

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**

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

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

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO.: 2010-CA-004000

WILBUR HAROLD WILLIAMSON DEFENDANT/COUNTER-PLAINTIFF

VS

MARY JEAN (WADDELL) WILLIAMSON PLAINTIFF/COUNTER-DEFENDANT

CERTIFICATE OF INTERESTED PERSONS

This undersigned counsel of record certifies that under Rule 28 the following listed persons have an interest in the outcome of this case. These representations are made in order that the Chancellor's of this Court may evaluate possible disqualification or recusal.

Honorable Percy Lynchard, Chancellor

Honorable Vicki Cobb, Chancellor

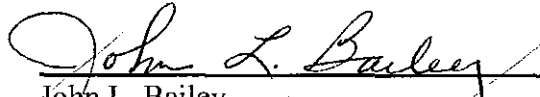
Honorable Melinda H. Meacham, Counsel for Plaintiff/Counter-Defendant

Wilbur Harold Williamson-Defendant/Counter-Plaintiff-Appellant

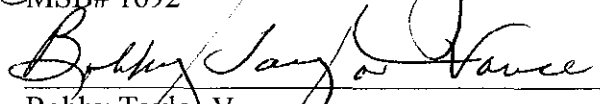
Honorable John L. Bailey, Counsel for Defendant/Counter-Plaintiff-Appellant

Honorable Bobby Taylor Vance, Co-Counsel for Defendant/Counter-Plaintiff-Appellant

DATED this the 20th day of December, 2010



John L. Bailey
MSB# 1692



Bobby Taylor Vance
MSB#8616/TNB# 024268

STATEMENT OF THE ISSUES

- I. WHETHER THE CHANCELLOR ABUSED DISCRETION AND OR APPLIED AN ERRONEOUS LEGAL STANDARD AND COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ESTATE AND AWARDS OF ALIMONY
- II. WHETHER THE CHANCELLOR ABUSED DISCRETION AND COMMITTED MANIFEST ERROR IN FINDING APPELLANT IN CONTEMPT OF COURT AND IN AWARDING ATTORNEYS FEES

STATEMENT OF THE CASE

On February 4, 2009, Mary Jean (Waddell) Williamson filed an Original Bill of Complaint for Divorce, Etc. and Temporary Relief in the Chancery Court of Tate County, Mississippi alleging as ground for divorce habitual cruel and inhumane treatment and the alternative ground of irreconcilable differences. On March 10, 2009 Wilber Harold Williamson, Sr. filed his Answer to Complaint for Divorce and Counter-Claim alleging habitual cruel and inhumane treatment and the alternative ground of irreconcilable differences. On March 31, 2009 Mary Jean (Waddell) Williamson filed Answer to Counter-Claim. [RE 2, 3, and 4] The hearing that consisted of contempt of a temporary order and the hearing on the merits was heard on January 13, 2010. On January 13, 2010, the Parties filed a stipulation and consent to divorce on the ground of irreconcilable differences. The trial court did not bifurcate the hearing on the contempt action and the testimony on the division of the marital estate and need for alimony [Vol. 3, P. 4] The Decree of Divorce was entered February 9, 2010. [RE 9, 13]

STATEMENT OF THE FACTS

At the time of the divorce Wilbur Harold Williamson was sixty-two years old and Mary Jean Waddell Williamson was sixty years old. They had been married forty-two years. [Vol. 3,

P. 45] The Parties built the marital home and had lived there for only seven or eight years. [Vol. 3, P. 58, Vol. 4, P. 92] The children of the Parties are adults but the son, daughter, daughter's spouse and two grandchildren live with the Parties. [Vol. 3, P. 76] At the time of the hearing Mary Jean (Waddell) Williamson and Wilbur Williamson were occupying the marital residence.

Initially, the Parties also agreed to a division of their personal property as follows:

Wilbur Harold Williamson received the bed and mattress from the room in which he stays in the marital home, the desk in that room, as well as the armoire, the big screen TV, his clothing and personal effects, the weed eater, the chain saw; the tools and tool box, yard work tools, his shotgun, utility trailer. They will divide and copy the photos, the family photos, throughout the years and equally divide the cost of any copying that may have to be done. Mary Jean (Waddell) Williamson received the following: chest of drawers and smaller TV in the room where Mr. Williamson stayed, and all other personal property in the house. The contents in the house were insured for \$40,000.00 [Vol. 3, Pp. 8, 9; Vol. 4, P. 140] The Court accepted this agreement. Ultimately, during trial, the Parties agreed that each would receive one of the two sound systems and DVD players. [Vol. 3, Pp. 51-54]

Property that was not a part of an agreement consisted of: the marital home at 1145 Golden Pond Circle, Coldwater, Mississippi, the automobiles of the parties, the Union National/Wells Fargo 401-K of Wilbur Harold Williamson with a balance of \$24,041.00 and Harrah's savings of \$1,500.00 [Vol. 3, P. 33, 41-45], the First Tennessee Retirement/Sycamore Bank account at \$300.00; the 401K Account of Mary Jean (Waddell) Williamson worth approximately \$19,000.00 [Vol.3, Pp. 61- 63], cash belonging to Mary Jean (Waddell) Williamson in a safety deposit box, [Vol. 4 P. 92] The First Tennessee Retirement Account should have been reduced to present day value in considering the equitable distribution of the

marital estate The mortgage on the marital home was approximately \$160,000.00. [Vol. 4, P. 91] Each of the Parties had taken money from or had a loan against their 401 K. Wilbur had taken approximately \$10,000.00 from his and Mary had taken \$25,000.00 from hers. [Vol. 1, P.100] Mary testified she used the \$20,000.00 (\$5,000.00 was early withdrawal fee) to pay off her van in the amount of \$12,000.00; paid Friedman for a jewelry bill and then when the van was totaled to buy another car. Wilbur testified that he used his \$8,000.00 (\$2,000.00 was early withdrawal fee) to obtain an attorney in these divorce proceedings.

Wilbur Harold Williamson, an insurance salesman, whose income at the time of the hearing was averaging \$ 4,527.92 a month. He also received \$299.70 each month from State Street AIG Pension. [Vol. 3, P. 17] Mr. Williamson testified he worked five days a week. He also testified that in 2009 his gross income was \$58,000.00 which included his insurance commissions and pension. [Vol. 1, Pp.17, 18, 20] His 401K had a loan against it that was payroll deducted. Another deduction was for money he had taken out of the 401 K. Mr. Williamson testified that approximately \$4,000.00 or \$4,500.00 was still owed the 401K. Mr. Williamson also testified he withdrew \$10,000.00 from Harrah's retirement in order to obtain a lawyer to represent him in the divorce. He only received \$8,000.00 since \$2,000.00 was withdrawal penalty. [Vol. 1, Pp.21, 23] He also testified that he was refunded \$1188.00 of the attorney fee to pay "that note" [house] in September. Mr. Williamson had expenses on the marital home, business expenses in his insurance business, and his living expenses set forth in the 8.05 filed of record. [RE 19]

Mary Jean Waddell was working and making \$ 27,000.00 or \$28, 000.00 a year, substantially the same as she made when she was with First Tennessee. She also had her

retirement account with First Tennessee that she had frozen until age 65. [Vol. 1, P.62] In addition she had \$19,000.00 remaining in her 401 K at the time of the hearing. [Vol. 1, P. 33] Ms. Williamson had two bank accounts, a joint account with Mr. Williamson and a personal account. Mr. Williamson's entire check went into this joint account. Ms. Williamson also maintained a personal account. She deposited her money in this account, but sometimes put money into the joint account. [Vol. 1, P. 86] She also put money in her safety deposit box that she failed to disclose on her 8.05. She had been saving this money for approximately ten (10) years so she could file for a divorce. [Vol. 3, Pp. 81-84] [Vol. 4, Pp. 92, 93] The Financial Declarations of the parties were submitted to the Court by agreement. Vol. 1, Pp.14, 15] [RE 18, 19]

The Temporary Order: Prior to the hearing on the merits the Court entered a Temporary Order on April 7, 2009, in which both Parties were to remain in the marital home; continue paying household bills as they have done in the past; Mary Jean Waddell Williamson was to pay the note on her vehicle, the light bill, cable bill, her credit card bills and both Parties purchase groceries. Wilbur Harold Williamson was to pay all other household bills, including the mortgage on the martial home including taxes and insurance, gas/propane for the marital home, his vehicle note, garbage pickup, pest control, automobile insurance for the parties, his cell phone bill, upkeep and maintenance on the marital home and any bills solely in this name. He was to continue to maintain Ms. Williamson on his dental insurance and provide vision insurance if available through his employer. The 401-K accounts were frozen until further orders of the Court. (Emphasis ours) This resulted in a QUDRO being placed on Mr. Williamson Accounts. Both Parties were enjoined from removing or dissipating funds from any account except in the ordinary course of business. Both Parties were enjoined from removing or dissipating any marital

assets. Defendant's [Mr. Williamson] account with Union National and the Plaintiff's through Sycamore Bank shall be frozen until further orders of the Court. Any other Parties accounts not addressed in this agreement are hereby frozen as well. [VOL I, Pp. 29 – 31][RE 15]

On September 29, 2009 Wilbur Harold Williamson filed his Motion to Modify Temporary Order and For Trial Setting together with his Notice of Motion for October 26, 2009 alleging a decrease in income and inability to pay the house payment and other household bills.

The First Contempt: On December 16, 2009 Mary Jean (Waddell) filed Petition for Contempt alleging that Wilbur Harold Williamson was in contempt of the Temporary Order in failing to pay the mortgage payment on the marital home for two months, pay for groceries and seeking Attorneys Fees. Mr. Williamson alleged impossibility to pay. The Court had frozen his 401K and all other accounts until further order of the Court. The third party administrator of the different funds controlled if and when funds could be disbursed. These accounts remained frozen until the final Qualified Domestic Relations Order was approved by the third party administrators and filed by the Court on March 25, 2010. (Emphasis Ours) [RE 13] Therefore, the administrators did not construe the Court's order to allow any withdrawals whatsoever, whether this was the intention of the Court or not. In addition, in the Temporary Order there was no time frame in which Mr. Williamson was to pay any of the items attributed to him. Mr. Williamson avers he was not in contempt because there was no time frame in which Mr. Williamson was to pay. Mr. Williamson testified "the only way I can get the money is get it out of my 401-K." [Vol. 1, P. 33] Mr. Williamson was not in contempt of the temporary order in nonpayment of a share of the groceries for Ms. Williamson's household. The order did not

specify a sum he was to pay for groceries. Ms. Williamson testified that he had given her \$650.00 since the temporary order. [Vol. 3, P. 74]

This Petition for Contempt was heard in conjunction with the trial on the merits on January 13, 2010. The hearing on the Petition for Contempt and hearing on the merits were not bifurcated. [RE 20]

The Findings and Opinion of the Court: The Court found Mr. Williamson in contempt for failing to abide by the Court's Temporary Order. The Court found, "The issues that I want him to take care of, immediately, the house is three months in arrears. I want that caught up, immediately. I mean, no more than twenty days. The Temporary Order is gone, so any freezes on your disposition of your property gone, because, today, I'm going to divide up your property...So, you are going to have to go to your 401-K, I guess, and get the money, Mr. Williamson....Twenty days is an upward limit, because I feel like it's going to take you some time to get the money out of your foreclosure [sic 401-K] (Emphasis Ours) Also, then Mrs. Williamson testified that, of the monies that I ordered you, Mr. Williamson, to pay, she has had to give to you, \$200.00 toward the house payment; \$449.00 to pay toward the gas in the house; \$610.00 she had to pay to buy eye glasses, when you are supposed to have vision insurance for her; and \$150.00 for the law service. You know, to get the lawn taken care of. That totals \$1,409.00 of monies that I ordered you to pay, Mr. Williamson, at the Temporary, that either, she paid Williamson a Judgment in that amount, and I am ordering you to pay that. [Vol. 4, P. 150]

The Court assessed fees of \$2,500.00 for the bringing the contempt action. "I am also assessing as attorney fees for her having to bring the Motion to Compel."..... And, if my math is correct, that totals \$4,824.81. And I want all of that to be paid to Mrs. Williamson within

thirty days. I understand you are going to have to get that money out of your 401-K (Emphasis Ours)...[Vol.4, Pp. 153, 154]

The Court found, “I am granting each of you an Irreconcilable Differences divorce.” [Vol. 4, P.154]

The agreement of the Parties as to the division of real property was ratified. [Vol. 4, P. 155] Then the court said, “Y’all didn’t really talk about, or put on any proof about, your cars, but I understood from the testimony, that Mrs. Williamson has a vehicle. She is paying for her vehicle. Mr. Williamson has a vehicle. He is paying for his vehicle. And that will continue. Your will be awarded your vehicle, Mr. Williamson. You will be awarded yours, Mrs. Williamson. Y’all will each be required to pay the debt on your own vehicle.”...[Vol. 4, P.155]

The Court then found, “ ...The marital assets, as I understand what they are, are Mr. Williamson’s Harrah’s 401-K account, and Mrs. Williamson’s Retirement or 401-K account, and the home—the marital home.” [Vol. 4, P.156]

The Court found neither Party “made any more of a dissipation of the assets than the other one has.” [Vol. 4, P.159]

The Court found the total both Parties’ 401-K accounts was \$45,538.07. stating “Well, as I said, I’m working on a fifty-fifty split....I am finding that your contributions are equal in value...and I feel like, an equitable thing to do will split things, half and half. ... So if I divide the total in half each one of you should end up with \$22,769.53 worth of the 401-K money.... [Vol. 4, P.160] ¹

The Court continued, “So Mrs. Williamson, if you keep your \$19,000.00 401-K, and you,

¹ This figure is not take into account the amount the Court had already ordered Mr. Williamson to pay from his now portion of his 401K, thus the 50/50 split the Court intended was impossible.

get \$3,768.54 out of Mr. Williamson's 401-K, then that's going to make y'all even. ... So I suggest you do a QUADRO on his Wells Fargo Account, transferring \$3,768.54 worth of value out of your Wells Fargo Account to her...So, that's my Order to equalize the 401-K's." [Vol. 4, Pp. 161, 162]

The Court found "...each one of you is going to pay your own attorney fees." [Vol. 4, P. 162]

The Court found "...with regard to the 2009 tax return, I'm going to order that y'all file a joint return, and that y'all equally divide the refund from that... I'm still trying to divide the things that y'all accumulated during your marriage, equally." [Vol. 4, P.163, 164]

The Court found "the Wife will be allowed to continue to live in the house." [Vol. 4, P. 164]

The Court ordered, "the house is to be sold and is to be placed on the market, immediately, and made ready to sell and when the house is sold the equity is to be split, equally, between the two of you." [Vol. 4, P.164]

The Court found, "the Parties are to split the costs of any minor things that need to be done to get the house ready for the market." [Vol. 4, P. 164]

The Court said, "if the house is not sold within twelve months, then y'all can bring it back to the Court and have the Court revisit this part of my Order, with regard to your living in the house and the house to be sold. [Vol. 4, Pp. 166, 167]

In determining alimony and future support the Court referred to "the income and expenses of the parties and found a \$31,000.00, gross, difference in your incomes... The health and earning capacities of the parties—both of you are still healthy, but both of you are approaching retirement....But the case law says, what I'm supposed to do is divide up your property. And, then, if there is still an inequity, then I can use alimony to even that out." [Vol. 4, Pp.169]

The Court found, "alimony is going to be appropriate." [Vol. 4, Pp. 170, 171] The Court said, "I have taken into consideration the needs of each party, with regard to your financial statements and your expenses, ... your needs...the obligations and assets of each party...the length of the marriage...the presence or absence of minor children in the home....the age of the parties and your proximity to retirement..the standard of living of the parties, both during the marriage and at the time of the support determination...the tax consequences of the spousal support order, ...any periodic alimony is going to be taxable to you, Mrs. Williamson. It's going to be a tax break to you, Mr. Williamson....Fault or misconduct—and I have heard the little bit of evidence about fault. That might weigh a little bit in my decision....Wasteful dissipation of assets by either party. I don't think, as I said earlier, that either one of you dissipated any assets. [Vol. 4 P. 171- 174] If I took your incomes and tried to equalize your incomes,if I took \$818.47 from you, Mr. Williamson, and gave it to Mrs. Williamson, that would pretty much, equalize your net incomes each month." [Vol. 4, P.175]

The court found the debt on the marital home, \$1188.00 monthly, should be divided with Mr. Williamson paying to Mrs. Williamson \$594.00 every month until the house is sold.

The Court found Mr. Williamson should pay an additional \$200.00 every month in alimony...that's going to equalize your incomes...[Vol. 4, P. 176]

The Court found that the month after the house is sold Mr. Williamson's alimony payment is going to increase to \$800.00 per month so that will equalize your incomes. [Vol. 4, P. 176]

The Court found the alimony to be periodic. [Vol. 4, P. 178]

The Court found each Party would receive one-half of the interest credit for income tax purposes ---- "for the months that y'all split the house payments." [Vol. 4, P. 178]

The Findings and Order Of the Court on Contempt: The Court found that Wilbur Harold Williamson was in contempt for failure to pay the mortgage on the marital home and failure to pay other bills he was ordered to pay under the Temporary Order including one half of the groceries. [Emphasis Ours] The Temporary Order did not order him to pay one-half of the groceries, he was to pay a share. Ms. Williamson testified he paid \$1100.00, \$650.00 of which was for groceries.][Vol. 3, P. 73] This Final Decree ordered him to pay these amounts and in addition to pay \$4,824.81 within thirty (30) days from January 13, 2010 or February 12, 2010, \$200.00 reimbursement to Ms. Williamson for a house payment, \$449.00 for a gas bill, \$610.00 for eyeglasses, \$150.00 for lawn service, \$2,500.00 in attorney's fees on the Motion for Contempt and \$915.81 for the filing of the Motion To Compel. The Court acknowledged Mr. Williamson would have to access the funds in his 401 K to comply with this order. (Emphasis Ours) [Opinion of the Court [Vol. 4, Pp. 150-154] [RE 20]

The Findings and Order of Equitable Division of the Marital Estate: Then the Court divided the "remaining assets, the 401K accounts and the marital home" as follows (Emphasis Ours): Mary Jean Waddell Williamson acquired most of the unencumbered personal property; however, the court did not assign a value to the property awarded to her. The Court did not assign a value to either of the automobiles even though Mr. Williamson testified that his auto a 2006 Corolla had over 200,000 miles on it and he used it to sell insurance and would soon have to have another vehicle. [Vol. 4, P. 128] Ms. Williamson was driving a new vehicle; [the Court awarded each their own vehicle and any debt thereon] [Vol. 4, P. 155] The Court did not assign a value to the occupancy and use of the marital residence. The Court did value the 401K accounts of the parties and divided these accounts fifty-fifty as a part of the equitable distribution of the marital estate. However, the Court used the value of Mr. Williamson's

accounts as of the date of the hearing and the value of Ms. Williamson's accounts as of the date of the filing for divorce.[RE 18, 19] The Court accomplished this fifty-fifty division by ordering Mr. Williamson to pay \$ 3769.54to Ms. Williamson out of his 401K. The court did not give Mr. Williamson credit for all amounts that were to be paid under its finding of contempt.

The Court found that the 401K accounts should be equally divided. To accomplish this division Defendant, Wilbur Harold Williamson was ordered to transfer \$3,769.54 from his 401 K by a Qualified Domestic Relations Order. [RE 13] The marital home was to be placed on the market immediately with Ms. Williamson to have sole use of the home until it is sold. The Court reserved unto either party the right to Petition the court regarding sale of the house. Mr. Williamson was ordered to pay \$594.00 per month toward the mortgage [Vol. 4, P.175]. The Court awarded Ms. Williamson periodic alimony in the amount of \$200.00. per month until the marital home is sold. Upon the sale of the home the periodic alimony paid shall be \$800,00. No consideration was given to the \$300.00 or more per month Ms. Williamson was to receive from her retirement account at First Tennessee. The Court did not address the fact that payments ordered for the arrearage on the house were to be deducted from Mr. Williamson's one-half of his 401 K nor the benefit Ms. Williamson receives from the use of the home until sold. [Vol. 1 P. 61, 64]

The Motion For Reconsideration: On February 17, 2010 Mr. Williamson filed a Motion For Reconsideration and Other Relief alleging, inter alia, the Court failed to use the proper figure to determine the value of the parties retirement accounts; the Plaintiff failed to provide the current balance of retirement account to the Court as of the date of the hearing and that the Defendant proved both balance at the time of the filing of the divorce and at the time of hearing. Thus the division [of the 401Ks] determined by the court was not equitable and to Mr. Williamson's

detriment. The Motion also alleged that the Court failed to take three hundred dollars per month from the pension of Ms. Williamson into her division of the marital income. The Motion requested the Court take into consideration sums expended by the Defendant for temporary support, all monies owed and paid under the temporary order, value of the personal property items awarded Ms. Williamson, value of the continued residence in the marital home and the additional cost of a separate residence for Mr. Williamson, and the percentage of taxes paid by each party in dividing the tax refund. [RE 10]. The Motion for Reconsideration was denied. [RE 11]. A proper Notice of Appeal was filed following the entry of this Order.

The Post Divorce Contempt:² After an appeal was perfected, On April 6, 2010, Mary Jean (Waddell) Williamson filed a Petition for Contempt alleging contempt for failure to pay \$3,769.54 per a Qualified Domestic Order and seeking an award of an attorney fee. Mr. Williamson responded to this Motion for Contempt alleging that he had not been properly served with process. [Vol. 5, P. 182] A policeman, Mr. English, who had served the Rule 81 Summons for Ms. Williamson was under subpoena by Mr. Williamson, but the Court was advised the day of the hearing he was out of State and would not be available to testify. [Vol. 5, P. 182] Mr. Williamson Testified that “no one served him with papers...It [the Petition for Contempt] was stuck in the door when I come home one night. He further testified that “no one ever handed that [Summons] to him at any time.” [Vol. 5, P. 186] Mr. Williamson testified he received the check from Fed Ex [the \$ 4, 824.81] on Wednesday, the 14th and that was the only thing received that day...there was nothing on the door...nothing else was placed on the door on that date.” [Vol. 5, P. 190] Mr. Williamson’s testimony was “when I got in the night of the 15th that package

² Even though the Order on which this Motion For Contempt was predicated was on appeal the Clerk of the Court treated this Motion For Contempt as a new case and assigned it to a different chancellor even though it kept the same cause number.

[Summons and Petition For Contempt] was on the door...it was just left on the door.” He testified he never received any kind of mail or any other notification about that [Petition For Contempt]³

On cross examination Mr. Williamson testified he was not inside the house when the officer left the process stuck in the door. [Vol. 5, P. 194] The Court held that Mr. Williamson had waived this affirmative defense of lack of process by answering the Petition. [Vol. 5, Pp.182-184]

Mr. Williamson testified that the order of the Court required him to pay \$4,824.81 within 30 days from January 13, 2010. [From his 401K] [Vol.5, 184-185] Mr. Williamson further testified he sent a check to his attorney dated April 15, 2010. Mr. Williamson acknowledged the paid the amount after the petition for contempt was filed and explained he could not get the money out of the 401K .. The judge said I had to get it out of that 401K. It had a QDRO hold on it.... [Vol. 5, Pp. 185-186] Mr. Williams testified he attempted to borrow money from a bank but could not get it. He testified he did not have funds of his own to pay with. He testified he called everyday trying to get the QDRO hold released. He testified he wrote the company asking them to document when the QDRO hold would be taken off the account... that he contacted Federal Express to get them to give you information about when you received the funds. [Vol. 5, P. 186-187] After reviewing Fed Ex documents regarding a tracking number and delivery date, Mr..Williamson testified the date of the delivery [of the 401K funds] was April 14, 2010 at 12:01 p.m. Mr. Williamson testified that the QDRO hold was released and the funds were sent overnight on the 13th day of April. Mr. Williamson testified he could not get the funds prior to

³ Neither Counsel of record for the previous Order nor counsel on record for the appeal were noticed or served with the Summons and Petition For Contempt.

that date. [Vol. 5, P. 189, 192] Mrs. Williamson testified that the \$4,824.81 was paid current. She also testified her attorney was charging an attorney fee of twenty-five hundred dollars for the contempt action. [Vol. 5, P. 196] After hearing testimony, inter alia, regarding the 401 K account the Court found Mr. Williamson was in contempt of the Order that had been appealed for failing to pay the \$4,824.81 within 30 days of January 13, 2010. The Court held that Mr. Williamson had failed to prove inability to pay with particularity. [Vol. 5, P 201] [Vol. 5, P. 200] The Court found that Mr. Williamson had purged himself of contempt. The Court then found that the McKee factors would not come into play awarded \$2,500.00 in attorney's fees to "make the plaintiff whole..." without any justification for the amount charged. [Vol. 5, P.200]

SUMMARY OF ARGUMENT

The Court granted an irreconcilable differences divorce. The Court ratified and accepted the personal property division agreed to by the Parties. The Court then heard testimony on the division of the remaining marital estate and a previously filed Petition For Contempt. Neither the testimony nor the ruling was bifurcated on these two matters. The Court attempted to divide the marital assets fifty/fifty. However, in trying to accomplish this division the Court failed to consider the value of the assets divided by agreement of the Parties in which Ms. Williamson received the bulk of unencumbered assets and the use of the marital home. It also awarded what is essentially lump sum alimony to Ms. Williamson in dividing the marital estate by Ordering Mr. Williamson to pay \$3, 769.54 from his 401K to Ms. Williamson. [RE 9]

In addressing its finding that Ms. Williamson should then received periodic alimony, the Court again used money from Mr. Williamson's 401K ordering Mr. Williamson to pay \$594.00 per month toward the mortgage [Vol. 4, P.175]. The Court awarded Ms. Williamson periodic alimony in the amount of \$200.00. per month until the marital home is sold. Upon the

sale of the home the periodic alimony paid shall be \$800,00. No consideration was given to the \$300.00 or more per month Ms. Williamson was to receive from her retirement account at First Tennessee. The Court did not address the fact that payments ordered for the arrearage on the house were to be deducted from Mr. Williamson's one-half of his 401 K nor the benefit Ms. Williamson receives from the use of the home until sold. [Vol. 1 P. 61, 64]

Then the Court proposed to equalize the future incomes of the parties by dividing the 401K accounts equally between the Parties ordering Mr. Williamson the pay. These accounts had already been divided as "lump sum alimony." Equalization of the future income of the Parties is not the purpose of periodic alimony. Periodic alimony is only considered when there is a deficit in the equitable distribution of the marital estate.

Mr. Williamson's 401 K funds were under a QUDRO hold by order of the Court in its Temporary Order. The trial court acknowledges that different amounts he was order to pay would have to be taken from his 401K money. Mr. Williamson was without other sources of funds. Mr. Williamson raised the defense of inability to pay and the Court should not have found him in contempt, since its own order created the hold on his funds. Even if this was not the intent of the Court's order, the hold was not released until the third party administrator accepted a QUDRO it was filed.

The post appeal contempt hearing was heard by a different Chancellor because the Petition For Contempt was a "new case" even though it as based on the orders on appeal ordering him to pay \$4,824.81 from his 401K. Thus a Rule 81 summons was necessary to notify Mr. Williamson of the Petition and hearing thereon. Mr. Williamson raised the affirmative defense of lack of process. The Court held that Mr. Williamson waived his defense of lack of process by answering the petition. This is an erroneous standard. In this hearing Mr.

Williamson also raised the affirmative defense of inability to pay. The Court held Mr. Williamson had failed to prove this defense with particularity. Again this defense was based upon his inability to access his 401K account under the orders of the previous Chancellor that were on appeal. The Court erred in denying this affirmative defense.

Each of the trial Courts assessed attorney's fees in each of the hearing on Contempt. Not stated, but implied, by the first Court was Ms. Williamson was being made whole. In the second Court, the Chancellor stated the fee was granted to make Ms. Williamson.

The trial Courts abused discretion, committed manifest error and/or applied an erroneous legal standard.

ARGUMENT AND AUTHORITIES

Standard of Review

The Court in Dix v. Dix, 941 So.2d 913 (Miss.App. 2006) stated, "A chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings or unless the chancellor was manifestly wrong or clearly erroneous. Turpin v. Turpin, 699 So.3d 560, 564 (¶14) As to matters of law, however, a different standard applies. In that case, our review is de novo, and if we determine the chancellor applied an incorrect legal standard, we must reverse. Morreale v. Morreale, 646 So.2d 1264, 1267 (Miss. 1994). The Court reviews all of the evidence in a light most favorable to the Appellee. Rawson v. Buta, 609 So.2d 426, 429 (Miss. 1992)"

In Contempt proceedings, the matters are committed to the substantial discretion of the trial court, though clear and convincing evidence is required. Howard v. Howard, 968 So.2d 961, 978 (Miss.App.2007) citing Cumberland, 564 So.2d at 845. In Wing v. Wing, 549 So.2d 944, 946-47 (Miss.1989), this Court stated the standard of review for contempt proceedings:

In reviewing a judgment for contempt, this Court proceeds ab initio.

I. WHETHER THE CHANCELLOR ABUSED DISCRETION AND OR APPLIED AN ERRONEOUS LEGAL STANDARD AND COMMITTED MANIFEST ERROR IN THE DIVISION OF MARITAL ESTATE AND AWARDS OF ALIMONY

Equitable Distribution And Permanent Alimony

To assess the needs of the recipient spouse, the court will evaluate the standard of living to which the receiving spouse had become accustomed prior to the divorce. Jenkins v. Jenkins, 278 So.2d 446 (Miss. 1973) The source of alimony payments is from the income or corpus of the assets or estate of the spouse being ordered to make the alimony payments, according to the condition of both parties, including their separate estates, earning capacities, and fixed liabilities. Horton v. Horton, 301 So.2d 305 (Miss. 1972); Carpenter v. Carpenter, 519 So.2d 891 (Miss. 1988).

The Court in Barker v. Barker, 996 So.2d 161, 163 (¶8) (Miss.App. 2008) said the factors to be used by a chancellor in determining whether to make an award of permanent alimony are well-settled, as stated by the supreme court in Armstrong, 618 So.2d at 1280. Those factors are as follows: (1) the parties' income and expenses; (2) the parties' health and earning capacities; (3) the needs of each party; (4) the obligations and assets of each party; (5) the length of the marriage; (6) the presence or absence of minor children in the home, which may require one or both of the parties to provide childcare; (7) the parties ages; (8) the parties' standard of living both during the marriage and at the time support is determined; (9) the tax consequences of the spousal support order; (10) fault or misconduct; (11) wasteful dissipation of assets by either party; and (12) any other factor deemed by the court to be "just and equitable." *Id.*

The facts do not support an award of permanent alimony as the Court applied an erroneous legal standard. Before considering periodic alimony, the Court had already divided

the 401K accounts of the Parties in making an equitable division of the marital estate. For all practical purposes the Court awarded lump sum alimony to Ms. Williamson when it directed Mr. Williamson to pay \$3,768.54 from his 401K to her, thereby equalizing the marital estate.

The purpose of lump sum alimony is to serve "as an equalizer between the parties to serve equity amongst them completely once and for all." Hubbard, 656 So. 2d at 130. Lump sum alimony is usually used to create a fair or equitable property division. Gray v. Gray, 562 So.2d 79 (Miss. 1990), quoting from Cheatham v. Cheatham, 537 So. 2d 435 (Miss. 1988).

In the instant case the Chancellor used Mr. Williamson 401K payment of \$ 3,768/54 to Ms. Williamson as the equalizer in the division of the marital property.

The Court then refers to the Armstrong factors in determining periodic alimony; however it is clear from the courts findings and comments the intent was to equalize the future income of the Parties. Equalization of the future income of the Parties is an erroneous legal standard in determining periodic alimony.

It is well established that equitable distribution does not require equal distribution. Morris v. Morris, 2006-CA-01488 COA (Miss.Ct.App. 2008), citing Bresnahan v. Bresnahan, 818 So.2d 1113, 1122 ¶11 (Miss.2002).] However, "[a]limony is considered only after the marital property has been equitably divided and the chancellor determines one spouse has suffered a deficit." Laurov. Laurov, 847 So. 2d 843, 848 (¶13) (Miss. 2003). Stated another way, "If after the equitable distribution of the marital property, both parties have been adequately provided for, then an award of alimony is not appropriate." Tritle v. Trifle, 956 So.2d 369 (Miss. Ct. App. 2007)

The Court made no finding of a deficit in the division of the marital estate after the division of the 401K accounts; therefore periodic alimony should not have been considered. At

that point both Parties had been adequately provided for. The Court refers to this additional division as periodic alimony; however, the Court attempted, by again using Mr. Williamson 401K, to create equal future incomes of the Parties. In applying this erroneous standard Mr. Williamson was at best paying \$1,244.00 for housing and \$200.00 in alimony while Ms. Williamson only paid \$594.00. [RE 9] In addition Mr. Williamson was given no credit for sums paid under the temporary or sums ordered to be paid from his 401K under in the contempt findings.

The standard applied by this Court results in a future in which Mr. Williamson would receive his income from his job and the benefits that remain of his portion of his 401 K after the payment of \$4,824.81 plus \$3,759.54. .

Mr. Williamson needed a place to live and testified it would cost about \$600.00 per month to rent an apartment. By implication he would have to have furniture, food, clothing, utilities, telephone, and other necessities of his household. He testified he was overdrawn about \$300.00 or \$350.00 and had about \$50.00 in another bank [Vol. 4, Pp. 131, 132]

Ms. Williamson employed. [Vol. 1, P. 73] Ms. Williamson would receive her income until retirement, \$200.00 per month, use of the marital residence until sold, household contents insured for \$40,000.00, \$300.00 + from her retirement account at age 65; the benefits of her 401 K and then \$800.00 per month in alimony once the house is sold. She has the contributions to the household expenses of groceries by her children who live in the house with her; the [Vol. 1, P.75, 97] Ms. Williamson also has her bank account. [Vol.1, P.85] She also [secretly] saved cash money in a safety deposit box for approximately 10 years. ⁴

⁴ The court did not consider Social Security benefits in this determination.

Even when Armstrong is applied, then there are no minor children of the Parties; however an adult daughter, her husband and their two minor children and an adult son live in the house.. [Vol.1, Pp. 75, 76] Mr. Williamson is 63 and Ms. Williamson is 60. [Vol.1, Pp. 80] The Parties had been married 42 years [Vol.1, P.44] The Parties had only lived in the marital home for seven or eight years. She is still employed and makes substantially the same amount of money. Mr. Williamson is employed but has lost his second job at the casino so he is making substantially less money. In the beginning of the marriage after Mr. Williamson was out of the military, the couple lived in apartments and rented until after the son was born. The couple lived with Mr. Williamson's parents. They lived in a mobile home for a long time, until the kids were in high school, [Vol. 1, Pp. 87-91] The residence was built and Mr. Williams was working two jobs in order to make the house payment Thus Ms. Williamson enjoyed the standard of living in the residence for seven or eight years. The Parties stipulated to a divorce on irreconcilable differences, which in and of itself means there is no fault ground of a Party. [Vol. 1, P.45]

Periodic permanent alimony should not have been awarded in the instant case.

Permanent alimony is paid from one spouse to the other and continues until the death of either party or the remarriage of the recipient. It is deductible from the income of the person paying and includable as income to the person receiving it. Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993) (See also, Hammonds v. Hammonds, 597 So.2d 653 (Miss. 1992)). [Vol. 1, P. 92, 99]

An application of the Armstrong factors to the facts of this case after the initial division of the marital estate and Mr. Williamson's 401K do not support an award of permanent alimony. The

Motion For Reconsideration and Order

In his Motion For Reconsideration Mr. Williamson substantially contended that the award of the periodic alimony resulted in an inequitable division of the marital assets. He

further contended that the court erred in the money and assets it considered in determining the amount of duration of permanent alimony. The monetary calculations set out in his motion are prima facie evidence of the inequity of the order of the Court. [RE 10, 11]

The Court committed reversible error in denying Mr. Williamson Motion For Reconsideration.

II. WHETHER THE CHANCELLOR ABUSED DISCRETION AND COMMITTED MANIFEST ERROR IN FINDING APPELLANT IN CONTEMPT OF COURT AND IN AWARDING ATTORNEYS FEES

The Post Divorce Contempt

After an appeal was perfected, On April 6, 2010, Mary Jean (Waddell) Williamson filed a Petition for Contempt alleging contempt for failure to pay \$3,769.54 per a Qualified Domestic Order and seeking an award of an attorney fee. Mr. Williamson responded to this Motion for Contempt alleging that he had not been properly served with process. [Vol. 5, P. 182]

Affirmative Defense Of Lack of Process:

The officer, Mr. English, who had served the Rule 81 Summons for Mrs. Williamson was under subpoena by Mr. Williamson but advised the day of the hearing he was out of State and would not be available to testify. [Vol. 5, P. 182] Mr. Williamson testified that “no one served him with papers...It [the Petition for Contempt] was stuck in the door when I came home one night. That no ever handed that to him at any time.” [Vol. 5, P.6] Mr. Williamson testified he received the check from Fed Ex on Wednesday, the 14th and that was the only thing received that day...There was nothing on the door...except a not I put on the door for the Fed Ex man to leave the package in the door. ..Nothing else was placed on the door on that date.” [Vol.. 5, P. 10] He said, “when I got in the night on the 15th, that package [Petition For Contempt] was on the

door...It was just left on the door.” The significance is that the process server had to perfect service on the 14th in or to have seven days notice of the hearing. Mr. Williamson testified, “he never received any kind of mail or any other notification about that [Petition For Contempt]”⁵ On cross examination Mr. Williamson testified he was not inside the house when the officer left the process at the door. [Vol. 5, P. 14] This Court held that Mr. Williamson had waived this affirmative defense of lack of process by Answering the Petition. [Vol. 5, Pps. 182 – 184]

Affirmative Defense Of Inability To Comply With The Court Order

Mr. Williamson testified that the order of the Court required him to pay \$4,824.81 within 30 days from January 13, 2010. [From his 401K][RE] Mr. Williamson further testified he sent a check to his attorney dated April 15, 2010. Mr. Williamson acknowledged he paid the amount after the petition for contempt was filed and explained he could not get the money out of the 401K .. The judge said I had to get it out of that 401K. It had a QDRO hold on it.... [Vol. 5, Pp. 5, 6] Mr. Williams testified he attempted to borrow money from a bank but could not get it. He testified he did not have funds of his own to pay with. He testified he called everyday trying to get the QDRO hold released. He testified he wrote the company asking them to document when the QDRO hold would be taken off the account... that he contacted Federal Express to get them to give you information about when you received the funds. [Vol. 5, P. 6, 7] After reviewing Fed Ex documents regarding a tracking number and delivery date, Mr. Williamson testified the date of the delivery [of the 401K funds] was April 14, 2010 at 12:01 p.m. Mr. Williamson testified that the QDRO hold was released and the funds were sent overnight on the 13th day of April. Mr. Williamson testified he could not get the funds prior to that date. [Vol. 5, P. 9, 12] Mrs. Williamson testified that the \$4,824.81 was paid current. She also testified her attorney

⁵ Counsel of record for previous Order and Appeal were not served with the Petition For Contempt.

advised her the attorney fee for the contempt action would be twenty-five hundred dollars for the contempt action. [Vol. 5, P.16] After hearing testimony, inter alia, regarding the 401 K account the Court found Mr. Williamson was in contempt of the Order that had been appealed for failing to pay the \$4,824.81 within 30 days of January 13, 2010. The Court held that Mr. Williamson had failed to prove inability to pay with particularity. [Vol. 1, P.21]

The Attorney Fee Awards

At each of the hearings for contempt, the Court found Mr. Williamson in contempt and awarded attorney fees in addition to the other sums he was ordered to pay.

During the hearing on the merits of this case Ms. Williamson testified she had incurred attorney's fees in the amount of \$2,500.00 for the filing of the Petition For Contempt. Ms. Williamson also testified that she incurred attorney fees in filing a Motion To Compel in the amount of \$915.81. [Vol. P. 67] The Court ordered Mr. Williamson to pay \$2,500.00 and \$915.81. These awards were not made in accordance with the McKee factors and should be reversed.

In the post divorce contempt proceeding the Court awarded attorney's fees stating "an award of attorney fees in the amount of \$2,500.00 is due and payable within thirty days of this date, same being the 23rd day of July at 5:00 p.m. shall be required. [Vol. 5, P.201]

In the case of McKee v. McKee, 418 So.2d 764, 767 (Miss. 1982), the Mississippi Supreme Court set out the following factors that must be considered by the court in determining the proper amount of attorney's fees to be awarded:

1. The parties' relative financial ability;
2. The skill and standing of the attorney;
3. The novelty and difficulty of the issues;
4. The degree of responsibility involved in management of the case;
5. Time and labor;

6. The usual and customary charge in the community;
7. Preclusion of other employment as a result of accepting the case.

In a divorce case, an award of an attorney's fee is properly made only to a party who proves inability to pay and there is proof of the McKee factors. In Turner v. Turner, 744 So.2d 332, 338 (Miss. App. 1999), the trial court's award of attorney's fees was reversed where no itemized account was introduced into evidence, and the only testimony of fees was that the fee charged was \$1,500 and that the party seeking the award was unable to pay it.

In other cases, an award of attorney's fees may be made regardless of ability to pay where the party is found in contempt, or is found guilty of dilatory behavior or behavior that causes the other party undue expense, or for frivolous litigation, or for unfounded allegations of domestic abuse. In such cases, the proof of attorney's fees should be supported by proof of the McKee factors.

In divorce cases, ability to pay is the most critical consideration, and if you do not establish your client's inability to pay, she will not be eligible for an award of an attorney's fee. Deen v. Deen, 856 So.2d 736, 739 (Miss. App. 2003); Bates v. Bates, 755 So.2d 478, 482 (Miss. App. 1998). Even in a contempt case, where inability to pay is not required, you are wise to offer testimony about the financial effect of the contempt and the resulting attorney's fees on your client, since an award of an attorney's fee is not mandatory in contempt. Suess v. Suess, 718 So.2d 1126, 1129 (Miss. App. 1998). .

A case on point is Moses v. Moses, 2003-CA-01471-SCT (Miss. 2004). This decision refers the Parties as Kindalin (Wife) and Christopher (Husband). In Moses, Kindalin filed a contempt action against Christopher, alleging contempt by his failing to exercise his option to purchase the marital home or alternatively, failing to place the home on the market by listing it with a realtor in violation of the terms of the final decree.

Specifically, the decree read “...The husband is granted the first option to purchase the house and pay the wife one half of the equity in the house within sixty days of the date of this order. If the husband fails to exercise his option to purchase the house, the house will be placed on the market for public purchase...” Kindalin argued that placing an advertisement in the Clarion Ledger offering the home for sale was contempt. Christopher argued the order did not require him to list the home with a realtor.

The trial Court found Christopher was in Contempt and awarded attorney’s fees. The appellate court reversed.

Moses v. Moses, 2003-CA-01471-SCT (Miss. 2004).

When Moses is applied to the facts of the instant case this court should reverse the decision of the trial Court.

The Courts erred in finding willful or contumacious conduct because it was due to Mr. Williamson’s inability to pay. “Inability to pay is a defense to a prima facie case of contempt.” Newell v. Hinton, 556 So.2d 1037, 1044 (Miss. 1990). The Court’s QUADO hold on Mr. Williamson’s funds prevented him from complying with the orders of the Court; thereby negating any willfulness of conduct. Mr. Williamson relies on his testimony and efforts to obtain a loan as well.

Mr. Williamson acknowledges that awarding attorney fees is discretionary with the court and further that the court is not required to take McKee proof in a contempt action. However, Mr. Williamson avers in if the award is to make Ms. Williams’ whole, then simply a recitation of what the attorney quotes or takes as a fee is subject to abuse. Even in Bounds at trial the petitioners attorney testified to Kathie’s attorney fees and an itemization of attorney’s fees was introduced into evidence. Bounds v. Bounds, 935 So.2d 407 (Miss.App. 2006) the petitioner Without an itemization of time and rate alleged respondents could be assessed for attorney fees

in any number of amounts depending upon the particular Court, Chancellor, district or locale leading to litigation regarding abuse of discretion. This situation is adverse to judicial economy.

In the instant case this award of attorney's fees should be reversed since Mr. Williamson had been unable to pay and the contempt had been purged prior to the hearing.


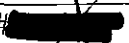
Moses v. Moses, Id.

CONCLUSION

For the foregoing reasons and authorities this Court should reverse the holdings on the equitable division of the marital estate, alimony, contempt and attorney fees.

Respectfully submitted this the 20th day December, 2010.

WILBUR HAROLD WILLIAMSON, SR.

BY: 
John L. Bailey MSB# 

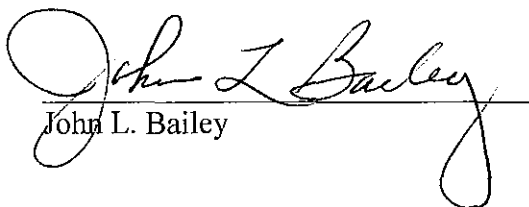
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CERTIFICATE OF SERVICE

I, John L. Bailey, hereby certify that I have this day served by United States mail, proper postage prepaid, a true and correct copy of Brief of Appellant upon: Honorable Vicki B. Cobb, Post Office Box 1104, Batesville, MS 38606, Honorable Percy Lynchard, Courthouse, Highway 51 S., Post Office Box 340, Hernando, MS 38632-0340, Honorable Malenda H. Meacham, Post Office Box 566, Hernando, MS 38632-0566.

This the 20th day of December, 2010.


John L. Bailey