

**COPY**

NO. 2006-CA-01987

**SUPREME COURT AND COURT OF APPEALS  
STATE OF MISSISSIPPI**

---

**JAMES STRONG**

**APPELLANT**

**versus**

**GRETCHEN STRONG**

**APPELLEE**

---

**FILED**

**AUG 06 2007**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

---

**APPEAL FROM**

**THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI**

**HONORABLE MARGARET ALFONSO, PRESIDING TRIAL JUDGE**

---

**REPLY BRIEF OF APPELLANT**

**Clement S. Benvenutti  
831 Highway 90  
Post Office Box 2718  
Bay St. Louis, Mississippi 39521  
Telephone: (228) 467-0744  
Facsimile: (228) 467-0317  
MS BAR [REDACTED]**

## TABLE OF CONTENTS – REPLY BRIEF

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	2
ARGUMENT I. Prejudgment Temporary Child Support.....	3
ARGUMENT II. Insurance Proceeds as Child Support.....	4
ARGUMENT III. Gretchen Disposed of Marital Assets .....	5
CONCLUSION.....	8

## TABLE OF AUTHORITIES

### Cases:

1. *Ferguson v Ferguson*  
639 So. 2d 291 (Miss. 1994) .....9

### Statutes and Rules:

1. Miss. Code Ann. §93-11-65 .....3
2. Miss. Code Ann. §93-9-11 .....3

### Treatises

1. Bell on Mississippi Family Law, Deborah H. Bell .....3

**ARGUMENT I**  
**Prejudgment Temporary Child Support**

The Appellee attempts to restate the Appellant's Statement of Issue I as a dispute solely about sufficient notice. The primary issue before this Court is not only an issue of notice, but does the Chancellor have authority to require Mr. Strong to pay pre-judgment child support. Mr. Strong does not argue that the Court did not have jurisdiction to order prospective child support, he argues that the Court has no authority by statute or case law or common law to require pre-judgment child support.

The Appellee quotes a portion of the Agreed Order found at the Clerk's Papers Pg. 53 – 54, to support the proposition that Mr. Strong admitted that he owed temporary child support. The said Agreed Order makes no such statement. The Court was to determine if there existed any temporary child support arrearage; based upon an order of child support. No such order was entered nor did the Appellee present any evidence at trial of such an order or present any evidence at all to the existence of a temporary child support order entitling Mrs. Strong to child support prior to the order dated May 2, 2006 found at Clerk's Papers Pgs 45 - 52.

Mrs. Strong summarizes her argument stating "given the above noted facts and authority, the Chancellor's grant of Temporary Relief was wholly adequate and justified while Jimmy's position is wholly unfounded and without merit." The authority quoted consisted of Deborah H. Bell and Bell on Mississippi Family Law §19.02 (1) and Mississippi Code Annotated 93-11-65 and Mississippi Code Annotated 93-9-11. None of these authorities support the position of the Chancellor or the Appellee that the Court had any authority to grant pre-judgment temporary child support against Mr. Strong. Therefore Mr. Strong submits that no authority for the

Chancellor's award of pre-judgment temporary child support. The award is without basis in law should be overturned.

## **ARGUMENT II**

### **Insurance Proceeds as Child Support**

Mrs. Strong in her Appellee's brief appears to want to differentiate equitable division of property and child support, viewing the manner in which Mrs. Strong expended the insurance proceeds from the damage to the marital domicile. Mrs. Strong seems to want to ignore the fact that Mr. Strong supplied the insurance for the house by paying the premium on same. The suggestion that Jimmy had no interest in the insurance proceeds is just simply wrong and not supported by the record. The parties finally separated in May, 2005, however, the taxes and insurance were being escrowed in the mortgage payments. After the separation Gretchen paid four house payments. While the parties were together up until the separation, they pooled their income and paid the house note with joint funds. The house note include escrowed funds to pay the insurance premium.

There is no question that Jimmy owned an interest in the insurance proceeds. Gretchen spent these insurance proceeds at will, and as she points out in her own brief "Gretchen could easily have squandered the funds or at least paid off her own \$10,000.00 - \$20,000.00 student loan which was in her name only; however, she did not. (Rec. Pg 110) Instead she paid off joint debt and supported their three children during an incredibly trying time all on her own." Jimmy would show unto the court that she did not support the children all on her own, she used these insurance proceeds, one-half of which belonged to him, to support the children. The Appellee on P. 7 of her brief suggests to the court that Gretchen brought the house into the marriage. No testimony supports such an assertion and in fact the testimony at trial was that Jimmy and

Gretchen bought the property from Gretchen's mother. The sale was an arms length transaction for which Gretchen's mother received valuable consideration, the retirement of an existing debt. Jimmy made substantial improvements to the property and refinanced same in his name and Gretchen's. There is no question that the marital domicile was a marital asset which was equally divided by the court and correspondingly, the insurance proceeds were a marital asset which should have been equally divided between Jimmy and Gretchen. Fifty cents of every dollar spent by Gretchen for support of their children from the insurance proceeds was a contribution by Jimmy.

### **ARGUMENT III**

#### **Gretchen Disposed of Marital Assets**

In her brief, Gretchen makes the statement that "Mrs. Fielder had procured and maintained the insurance in anticipation of future return of her residence many years prior to the transfer to Gretchen and all of the parties anticipated. It is hardly sneaky that Mrs. Fielder placed the remaining sum in a CD." None of these statements are supported by any facts or evidence in the record. Mrs. Fielder did not procure the insurance, the insurance was paid for by Jimmy and Gretchen. The house payments included monthly escrow amounts to pay the insurance premium. Mrs. Fielder paid none of the mortgage payments. The reason why the insurance remained in Mrs. Fielder's name was that Gretchen never got around to changing it. In fact, Mrs. Felder had no insurable interest in the property.

Gretchen at one time had all of the insurance proceeds in her hands. She voluntarily gave the money back to her mother in order to secret it from the court and in doing so she depleted marital assets, all of which the court ignored in failing to adjust Gretchen's share of the marital domicile at sale. The following excerpt from Gretchen's cross examination found at Record

Page 104-105 explains what happened in this matter, to-wit:

BY MR. BENVENUTTI

Q. And where is the rest of the money now?

A. In a CD.

Q. You don't remember when the Judge told you to turn that over to Mr. Rayburn and put it in the bank?

A. That's --

Mr. Rayburn: I object to that, Your Honor. That would have been part of a written order that never got signed by -- I prepared it, but it never got signed by Mr. Strong.

Mr. Benvenutti: That's fine Your Honor. If there are no -- if that's the Court's position, then my client has no past child support, If that's the Court's position, I won't go there.

The Court: I won't say what the Court's position is. I will render an opinion on this case.

Mr. Benvenutti: Well, Your Honor, if I'm not allowed --

The Court: There is no written order in place. There is no written order either to put the money -- I don't remember what the written order said or was supposed to say. CD was going to --

Mr. Rayburn: At the time that we met, I did not realize the money was in a CD. I thought it was liquid in a bank account to be placed in the attorney's trust account; however, it was in a CD. And what I asked and instructed Mrs. Strong to do was to freeze that, do not liquidate it in any way until we can get this order signed.

The Court: The order was neither signed either for child support or the CD or anything?

Mr. Rayburn: That's correct, Your Honor. But the money is still there.

The Court: And you have roughly how much? \$9900 left?

The Witness: Basically -- well, in the CD there 9600 -- \$9600 -- \$9,696.30. The other \$300 was just coming from the other itemization that I just didn't add odds and ends to.

Mr. Benvenutti: I think we are clear on that then.

BY MR. BENVENUTTI:

- Q. And whose name is that CD in?  
A. Patricia Fielder.  
Q. Why is it in the name of Patricia Fielder?  
A. Because the check was made out to her and she went to the bank.  
Q. Which check are we talking about here?  
A. I signed the check with the \$14,696.30. I endorsed it. She had the bank endorse it and she endorsed it and put it in a CD so it could not be touched.  
Q. How did the \$5,000.00 come out?  
A. You were allowed to make one withdrawal without penalty.  
Q. Oh, I think I understand now. She opened up one CD in that entire amount and made one withdrawal?  
A. Yes. Yes.  
Q. Okay. She wasn't – just because the check was made payable to her, that didn't disqualify her or limit her to whose name she was going to put the CD in, did it? You worked at the bank. You know that's true.  
A. I know.  
Q. She could cash that check and put the CD in your name?  
A. She could.  
Q. But she didn't?  
A. Exactly, so I couldn't touch the funds.

It is quite apparent from this excerpt from the record that when the attorneys met in chambers with the Chancellor in March of 2006, to talk about temporary relief, Mr. Rayburn, on behalf of his client, Gretchen, advised the court and Mr. Benvenuti that the balance of the insurance proceeds were in a bank account and that he would place them into his trust account awaiting decision of the court. (See crossed out portion of Paragraph XI, Clerk's Papers P. 51) Mr. Benvenuti was not made aware that in fact the funds were in a CD in Mrs. Fielder's name until he questioned Gretchen during the trial. Subsequently the court finds that the Defendant failed to properly join Mrs. Fielder as a party in order to get the refund of the balance of the insurance proceeds. Neither Mr. Strong nor his attorney could have known that the information provided to the court and to Mr. Benvenuti in March of 2006 was false, that Gretchen did not have the funds, and that in fact her mother, Mrs. Fielder, had the funds because Gretchen gave



the funds to her mother "so it could not be touched." The transcript makes quite clear that:

1. Gretchen had all of the insurance proceeds in her hands,
2. She spent them at will
3. That the balance of the insurance proceeds was turned over to her mother to try to keep them from the court.
4. That Gretchen, through her attorney, led the court and Mr. Strong's attorney to believe that the insurance proceeds funds were in his trust account from and after March of 2006.
5. That neither Mr. Strong nor his attorney were made aware that the funds were held by Mrs. Fielder in a CD until the first day of the trial.
6. That the Chancellor ignored all of these facts and allowed Gretchen to defraud the court and to transfer funds which were part of the marital estate to a third party to keep them out of the jurisdiction of the court.
7. That the court took no action based on these facts to adjust the distribution of the marital estate by virtue of Gretchen's dissipation of the marital estate which was error on the part of the Chancellor and should be overruled.

### **CONCLUSION**

The Appellee's brief quotes no law to support the contention that the Chancellor has a right to order an arrearage of temporary child support when Jimmy was never ordered to pay child support. It is not surprising as no law exists to support such a ruling. The Appellee attempts to reframe the question as one of notice to the Appellant; however, this is not the sole issue before the court. The Appellee admits that she used insurance proceeds to support herself and her children and denies that the insurance proceeds are marital property which is akin to

saying that the Court determined that the cow was marital property but the milk that the cow gave was not. If in fact the insurance proceeds were marital property and Gretchen used them to support herself and the children, one-half of every dollar spent in that regard belonged to Jimmy and Jimmy paid child support. There is no question but that Gretchen had all of the insurance proceeds in her hands. She for whatever reason, gave them to her mother therefore depleting marital assets. The Chancellor ignored this depletion of marital assets, and therefore ignored a vital Ferguson factor in reaching her decision. For all of these reasons, the Judgment entered by the Chancellor should be overturned and remanded with instructions to properly apply the law and thereby delete any requirement of pre-judgment temporary child support and reassess the depletion of marital assets by Gretchen in determining the division of the marital home.

Respectfully submitted this the 6<sup>th</sup> day of August, 2007.



CLEMENT S. BENVENUTTI  
Attorney for the Appellant, James Strong  
Post Office Box 2718  
Bay St. Louis, Mississippi 39521  
Telephone (228) 467-0744  
MS BAR [REDACTED]

CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellant, James Strong, hereby certify that I have on this date mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Reply Brief of the Appellant to the following parties of interest:

ATTORNEY FOR THE APPELLEE:

Kelly M. Rayburn  
Attorney at Law  
Post Office Box 2566  
Gulfport, Mississippi 39505

PRESIDING TRIAL JUDGE:

Hon. Margaret Alfonso  
Chancellor  
Post Office Box 986  
Gulfport, Mississippi 39502

COURT OF APPEALS:  
(4 copies)

Court of Appeals  
Post Office Box 249  
450 High Street  
Jackson, Mississippi 39205-2847

SO CERTIFIED this the 6<sup>th</sup> day of August, 2007.

  
CLEMENT S. BENVENUTTI