

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

**DOCKET NO. 2010-CA-004000**

**WILBUR HAROLD WILLIAMSON, SR.**

**DEFENDANT/COUNTER-  
PLAINTIFF**

**VERSUS**

**MARY JEAN (WADDELL) WILLIAMSON**

**PLAINTIFF/COUNTER-  
DEFENDANT**

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**ORAL ARGUMENT REQUESTED**

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**ON APPEAL FROM THE CHANCERY COURT  
OF TATE COUNTY MISSISSIPPI  
DOCKET NO.: 09-2-52-(VC)**

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**REPLY BRIEF OF APPELLANT  
DEFENDANT/COUNTER-PLAINTIFF  
WILBUR HAROLD WILLIAMSON, SR.**

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## REPLY TO STATEMENT OF THE CASE

Mary Williamson filed her original Complaint for Divorce in the Chancery Court of Tate County, Mississippi and in accordance with the Chancery Clerks random selection process the case was assigned to the Honorable Vickie B. Cobb one of the two chancellors who hear cases filed by counsel for Mary Williamson. After the entry of the Decree of Divorce Wilbur Williamson properly perfected his appeal, designated the record, and paid fees and costs as directed by the clerk. Counsel for Mary Williamson then filed in this same cause number a Petition for Citation of Contempt alleging that Wilbur Williamson was in contempt of the Final Decree of Divorce. This Petition was assigned to the other Chancellor, Honorable Percy Lynchard. Counsel for Mary Williamson did not serve a copy of the Petition for Contempt upon trial counsel of record for Wilbur Williamson, nor did she serve a copy of the Petition upon his appellate counsel of record. Solely because Chancellor Lynchard was assigned this Petition it was deemed an entirely new case, even though it was filed in the same cause number and based upon a Order that was the subject of the appeal herein. Appellate Counsel was advised by the Clerk of the Supreme Court that the records on appeal was incomplete without the transcript of the Lynchard hearing and clerks papers therein. In fact the record

was returned so that the second court reporter could transcribe the hearing and the clerk could complete the record.

## REPLY TO STATEMENT OF FACTS RELEVANT TO APPEAL

On April 7, 2009 the Court entered Temporary Agreed Order in which both Parties were to continue living in the marital home; all household bills were to be paid by the Parties as they had done in the past; Mary Williamson was to specifically pay the note on her vehicle, light bill, cable bill, her credit card bills. Wilbur Williamson was to pay all other household bills, the mortgage on the marital home including taxes and insurance, gas/propane for the marital home, the note on his vehicle, garbage pickup, pest control, automobile insurance for both Parties, his cell phone bill, upkeep and maintenance on the marital home and any bills solely in his name. Both Parties were to contribute to the grocery bill.<sup>1</sup> He was to continue to maintain dental insurance on Mary Williamson and vision insurance if available from his employer. This order also enjoined the Parties from dissipating assets. The Order froze Wilbur Williamson's retirement account with Union National, his 401K account through Sycamore Bank and any other accounts

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<sup>1</sup> The order entered did not take into account the fact that children, their spouses and children were consumers of the utilities, food, and other benefits of the marital residence.

not addressed were frozen until further order of the Court.<sup>2</sup> [Vol. 1 of 5, Clks. P. Pps. 29-31] The 1/3/2010 Form 8.05 filed by Mary Williamson showed \$19,000.00 in her retirement account. This value did not reflect the increase during the pendency of the divorce. The 1/11/2010 Form 8.05 filed by Wilbur Williams showed retirement account values of \$25, 000.00 Wells Fargo and \$1,200.00 Harrah's which was the value of the accounts on that date. [Exhibits 1 of 1, Clks. P. Pp. 3-11, 15-57] At the time the Mr. Williamsons accounts were frozen the value was less than \$21,000.00. [RE 51] Any withdrawal made by the Defendant from any retirement account shall be immediately disclosed to the Court and an accounting of said fund shall be filed with the court. [RE 29-31] [Emphasis Ours]<sup>3</sup>

On September 29, 2009, Counsel for Wilbur Williamson filed Motion to Modify Temporary Order and for Trial Setting alleging it was impossible for Wilbur Williamson to pay the mortgage on the house and other household bills after September 2009 due to a steady decrease in his income. [Note: the QDRO

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<sup>2</sup> The value of all accounts of both Mr. and Williamson were frozen as of the date of the Order. Thus the Court in its division of assets used the "frozen figure" for Ms. Williamson as of the 8.05 filed with the complaint. The Court erred when it did not use the "frozen figure" for Mr. Williamson, but used a subsequent 8.05 figure that was much higher.

<sup>3</sup> Appellant avers the effect of the "frozen language" was intended to establish the value of any retirement funds of the parties. It was not intended to prevent a party from withdrawing funds. However, the result of this Order was a qualified domestic relations order hold on all Mr. Williamson's retirement account thus he was denied any access to the funds.

hold on all Mr. Williamson's retirement funds was in place at this time] Hearing on this Motion was noticed for October 26, 2009, Montgomery County Courthouse, Winona, Mississippi. It is apparent this Motion was not heard that day. [Vol. 1 of 5, Pp. 46-48]

On November 3, 2009 trial on the merits was set for January 13, 2010, Tate County Courthouse, Senatobia, Mississippi. [Vol. 1 of 5, P. 50] This Administrative Order provided that all Motions pending had been heard or withdrawn. Based upon this Administrative Order the only matter to be heard by the court was the merits of the divorce case.

On December 16, 2009 Counsel for Mary Jean Williamson filed Petition for Contempt alleging Wilbur Williamson had failed to abide by the Temporary Agreed Order by failing to pay the mortgage payment on the marital home for two months and for failing to pay gas/propane for the marital residence. [Vol. 1 of 5, Pp. 55-56] The record is devoid of any service of this Petition of Contempt upon Counsel for Appellant or Appellant. However, this Petition was heard as a part of the divorce case in violation of the Administrative Order Setting Trial for January 13, 2010.

On January 13, 2010 the Temporary Agreed Order was still in effect including the freezing of Wilbur Williamson's funds. On January 13, 2010, the day of the hearing, almost all the Parties property was divided by agreement of the

Parties except the marital home. The other issues reserved by the Court were alimony, attorney fees, and contempt, if any. [Vol. 3 of 5, Pp. 60 – 61] [Emphasis Ours]

After the Parties stipulated to an irreconcilable divorce [Vol. 3 of 5, P. 63], the Court heard testimony on the combined issues of division of remaining marital assets, alimony, attorney fees, and contempt. There was no bifurcation of the Petition for Contempt and trial. Mr. Williamson's Motion to Modify the Temporary Agreed Order was not heard.

The opinion of the Court states, inter alia, "Mr. Williamson is in contempt of the Temporary Agreed Order for failure to pay the mortgage payment on the marital home." Mr. Williamson was ordered to bring the mortgage current to January 2010 with twenty (20) days of January 13, 2010, which was \$3,564.00.

In addition he was ordered to pay to Ms. Williamson \$4,824.81, which included an award of attorney, fees of \$3,415.81 for the Petition for Contempt and a Motion to Compel that was resolved by an Agreed Order entered December 11, 2009. [Vol. 4 of 5, Pp. 149-178]<sup>4</sup>

After requiring Mr. Williamson to pay \$8,388.81 the Court began the division of the remaining marital assets including the retirement funds of the

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<sup>4</sup> Once again, the result of the frozen funds hold pursuant to a qualified domestic relations order made it impossible to comply with the time frame imposed in the Court opinion because the fund holders required an approved, executed Qualified Domestic Relations Order.

parties. Mr. Williamson also had a \$4500.00 loan against his retirement account that he was paying.

The Court, quite possibly inadvertently, created the impossibility that Mr. Williamson had in complying with any of the orders of the Court.

After the filing of appeal Counsel for Mary Williamson filed a second Petition for Contempt alleging contempt of the Decree of Divorce regurgitating the first Petition for Contempt that was heard by a different Chancellor. Neither trial counsel nor appellant counsel were served with the Petition for Contempt.

[Vol. 1 of 5, Pp. 120- 123]

#### REPLY TO SUMMARY OF THE ARGUMENT

The problems that plagued Mr. Williamson began with the “freezing of his retirement accounts” in the Temporary Agreed Order that resulted in a QDRO hold being placed on his accounts. Throughout the case it is undisputed that the only source of additional funds for Mr. Williamson was his retirement accounts. Throughout the case it is undisputed that Mr. Williamson retirement accounts were frozen from the entry of the Temporary Order until April 14, 2010 the date of the release of funds pursuant to the Qualified Domestic Relations Order by the Plan Administrators. Throughout the case it is undisputed that Mr. Williamson had to withdraw funds from his retirement accounts in order to pay as ordered. The



division of the marital estate and alimony is inextricably tied to the retirement accounts of Mr. Williamson.

## REPLY TO ARGUMENT AND AUTHORITIES

### Reply to Argument A. Division of Marital Estate and Award of Alimony

Appellant maintains the Chancery Court erred in its allocation and division of the marital estate and its award of permanent alimony or in the alternative the Court failed to make sufficient finding of facts and conclusion of law regarding the distribution of the marital estate and the award of permanent alimony. It is clear from a review of the dates of the 8.05s submitted by the Parties that some six to nine months increase in Mr. Williamson's retirement account was considered by the Court but the previously ordered expenditure of \$8,388.81 was considered in its value. Ms. Williamson's retirement account remained at the initial balance. This skewed the value of the marital estate in favor of Ms. Williamson. Ms. Williamson was to receive approximately \$300.00 per month in income from a retirement account with First Tennessee. [This account and amount was not disclosed on her 8.05], which also skewed the value of the marital estate in favor of Ms. Williamson. Further, no value was assigned to all of the personal property received by Ms. Williamson by agreement of the Parties, which also skewed the

value of the marital estate in favor of Ms. Williamson. The value of the marital home received by Ms. Williamson was not established. This fact and the fact that Mr. Williamson is ordered to pay one-half the payment on the marital home also skewed the value of the marital estate in favor of Ms. Williamson. The Court did not make proper findings to support its determination of marital assets and the valuation of the marital estate. The result was a great disparity in the division of the marital estate in favor of Ms. Williamson. [Vol. 4 of 5, Pp. 149-178 – Opinion of the Court]

The trial court was made aware of Mr. Williamson's dilemma when Mr. Williams filed his Motion for Reconsideration and Other Relief. [Clks. Papers 97-99]

As stated in Spahn v. Spahn 959 So.2d 8, 12 (Miss.Ct.App. 2006), Classification as to marital or non-marital is the first step in equitable distribution. Smith v. Smith 25 So.3d 369 (Miss.Ct.App. 2009) Upon a determination of the marital estate, the Chancellor must consider the following eight Ferguson factors when conducting equitable distribution of marital property 1) substantial contribution to the accumulation of the property; 2) degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets; 3) market value and emotional value of the assets subject to distribution; 4) value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution; 5) tax and other economic consequences; 6) extent to which property division may be utilized to eliminate periodic payments; 7) needs of parties for financial security with due regard to the combination of assets, income and earning

capacity; and 8) any other factor which in equity should be considered.

Spahn 959 So.2d at

In Richardson v. Richardson, 912 So.2d 1079 (Miss. Ct. App. 2005) the court reversed the property division for failure to value assets.

In Jones v. Jones, 995 So.2d 706 (Miss 2008), income that a wife anticipated receiving after the divorce but which was earned during the marriage was marital property.

In reviewing the facts of the instant case and the applicable Ferguson factors Appellant submits the following analysis:

Ferguson Factor No. 1: There is no question Wilbur Williamson made a substantial contribution to the accumulation of marital property including the final marital home. It is undisputed he worked two jobs. Ms. Williamson was employed as well. The disparity in the marital estate set out hereinabove is paramount importance in applying Ferguson Factor number one weighs heavily in favor of Wilbur Williamson.

Ferguson Factor No. 2: Wilbur Williamson did not dispose of marital assets; however Mary Jean Williamson put "cash in a lock box for almost ten years in contemplation of a divorce. Thus factor number two favors Mr. Williamson.

Ferguson Factor No. 3: The marital home, according to Mary Jean Williamson has a value of \$210,000.00. The mortgage against the home is \$160,000.00. If that is the case, then Mary Jean Williamson's receipt of the marital home with Mr.

Williamson contributing one-half of the mortgage payment weighs in favor of Wilbur Williamson. The Court did not value the marital home as to the property division.

Ferguson Factor No. 4: The Court also divided as a part of the distribution of the marital estate the future income of the Parties. The Court refers to the fact that Mr. Williamson is nearing age 65 and Social Security eligibility. It failed to consider this event in distributing the estate and awarding alimony.

Factor No. 5: Penalties and tax consequences of a forced withdrawal from his retirement account were devastating to Wilbur Williamson. The penalty and tax consequences were not deducted before the 50-50 division as a part of the marital estate. Ms. Williamson received her one-half of the account with no penalty or tax consequences. Mr. Williamson paid all penalties and tax out of the remaining funds in the account. Thus factor number 5 weighs in favor of Mr. Williamson

Factor No. 6: With the disparity in the distribution of the marital estate under the facts of this case, the original Court erred as a matter of law in its application of the Ferguson factors, thereby making its award of permanent periodic alimony error.

There should have been no award of permanent alimony in the instant case. Ms. Williamson was employed, she received the major of the marital property and fault should not have been an issue in this matter.

In Humphries v. Humphries, 904 So. 2d 192, (Miss. Ct. App. 2005) the Court said, “award of debt to husband obviated need for alimony award.”

In Luse v. Luse, 992 So. 2d 659 (Miss. App. 2008) the Court said, “the trial court must conduct a Ferguson analysis even when the parties agree to property division and submit on the issue of alimony to the court.”

In Rogillio v. Rogillio, 2008-CT-01838-SCT. the Court said, “Distribution of assets and alimony are distinct, though interrelated concepts.” Rogillio v. Rogillio No. 2008-CT-01838-SCT

In Segree v. Segree, 2009-CA-00757-COA (2010) the Court reversed and remanded for failure to provide adequate findings pertaining to the equitable distribution of the marital assets (particularly the award of the marital home) the award of permanent periodic alimony ... ¶ 25 In the Tynes case the Court stated, "If there are sufficient marital assets which, when equitably divided and considered with each spouse's nonmarital assets, will adequately provide for both parties, no more need be done." Tynes v. Tynes, 860 So.2d 325, 328 (¶6) (Miss. Ct. App. 2003) (quoting Johnson v. Johnson, 650 So.2d 1281, 1287 (Miss. 1994)).

In McIntosh v. McIntosh, 977 So.2d 1257 (Miss. Ct. of App. 2008) the Chancellor did not award alimony even though the husband's income was three time greater than the wife's income because she received an equal division of the marital assets. The McIntosh court affirmed the Chancellor's decision.

In Cosentino v. Cosentino, 986 So.2d 1065 (Miss. Ct. App. 2008) the Court reversed an award of \$7,000.00 per month in permanent alimony to a wife who received \$2.6 million in marital assets, stating that the chancellor did not explain why the property division left her "with a deficit."

Reply to Finding of Contempt of Decree of Divorce and Award of Attorney Fees - Second Chancellor

The second Petition for Citation of Contempt filed April 6, 2010, after this case had been noticed for appeal was assigned by the clerk to a different Chancellor.

This Petition is a part of the record on appeal and bears Docket No. 09-2-52 . The Petition itself alleges contempt of the Decree of Divorce that was noticed for appeal Docket No. 09-2-52. Yet the clerk of the court assigned this Petition to a second Chancellor.<sup>5</sup> The Petition stems from the dilemma "frozen asset" and

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<sup>5</sup> This single Petition was assigned to a second chancellor, deemed a new case, thus no notice was served upon Mr. Williamsons trial counsel or appellate counsel. This is contrary to Rules 3, 4 & Rule 81 of Mississippi Rules of Civil Procedure as promulgated by the Mississippi Supreme Court.

QDRO hold on Mr. Williamson's funds. Counsel for Wilbur Williams raised all Rule 12, M.R.Cv.P. defenses and the defense of impossibility.

The hearing on this Petition for content was June 23, 2010. At trial Mr. Williamson testified regarding personal service upon him. Mr. Williamson testified that he "found out about" [the petition for contempt when] it [the summons] when he found it on his door on April 15. He said that no one ever handed it [the summons] to him personally at any time. It [the summons] was stuck in the door when I came home one night. Mr. Williams also testified he was not inside the house at the time the summons was left." Vol. I of I, Pps. 186, 191, 194. The trial court found personal service with seven days notice of trial had been perfected upon Mr. Williams.<sup>6</sup> The Court the court found by the filing of the response that alleged the insufficiency of process Mr. Williams had placed himself before the court.

This manner and mode of service is not Personal service as defined by the Mississippi Rules of Civil Procedure. M.R.Cv.P. 4, 5, 6 & 81

Mr. Williamson also testified to the impossible situation of the retirement withdrawal. He testified as follows: "that he understood that the forms were to be paid within 30 days from January 13, 2010; that the petition for contempt was filed April 6; that he sent a check to counsel's office dated April 15, 2010 to pay

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<sup>6</sup>Deputy Sheriff English did not honor Mr. Williamson's witness subpoena.

the contempt; that there was no other way that he could have obtained money other than the 401 K [counsel for Mr. Williamson asked the court to take judicial notice of this ruling by the previous chancellor citing page 5 of her ruling; that the date of the delivery of the check was on April 14, 2010 at 12:01 PM; that he had to get the money out of the 401 K and could not get it because of the QDRO hold; that it took 90 days to get the QDRO hold off; that he made other attempts to borrow money and could not get it; that he had no funds of his own to pay with; that he called [plan administrator] every day to attempt to get the funds; that he contacted Federal Express about information on regarding date of receipt of the funds. [Vol. I of I, Pps. 185, 186, 187, 189, 190]

The court acknowledged that Mr. Williamson had already paid the money ordered. However he awarded Two Thousand Five Hundred Dollars to Ms. Williams even though he had purged the contempt prior to the hearing.

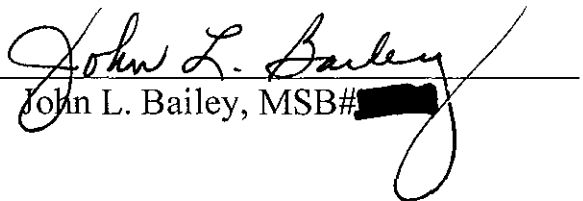
### CONCLUSION

For the foregoing reasons and authorities this Court should reverse the decisions of the lower court.

Respectfully, submitted this the 29th day of April, 2011.

WILBUR WILLIAMSON, APPELLANT

BY:

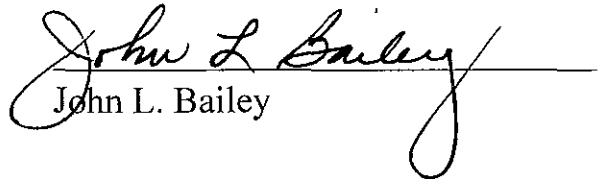
  
John L. Bailey, MSB# [REDACTED]



CERTIFICATE OF SERVICE

I, John L. Bailey, do hereby certify that I have this day served, by United States mail, proper postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant upon Honorable Percy Lynchard at his usual address of, Courthouse 2535 Highway 51 S., Post Office Box 340, Hernando, MS 38632-0340, Honorable Vicki B. Cobb, at her usual address of, Post Office Box 1104, Batesville, MS 38606 and, Honorable Malenda H. Meacham, Law Offices of Meacham and Jackson, at her usual address of, 2590 Panola Street, Post Office Box 566, Hernando, MS 38632-0566.

This the 29th day of April, 2011.

  
John L. Bailey