IN THE COURT OF APPEALS, STATE OF MISSISSIPPI

MICHAEL GARY, SR. — APPELLANT

VS.

WANDA WOODS GARY — APPELLEE

NUMBER 2010-CA-02057

BRIEF OF APPELLANT

APPEAL

CHANCERY COURT, DESOTO COUNTY

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL GARY, SR. **APPELLANT**

VS.

WANDA WOODS GARY **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned party, pro se 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 this Court may evaluate possible disqualification or recusal.

Hon. Vicki Cobb
Chancery Judge
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(Trial Judge)

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Former Attorney for Appellee

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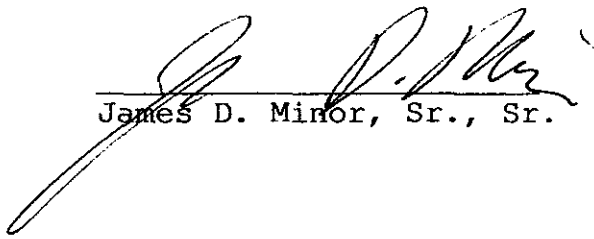
(Attorney for Appellant



James D. Minor, Sr., Sr.

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STATEMENT OF THE ISSUES

Whether an amended decree and consent order were entered to have husband pay a disbursement from his retirement account at his own expense and in cash rather than through a qualified domestic relations order.

Whether the removal of retirement funds to a new plan constituted contempt of court when the former employer dictated removal prior to the submission of a qualified domestic relations order but after a court order.

STATEMENT OF THE FACTS

Appellee, Wanda Woods Gary, filed a complaint for divorce September 28, 2007 against her husband of thirteen years, Michael Gary, Sr. The complaint cited as grounds habitual cruel am inhuman treatment and irreconcilable differences. On February 25, 2009 the trial court granted a divorce to Appellant, Michael Gary, Sr. upon the grounds of uncondoned adultery.

As a part of its decree the court below awarded the sum of $27,600.00 from the Appellant's 401K plan and an additional $8,338 from a pension fund to Mrs. Gary. The court further ordered that "these amounts will be transferred to an account in the Wife's name only by way of a Qualified Domestic Relations Order that shall be prepared by Wife's attorney." (Excerpts Page 14) The record is silent as to when a qualified domestic order was submitted but on August 5th 2010 a letter was mailed to Mrs. Gary's attorney indicating that the Appellant had no assets to segregate (Excerpts page 21). It is undisputed in the record that Appellant was required to move those funds because he had lost his previous job (Hearing record, page 3, line 21 to page 4, line 2)

Appellee filed a Petition for Contempt (Excerpts page 17). Subsequently a "Consent Order" was signed by the parties and approved by the Chancellor (excerpts page 22). The Consent Order was issued before what purports to be an amended decree

with a change in wording because of Michael Gary's change in jobs (Hearing transcript page 3, line 27-4, line 6). In paragraph 9 of the amended decree it is stated:

> further, the Husband has accumulated throughout the marriage a 401K plan and pension plan, and the Court hereby finds that 59% of the 401K and 59% of the pension fund that were accumulated through Husband's employment with DHL were during the marriage and therefore the Wife is entitled to one-half of 59% in each of the funds, Since the funds have now been rolled into an IRA account, it is hereby ordered that the Wife is awarded the amount of $35,938.00 to be transferred from the IRA assets that are in Husband's Fidelity Investments Ira. (Emphasis added by Appellant)

The amended order omits the "qualified domestic relations order" language used by the original judge. The original Decree was signed by Chancellor Percy Lynchard and the amended Decree and Consent Order by Chancellor Vicki B. Cobb.

The relevant portion of the Consent order of March 3, 2010 and prior to the amended Decree of Divorce reads as follows:

> the Defendant is ordered to immediately upon entry of this Order, and at his own expense, withdraw the amount of $27,600.00 and $8,338.00 from wherever he has placed these funds and pay said funds to Wife within ninety (90) days of entry of this Order.

Though it would appear that the amended decree was entered because of Appellant's change of employment ("Since the funds have now been rolled into an IRA account")in its last order the court below reverted to an order made when the Court apparently did not have notice of the reason for the change in accounts.

Michael Gary's trial attorney filed for reconsideration on November 24, 2010. That request was denied by the Court December 7, 2010. Appellant filed notice of Appeal on December 15, 2011.

Appellant argues that the change in language in the amended decree and the consent order was only to fulfill the requirements for the Qualified Domestic Relations Order and was not intended to require payment directly to his wife of cash funds and any other reading would change the ruling of Judge Lynchard after hearing the case and issuing the original decree. The court ordered that Michael Gary pay the funds directly to his wife within 10 days from the order filed November 29, 2010 but based upon the decision from the bench November 15, 2010

SUMMARY OF THE ARGUMENT

I. Whether an amended decree and consent order were entered to have husband pay a disbursement from his retirement account at his own expense and in cash rather than through a qualified domestic order

The Parties were divorced by a decree dated February 25, 2009. The decree directed the attorney for wife to submit the qualified domestic relations order, not counsel for Michael Gary. Approximately six months after the Decree counsel for the wife received notice that Appellant's former fund had no funds to segregate. The record shows that this was so because Appellant had lost his job. When the qualified domestic relations order was submitted to the new fund it rejected it because of the wording. Appellant and his counsel signed a "Consent Order" and later an amended decree was entered to remedy that situation but instead of resubmitting a qualified domestic relations order Appellee and her counsel sought to have Appellant pay these funds directly. Such a requirement would make the distribution ordered originally inequitable since Appellant would in affect pay all taxes and penalties for an immediate withdrawal for the benefit of the Appellee who had not been diligent in filing the order in the first instance. Appellant was not in contempt in this matter since his attorney was not dilatory in any way and his previous employer mandated the moving of his retirement funds.

II. **Whether the removal of retirement funds to a new plan constituted contempt of court when the employer dictated removal prior to the submission of a qualified domestic relations order but after a court order.**

Appellant made changes in his retirement account subsequent to Judge Lynchard's order of February 25, 2009, but at the directions of his employer. There are no allegations to the contrary nor was any evidence presented to suggest an ulterior motive.

ARGUMENT I.

The amended decree and consent order were not entered to have husband pay a disbursement from his retirement account at his own expense and in cash rather than through a qualified domestic order

This matter is before the Court not by any actions of Appellant but through the inaction of Appellee, Wanda Woods Gary. First by not timely submitting a qualified domestic relations order promptly after the divorce February 25, 2009 and not submitting an order after an amendment that she admits was made so that the new retirement fund could set up an account for her. The pleadings below do not show when the attorney for Wanda Gary submitted the order to Michael Gary's fund but the records would indicate a passage of 6 months before the returned letter.

After it was discovered that the funds had been moved, Appellant was not on notice that anyone thought that he had moved the funds for a spiteful reason. The circumstances are summarized at pages 3 and 4 of the record and in part Ms. Winkler, attorney for Wanda Woods Gary says:

> so we had to do an amended Decree because the company was saying we can't get it out of the 401K and his pension because they don't exist. So we want to get it out of the IRA.

> That's the only thing we changed and that language was to allow Wanda to finally get her money. So we changed the Decree to that one sentence. (Page 3, line 27-page 4, line 6)

By the end of the hearing the argument was that Michael Gary was to pay Wanda Gary in cash which was nowhere mentioned in Judge Lynchard's initial order and to pay her attorney fees when the parties were arguably in court because of that attorney's tardiness.

At page 5 of the record, lines 23 and 24 Paragraph 4-7 of the Petition for contempt are at issue. Reference is made to Michael Gary, Sr. having "failed" to pay the funds ordered to be transferred via a qualified domestic relations order that the attorney for the Plaintiff below (Appellee here) was supposed to prepare. Appellant is made the victim of sleight of hand. Not only did Appellant not fail to do anything that initially he agreed to do, or was order to do but, he also signed paperwork to accomplish the intent of the original order of the court but is cited for failure to prepare an order that he was not to prepare. This twenty first century alchemy creates thousands of dollars of additional money out the failure to timely request money already awarded

It is worthy of note that the "Consent Order" was signed March 3, 2010 and read in light most favorable to Mrs. Gary would allow Mr. Gary to June 2nd or so to accomplish a transfer.

At page 12 of the record Mr. Shumake, attorney for Appellant below, stated that he had sent an e-mail to opposing counsel in May and "told her how to get the money" but that she still had not done it at the hearing date of November 25th, 2010.

Not mentioned by any party or the court below is the fact that the consent order was entered prior to an amended decree of divorce. Logically an order prior in time to an Amended Decree of Divorce cannot control the final or amended decree of divorce. The consent order is dated March 3, 2010 prior to the July 12, 2010 amended decree of divorce which does not recite that the requirements of the previous order remained in full force and effect.

At page 7 of the record Ms. Winkler, attorney for Wanda Gary makes reference to the fact that Appellant wanted her to roll over the Fidelity account. She says this was not the intent of the "consent decree". This being the same decree that was entered in to "allow Wanda to finally get her money" (page 4, lines 4 and 5). It is submitted that if Appellant was to simply pay the money in cash there would have been no need to comply with Fidelity's request for a change in the order. Appellant could have simply withdrawn money and paid penalties and taxes if that was the intent.

The argument of Michael Gary in the court below was succinctly put by his attorney as follows at page 8 of the record, lines 1-6:

> … the Court told her last time that as of this date to transfer that money and she still hasn't done it. We can't do anything until she sets up that account and rolls that amount over. That's what our position is.

The argument below by Wanda Woods Gary is totally illogical. Appellee below says "we did the same divorce decree, but just changed it from IRA to 401k and pension" (Hearing page 8, lines 16-18) totally ignoring the fact that Judge Lynchard had ordered that the transfer would be by a qualified domestic relations order.

The lower court in its ruling against the Appellant cited his moving of the funds from the previous account. Though Appellant did not testify his attorney stated without objections as follows:

> Mr. Shumake: Judge, again, if I might, just one point and again I don't expect it to change the Court's order, but just for the Court's information if the court will recall and I know it was a long day that day but the reason that Mr. Gary had to move that account was because he was forced to do that by DHL.
>
> He had been laid off for some three months and DHL was forcing him to close those accounts and I realize it did cause a mess, but I did want the Court to realize he didn't do that just to avoid something or because he was trying to move accounts around.
>
> He was forced to do that. And I realize it did cause all the problems but I did want the Court to know that he didn't just do that on his own.

(Hearing record at pages 20 line 15 to 21 line 4)

In addition it should be noted contrary to the indications in the Court's decision, the Mississippi Bar Number on the "Consent Order" is not that of the attorney for Appellant below but the Appellee. The Court's opinion suggests that Mr. Shumake prepared the order and made the changes when he apparently did not. In any event that order was consented to and signed prior to the Amended Decree of Divorce filed later in the proceedings. The actions of the attorney for Mr. Gary clearly indicated that he thought that the intent was to speed the qualified domestic relations order leading to his e-mail to counsel opposite (Hearing page 12, lines 4-7).

The issue below was largely one of whether Appellant was to pay Ms. Gary in cash or by way of a qualified domestic relations order. In the case of *Jones v. Mayo, 53 So. 3d 832 ¶9 (Miss. App. 2011)* this Court was presented with that issue and concluded that payment should be made by a qualified domestic relations order. The husband in *Jones v.* Mayo was likewise concerned because he would have to pay in excess of $15,000 in order to pay his wife the $36,488.50 requested in cash, *53 So. 3d at 835 (¶8)*. Judge Lynchard, the initial trial judge below attempted to award Ms. Gary one-half of Mr. Gary's account. Requiring Michael Gary, Sr. to pay to his ex-wife the one-half ($35,938.00) required plus any applicable taxes and penalties

for immediate withdrawal would render the original distribution inequitable.

The case presently before the Court like *Jones v. Mayo* involved two different judges. The law-of-the-case doctrine here would not allow Chancellor Cobb to change a ruling by Judge Lynchard *See also, Holland v. Peoples Bank &Trust Co., 3 So. 3d* 94 ¶25 (Miss. 2008). It should also be noted that apparently Judge Cobb took no further evidence relative to the financial circumstances of the parties at the time of the amended divorce decree other than the change in character of the retirement funds.

ARGUMENT II.

The removal of retirement funds to a new plan was not contempt of court when the employer dictated removal prior to the submission of a qualified domestic relations order but after a court order.

The lower court's order entered November 29, 2010 (Excerpts page 35) finds Appellant in contempt but does not cite wherein Michael Gary is in contempt. The lower court in its bench decision apparently based her decision totally upon the fact that funds were moved prior to the arrival of the court's order. Appellant apologizes for restating a prior quote verbatim, but it would appear that in a prior proceeding before the court it was given an explanation. The attorney for appellant stated:

> Mr. Shumake: Judge, again, if I might, just one point and again I don't expect it to change the Court's order, but just for the Court's information if the court will recall and I know it was a long day that day but the reason that Mr. Gary had to move that account was because he was forced to do that by DHL.
>
> He had been laid off for some three months and DHL was forcing him to close those accounts and I realize it did cause a mess, but I did want the Court to realize he didn't do that just to avoid something or because he was trying to move accounts around.
>
> He was forced to do that. And I realize it did cause all the problems but I did want the Court to know that he didn't just do that on his own. (Hearing record at pages 20 line 15 to 21 line 4)

There was neither objection to nor correction of this statement made by Mr. Shumake.

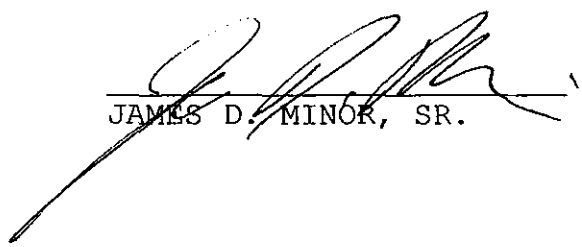
While the failure of a party in a divorce proceeding to comply with a decree is prima facie evidence of contempt, *Rainwater v. Rainwater, 236 Miss. 412, 421, 110 So. 2d 608, 611 (1959)*, here the compliance with the order is placed upon the complaining party. The attorney for Mrs. Gary and not Mr. Gary was to prepare and submit the qualified domestic relations order (Excerpts page 14, Paragraph 9). The record is totally silent as to any recalcitrance from the Appellant or his attorney in getting the order prepared. In fact the attorney for Appellant below, Mr. Shumake states that he had advised counsel for Mrs. Gary what she needed to do to obtain the funds (Hearing record at page 12, lines 4-13).

The record, however, does clearly show that the divorce was granted February 25, 2009 and the letter advising the attorney that no funds were available was dated August 5th (Excerpts page 21). The burden of proof to show contempt was upon Appellee, Mrs. Gary, and that by "clear and convincing evidence", *Allred v. Allred, 735 So. 2d 1064, 1068 (¶ 15)1067 (¶ 10)*. Appellant humbly submits that this record does not sustain that burden. Clearly to the extent that the burden shifted back to the Appellant, Mr. Gary, he has shown that his "failure to comply with a court's decree was not willful or intentional" *Prestwood v. Hambrick 308 So. 2d 82, 84 (Miss. 1975)*.

The record does not support the requirement for Mr. Gary to pay $2,500 in attorney fees or several thousand in taxes and penalties when if Mrs. Gary had performed promptly what she was required to do the problem would not have arisen.

CONCLUSION

The order of Judge Lynchard was for an equitable distribution of marital assets by way of a qualified domestic relations order. The result of the ruling appealed from is to upset that determination and to provide Appellee, who had not been diligent in seeking the distribution, a windfall wherein her spouse who was awarded a divorce on the grounds of adultery would have to pay taxes and any penalties associated with withdrawing funds form his retirement accounts so that she could enjoy immediately and without penalty her proportional share of his retirement. To add insult to that injury it also requires payment of attorney fees when the trial court ordered the attorney for Wanda Gary to prepare the qualified domestic relations order. A task that was not promptly performed.



JAMES D. MINOR, SR.

CERTIFICATE OF SERVICE

I, James D. Minor, Sr., attorney for Appellant, Michael Gary, Sr. certify that I have this day mailed a true and correct copy of Appellant's Brief by United States mail, postage prepaid, to the following person at the addresses listed:

Hon. Vicki Cobb
Chancery Judge
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Ms. Nancy M. Liddell
Attorney at Law
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Southaven, MS 38671

This 26th day of July, 2011.

James D. Minor, Sr.