Finally, it is;

ORDERED AND ADJUDGED any and all relief requested and not granted herein is denied. More specifically, Mr. Carlson's Motion for Modification is denied and dismissed at this [time] due to his unclean hands. Once Mr. Carlson becomes current in his obligations

the Court will then consider his change of circumstances. [R-58]

On November 21, 2002, the trial court executed, and Appellee's attorney forwarded to BellSouth, a proposed Qualified Domestic Relations Order which assigns to Kathryn Carlson not the $7,443.78 set forth in the Judgment, but $98,083.78 [R-69]. (By the entry of the Second Amended QDRO this amount had been reduced to $72,097.24).

Where a chancellor adopts, verbatim, findings of fact and conclusions of law prepared by a party to the litigation, the appellate court analyzes such findings with greater care, and the evidence is heightened to greater scrutiny. ***Smith v. Orman,*** 822 So.2d 975, 978 (¶7) (Miss. App. 2002); ***In Re Estate of Grubbs,*** 753 So.2d 1043, 1046 (¶8) (Miss. 2000); ***Brooks v. Brooks,*** 652 So.2d 1113, 1118 (Miss.1995). The QDRO "appeared" to the impression of the Appellant on November 28, 2002. [R-68] In a Motion filed October 18, 2002, Kathryn Carlson requested that she be allowed to file the QDRO, and the chancellor signed it on November 21, 2002. Appellant has no record or notice of, and certainly was not present at, any hearing on this Motion. Appellant is also not in possession of any transcript. When the trial court executed the QDRO, it is respectfully submitted that he allowed counsel opposite to supercede his ruling in the September 4, 2002 judgment, and would submit that the requirement of "heightened scrutiny was certainly applicable.

Deemed most egregious is the precipitous in crease in Mr. Carlson's obligation encompassed in this QDRO. This Court has held that it is error for chancellor, upon the chancellor's own motion, to order a party to pay child support absent any notice that the party would be required to defend such a proposition and absent any notice that the trial court was considering ordering the party to pay child support. ***Massey v. Huggins,*** 799 SO.2d 902, 909 (¶27) (Miss App. 2001); See, ***Morris v. Morris,*** 359 So.2d 1138, 1139 (Miss 1978).

Finally, the question arises whether the imposition of the QDRO was even necessary. The answer to that query must be an emphatic **NO.**

In the September 4, 2002 judgment, the trial court directed Mr. Carlson to initiate the process of obtaining his retirement funds. The court could simply and easily have required that Mr. Carlson post bond sufficient to cover any future obligations, or deposit funds to the registry of the court himself. Doing so would not only have obviated the motions, hearings and other matters subsequent to the September 4, 2002 judgment, and greatly simplify matters left currently pending, particularly to child support modification proceeding which is sure to take place.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CA-01283

DENIS FARRIS CARLSON — APPELLANT

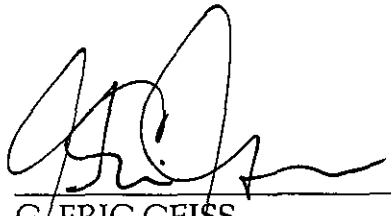
versus

KATHRYN MYRA MATTHEWS CARLSON — APPELLEE

CONCLUSION

Appellant would respectfully submit that the entry of the Qualified Domestic Relations Order in this cause was improper, and constitutes manifest error warranting that it be set aside, and that this Court either reverse this cause or else render a proper and equitable resolution of this cause.

RESPECTFULLY SUBMITTED this 16th day of January, 2007.



G. ERIC GEISS

JAMES F. THOMPSON

CERTIFICATE OF SERVICE

We, James F. Thompson and G. Eric Geiss, attorneys for the Appellant, do hereby certify that we have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF of APPELLANT**, to the office of the Honorable Carter Bise, Chancellor, at his usual office address located within the Harrison County Courthouse, Gulfport, MS 39501; and, to Woodrow W. Pringle, III, Esq., attorney for the Appellee, at his usual business mailing address of 2217 Pass Road, Gulfport, Mississippi, 39501.

SO CERTIFIED this the 16th day of January, 2007.

G. ERIC GEISS

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