

SC89279

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IN THE SUPREME COURT OF MISSOURI

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STATE ex rel. ROBERT M. FISHER  
Relator

v.

SHERIFF DON BLANKENSHIP  
Respondent

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Petition for Writ of Habeas Corpus

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RESPONDENT'S BRIEF

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**-ORAL ARGUMENT REQUESTED-**

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## **JURISDICTIONAL STATEMENT**

This is a Petition for Writ of Habeas Corpus brought concerning the incarceration of Relator under a Warrant and Order of Commitment issued pursuant to a Judgment of Contempt entered by the Circuit Court of Phelps County, Missouri. This matter involves the validity of a treaty or statute of the United States of America or a statute or provision of the Constitution of the State of Missouri and, therefore, pursuant to Article V, Section III of the Constitution of Missouri, as amended in 1979, the Supreme Court of Missouri has jurisdiction over this matter.

## **STATEMENT OF FACTS**

Robert Mitch Fisher (hereinafter referred to as "Mitch") is the Relator in this matter. Sheriff Don Blankenship is the Sheriff of Phelps county, Missouri and is the Respondent. Melanie Fisher (hereinafter referred to as "Melanie") is the ex-spouse of Mitch. Mitch and Melanie were married on July 31, 1993, and their marriage was dissolved on November 20, 2006. The Final Judgment and Decree of Dissolution of Marriage, attached hereto as Respondent's Exhibit 1, Index pages 1-19, made a division of real property, motor vehicles, household goods, life insurance policies, stocks and other investments between the parties. To equalize the equities, Mitch was ordered to pay to Melanie the sum of \$118,992.00.

Mitch failed to pay any portion of the \$118,992.00, which resulted in Melanie filing a Motion for Contempt. The Honorable Tracy L. Storie, heard evidence on the contempt action on August 15, 2007, in the Phelps County Circuit Court. On September 5, 2007, the trial court issued its Judgment of Contempt finding Mitch to be in contempt and ordering him incarcerated until he purged himself by paying the judgment amount. The Judgment of Contempt is attached hereto and marked as Respondent's Exhibit 2, Index pages 20-23. Mitch was then incarcerated in the Phelps County Jail.

Mitch filed Petition for Writ of Habeas Corpus with the Southern District Court of Appeals on September 12, 2007. Because the trial court had not issued an Order of Commitment prior to Mitch's incarceration and without consideration of any substantive issues raised, the Southern District Court of Appeals issued an Order of Discharge on September 20, 2007, attached hereto as Respondent's Exhibit 3, Index page 24.

Thereafter, on October 22, 2007, the trial court issued a Warrant and Order of Commitment, attached hereto as Respondent's Exhibit 4, Index pages 25-26. Mitch filed motions with the trial court, seeking to set aside the Judgment of Contempt and to quash the Warrant and Order of Commitment, which were denied by the trial court on December 6, 2007.

Mitch filed an improperly captioned Petition for Writ of Prohibition in the Southern District Court of Appeals on December 14, 2007, which was denied. On January 17, 2008, Mitch filed another Petition for Writ of Prohibition in the Southern District of Appeals, which was subsequently denied.

Mitch was arrested on April 26, 2008, pursuant to the Warrant and Order of Commitment issued by the trial court on October 22, 2007. Mitch filed a Writ of Habeas Corpus in the Southern District Court of Appeals on April 29, 2008, which was denied on April 30, 2008. Mitch remains incarcerated in the Phelps County Jail.

**POINTS RELIED ON**

**POINT I**

**THE TRIAL COURT'S ORDER FOR COMMITMENT OF RELATOR BASED ON THE TRIAL COURT'S FINDING OF CONTEMPT FOR RELATOR'S FAILURE TO COMPLY WITH THE PROPERTY DIVISION PORTION OF THE JUDGMENT AND DECREE OF DISSOLUTION OF MARRIAGE IS CONSTITUTIONAL AND A PROPER REMEDY.**

*State ex rel. Stanhope v. Pratt*, 533 S.W.2d 567 (Mo. banc 1976)

*Ellington v. Pinkston* 859 S.W.2d 798 (Mo. App. E.D. 1993)

*Yeager v. Yeager*, 622 S.W.2d 339 (Mo. App. E.D. 1981)

V.A.M.S. Const. 1& 11

**POINT II**

**THE TRIAL COURT'S IMPRISONMENT OF CONTEMNOR FOR FAILURE TO COMPLY WITH THE PROPERTY DIVISION PORTION OF THE JUDGMENT AND DECREE OF DISSOLUTION OF MARRIAGE IS CONSTITUTIONAL REGARDLESS OF WHETHER THE PROPERTY AWARDED IS CASH, OR THE PROPERTY AWARDED INVOLVES THE TRANSFER OF PROPERTY OTHER THAN CASH.**

**POINT III**

**THE TRIAL COURT'S JUDGMENT OF CONTEMPT, AND THE TRIAL COURT'S WARRANT AND ORDER FOR COMMITMENT, ARE VALID BECAUSE THEY SET FORTH THE FACTS THAT CONSTITUTE RELATOR'S CONTEMPT.**

*In re Brown*, 12 S.W.3d 398, 400 (Mo. App. E.D. 2000)

*Yalem v. Yalem*, 801 S.W.2d 439, 441 (Mo. App. E.D. 1985)

**POINT IV**

**THE TRIAL COURT'S JUDGMENT OF CONTEMPT, AND THE TRIAL COURT'S WARRANT AND ORDER FOR COMMITMENT, ARE VALID BECAUSE THEY MAKE A FINDING THAT REALTOR HAS THE ABILITY TO PAY THE MONEY JUDGMENT.**

*Watkins v. Watkins*, 839 S.W.2d 745, 747 (Mo. App. W.D. 1992).

*Krost v. Krost*, 133 S.W.3d 117, 119 (Mo. App. E.D. 2004)

*State ex rel. Stanhope v. Pratt*, 533 S.W.2d 567 (Mo. banc 1976)

**POINT V**

**THE TRIAL COURT'S ORDER FOR COMMITMENT IS VALID BECAUSE**

**IT SPECIFIES THE CONDITIONS THE CONTEMNOR MUST MEET IN ORDER TO PURGE HIS CONTEMPT.**

*Murphy v. Carron*, 536 S.W.2d 30 (Mo banc 1976)

*Krost v. Krost*, 133 S.W.3d 117 (Mo. App. E.D. 2004)

Section 452.335, R.S.Mo (2000)

**ARGUMENT**

**I**

**THE TRIAL COURT'S ORDER FOR COMMITMENT OF RELATOR BASED**

**ON THE TRIAL COURT'S FINDING OF CONTEMPT FOR RELATOR'S FAILURE TO COMPLY WITH THE PROPERTY DIVISION PORTION OF THE JUDGMENT AND DECREE OF DISSOLUTION OF MARRIAGE IS CONSTITUTIONAL AND A PROPER REMEDY.**

Imprisonment for failure to pay a debt, except when imposed for nonpayment of fines and penalties imposed by law, is prohibited by the Missouri Constitution. V.A.M.S. Const. 1& 11. However, this Court differentiated between the type of debt specified in V.A.M.S. Const. 1& 11 and debt created pursuant to an order to pay maintenance and child support. *State ex rel. Stanhope v. Pratt*, 533 S.W.2d 567, 575 (Mo. banc 1976). This Court upheld the trial court's power to imprison a party after a finding of contempt for failure to pay ordered maintenance or child support. *Id.* This Court however, has not formally extended the *Stanhope* rationale to specifically exclude orders to pay money as part of the division of marital property, from the protections of Mo. Const. Art. 1 & 11.

The Eastern District Court of Appeals has extended the *Stanhope* rationale to make proper a contemnor's imprisonment under contempt for failure to comply with a property distribution order provision of a dissolution judgment. *Ellington v. Pinkston* 859 S.W.2d 798, 800 (Mo. App. E.D. 1993) citing *Yeager v. Yeager*, 622 S.W.2d 339, 343 (Mo. App. E.D. 1981). *Reeves v. Reeves* 693 S.W.2d 149, 151 (Mo. App. E.D. 1985); *Huber v. Huber*, 649 S.W.2d 955, 958 (Mo. App. E.D. 1983); *Haley v. Haley*, 648 S.W.2d 890, 891 (Mo. App. E.D. 1982).

In creating the *Stanhope* exception, this Court referenced *Ex Parte Phillips*, 43 Nev.

368, 187 P. 311 (1920), which described debt that is subject to constitutional protection from imprisonment as the type that arises out of a business transaction and not the type of obligation arising from the existence of a marital status. State ex rel. Stanhope v. Pratt at 573. The purpose of such a distinction was within sound public policy to prevent the former spouse from becoming a public charge or dependant on relatives as well as to provide the trial court the ability to compel the obligated former spouse to perform his or her marital and public duty to the former spouse. Id., referencing Ex Parte Phillips.

Marital maintenance is intended to address many of the concerns the Stanhope opinion recognized in Ex Parte Phillips. Marital maintenance is statutorily intended to provide for a spouse who lacks sufficient property and is unable to support themselves through appropriate employment. V.A.M.S. 452.335.1(1 to 2). In consideration of an award of maintenance, the trial court must make a threshold determination of the needs of the party seeking maintenance. This threshold determination takes into account factors that include property that the spouse will receive upon the division of the marital estate. In Re Marriage of Ross, 231 S.W.3d 877, 884 (Mo. App. S.D. 2007); In Re Marriage of Trimble, 978 S.W.2d 55, 57 (Mo. App. S.D. 1998).

In determining the appropriateness of marital maintenance, the trial court is required to consider marital properties awarded. Coleberd. v. Coleberd, 933 S.W.2d 863, 870-871 (Mo. App. S.D. 1996). The marital property awarded bears upon the amount of maintenance to be awarded. Carter v. Carter, 869 S.W.2d 822, 831 (Mo. App. W.D. 1994).

In the case at bar, on the issue of marital maintenance, the trial court specifically

found, that, “due to the distribution of assets made herein, no award of maintenance shall be given to either party.” Respondent’s Exhibit 1 Index page 8. It is evident, that the trial court, in making its determination to not award marital maintenance, considered the fact that Melanie was to receive the cash sum of \$118,992.00, from Mitch, as and for her interest in the marital property awarded to Mitch. Had the trial court not attempted to equalize the distribution of property, and had the trial court awarded marital maintenance instead to Melanie, Mitch’s failure to comply could certainly be found by the trial court to be contemptuous and punishable by imprisonment.

It is clear that the amount of marital property awarded has a direct bearing on whether or not an order of marital maintenance is entered. The trial court’s decision whether or not to award marital maintenance is predicated on the assumption that the marital property awarded to the recipient spouse will actually be received. If a party requesting marital maintenance is denied maintenance based on an expectation that she will receive marital property sufficient to offset her financial shortcomings, imagine the injustice if the frustrated party has no effective means by which to compel the non-compliant party to obey the trial court’s judgment. As evidenced by the trial court’s Judgment of Contempt, Mitch by his own admission, “did not care if there was a judgment against him for the rest of his life, he would never pay her (Melanie) a dime and he would never own anything”. Respondent’s Exhibit 2, Index page 22.

The purpose of civil contempt is to provide coercive means to compel the other party to comply with the trial court’s order. *Teefy v. Teefy*, 533 S.W.2d 563, 566 (Mo. banc 1976).

This Court has recognized the importance of providing the trial court with the authority to imprison a contemnor that does not comply with the child support or maintenance provisions of a dissolution of marriage judgment. It is equally important to extend that same authority to the trial court in order to compel compliance with the property division portion of a dissolution of marriage judgment. Without this authority, the trial court's order for distribution of marital property is only as strong as the obligated party's willingness to comply, and the intended recipient spouse is without effective recourse against the non-compliant party.

The trial court's Judgment of Contempt and Warrant and Order of Commitment for failure to comply with the property division portion of a dissolution judgment is constitutional and is a proper remedy, therefore Respondent respectfully requests this Court to deny Relator's Petition for Writ of Habeas Corpus.

## ARGUMENT

### II

**THE TRIAL COURT'S IMPRISONMENT OF CONTEMNOR FOR FAILURE TO COMPLY WITH THE PROPERTY DIVISION PORTION OF THE JUDGMENT AND DECREE OF DISSOLUTION OF MARRIAGE IS CONSTITUTIONAL REGARDLESS OF WHETHER THE PROPERTY AWARDED IS CASH, OR THE PROPERTY AWARDED INVOLVES THE TRANSFER OF PROPERTY OTHER THAN CASH.**

The trial court's discretion on how to formulate a property division order, should not be predicated on the ability of the trial court to compel compliance with its order should the matter come before the trial court in a subsequent contempt proceeding. If this Court were to differentiate between enforcing the transfer of tangible property or enforcing the payment of cash, the trial courts may be more inclined to structure the property division in a manner that increases the likelihood of compelling future compliance, rather than basing the division on fair and equitable considerations.

This could also establish a new element of consideration on the part of the trial court as to a party's perceived willingness to comply with an anticipated order. This determination would require evidence from the litigating parties that would prolong the proceedings and cause undue delay and irreparable dissension. Currently the trial court considers the past actions and behaviors of the parties, this distinction would require the court to make predictions as to the parties' future behavior.

There is no practical need to differentiate between an ordered cash payment and the ordered transfer of tangible property, because whether cash or property the trial court's decision is typically based on the value of the item transferred.

Should the Court differentiate between the constitutionality of imprisonment for failure to transfer property other than cash, or the constitutionality of imprisonment for failure to pay a cash amount, the Court would be essentially be weakening the trial court's authority to enforce its judgment through contempt. Furthermore, not only would such a distinction between the types of property division create an additional burden on the part of the trial court, it would require a new level of scrutiny on the part of the appellate courts.

Based on the foregoing reasons, it is constitutional to imprison a contemnor for failure to comply with the property division portion of the judgement and decree of dissolution of marriage. Further, this Court should not regard an order to transfer cash in such a property division order any differently from an order to transfer property other than cash.

## ARGUMENT

### III

#### **THE TRIAL COURT'S JUDGMENT OF CONTEMPT, AND THE TRIAL COURT'S WARRANT AND ORDER FOR COMMITMENT ARE VALID BECAUSE THEY SET FORTH THE FACTS THAT CONSTITUTE RELATOR'S CONTEMPT.**

Review of this case is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo banc 1976). The trial court's decision must be affirmed, "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Id.* at 32.

"A trial court's judgment in a civil contempt proceeding will not be disturbed absent a clear abuse of discretion". *Walters v. Walters*, 181 S.W.3d 135, 138 (Mo. App. W.D. 2005). "An appellate court should set aside a judgment as 'against the weight of the evidence' if it firmly believes the judgment is wrong. *Id.*, citing to *Miers v. Miers*, 53 S.W.3d 592, 595 (Mo. App. W.D. 2001).

"Appellate courts should exercise the power to set aside a decree or judgment on the grounds that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong". *Id.* at 32.

The trial court is in a superior position to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles that are not revealed in the trial transcript. *Krost v. Krost*, 133 S.W.3d 117, 119 (Mo. App. E.D. 2004); and *In Re Marriage of Holden*, 81 S.W.3d 217, 220 (Mo. App. S.D. 2002), citing to *In Re Marriage of Lewis*, 808 S.W. 2d

919, 922 (Mo. App. S.D. 1991).

The Court must view the evidence and inferences therefrom in the light most favorable to the judgment and disregard all contrary evidence. Krost v. Krost at 119; Patton v. Patton, 973 S.W.2d 139, 144 (Mo. App. W.D. 1998); and Morse v. Morse, 80 S.W.3d 898, 903 (Mo. App. W.D. 2002).

The trial court is free to accept or reject all, part, or none of the testimony of the witnesses, Krost v. Krost at 119, and the trial court may disbelieve even uncontradicted testimony. In Re Marriage of Holden at 220. The appellant bears the burden of demonstrating error. Taylor v. Taylor 25 S.W.3d 449, 455 (Mo. App. W.D. 2000).

Substantial evidence is competent evidence from which the trial court could reasonably decide the case. Bauer v. Bauer, 38 S.W.3d 449, 455 (Mo. App. W.D. 2001).

The case before the Court is one of indirect civil contempt because it pertains to Relator's refusal and failure to pay to Melanie Fisher the total sum of \$118,992.00 as and for her marital interest in Fisher Trucking, RFM Trucking, and equalization of equity from division of the marital estate. Respondent's Exhibit 1 Index pages 10-11.

A judgment of contempt and order of commitment must set forth the facts that constitute contempt. In re Brown, 12 S.W.3d 398, 400 (Mo. App. E.D. 2000) citing Yalem v. Yalem, 801 S.W.2d 439, 441 (Mo. App. E.D. 1985). In its Judgment of Contempt, the trial court found that pursuant to the Final Judgment and Decree of Dissolution of Marriage, Relator was ordered to pay to Melanie Fisher the cash sum of \$105,191.00 for her interest in 9600 shares of stock in Fisher Trucking and Lumber Company, the cash sum of \$2,000.00

for her interest in RMF Trucking, and the cash sum of \$11,801.00 to equalize the equities in the property distribution. Respondent's Exhibit 2, Index pages 20-21.

The Judgment of Contempt further specified that these cash sums were all to be paid within 60 days of the date of the Final Judgment and Decree of Dissolution of Marriage. Respondent's Exhibit 2, Index pages 20-21. The trial court specifically found that Relator failed and refused to pay Melanie the total cash sum of \$118,992.00, and that such failure and refusal to pay the judgment, amounted to deliberate and contemptuous behavior on the part of Relator. Respondent's Exhibit 2, Index page 22. These findings alone are sufficient to establish that the Judgment of Contempt contained the requisite facts that constitute contempt in compliance with Brown.

In the Warrant and Order of Commitment, the trial court found that Relator "has commingled personal and business assets and has concealed these assets in an effort to prove he is without financial resources to pay the amounts ordered in the Judgment and Decree of Dissolution of Marriage entered on November 20, 2006". Respondent's Exhibit 4, Index page 25. The trial court also found that Relator's testimony was not credible. Respondent's Exhibit 4, Index page 25. These findings in the trial court's Warrant and Order of Commitment set forth the facts that constitute contempt and are in compliance with Brown.

Relator has failed to prove that the trial court's Judgment of Contempt and the trial court's Warrant and Order of Commitment do not set forth the facts that constitute the contempt, therefore Respondent respectfully requests this Court to deny Relator's Petition for Writ of Habeas Corpus.

## ARGUMENT

### IV

#### **THE TRIAL COURT'S JUDGMENT OF CONTEMPT, AND THE TRIAL COURT'S WARRANT AND ORDER FOR COMMITMENT, ARE VALID BECAUSE THEY MAKE A FINDING THAT REALTOR HAS THE ABILITY TO PAY THE MONEY JUDGMENT.**

Review of this case is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo banc 1976). The trial court's decision must be affirmed, "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Id.* at 32.

"A trial court's judgment in a civil contempt proceeding will not be disturbed absent a clear abuse of discretion". *Walters v. Walters*, 181 S.W.3d 135, 138 (Mo. App. W.D. 2005). "An appellate court should set aside a judgment as 'against the weight of the evidence' if it firmly believes the judgment is wrong. *Id.*, citing to *Miers v. Miers*, 53 S.W.3d 592, 595 (Mo. App. W.D. 2001).

"Appellate courts should exercise the power to set aside a decree or judgment on the grounds that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong". *Id.* at 32.

The trial court is in a superior position to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles that are not revealed in the trial transcript. *Krost v. Krost*, 133 S.W.3d 117, 119 (Mo. App. E.D. 2004); and *In Re Marriage of Holden*,

81 S.W.3d 217, 220 (Mo. App. S.D. 2002), citing to In Re Marriage of Lewis, 808 S.W. 2d 919, 922 (Mo. App. S.D. 1991).

The Court must view the evidence and inferences therefrom in the light most favorable to the judgment and disregard all contrary evidence. Krost v. Krost at 119; Patton v. Patton, 973 S.W.2d 139, 144 (Mo. App. W.D. 1998); and Morse v. Morse, 80 S.W.3d 898, 903 (Mo. App. W.D. 2002).

The trial court is free to accept or reject all, part, or none of the testimony of the witnesses, Krost v. Krost at 119, and the trial court may disbelieve even uncontradicted testimony. In Re Marriage of Holden at 220. The appellant bears the burden of demonstrating error. Taylor v. Taylor 25 S.W.3d 449, 455 (Mo. App. W.D. 2000).

Substantial evidence is competent evidence from which the trial court could reasonably decide the case. Bauer v. Bauer, 38 S.W.3d 449, 455 (Mo. App. W.D. 2001).

A judgment of contempt and order of commitment must contain findings that either (1) Relator has present ability to pay the amount of money ordered, or (2) that Relator lacks the present ability to pay due to his own deliberate and contumacious conduct. State ex rel. Stanhope v. Pratt, 533 S.W.2d 567, 575 (Mo. banc 1976). For a contempt judgment and order of commitment to be valid, the trial court must make findings regarding contemnor's ability to pay. Brown at 401. Upon petitioner's presentation of a prima facie case of civil contempt for failure to make an ordered payment, it then becomes the alleged contemnor's burden of proof to establish that he either has the inability to pay or that his noncompliance was not an act of contumacy. Watkins v. Watkins, 839 S.W.2d 745, 747 (Mo. App. W.D.

1992).

Relator asserts that the Judgment of Contempt is deficient alleging that the trial court did not make specific findings that Relator had the present ability to pay or that Relator deliberately and contumaciously placed himself in position of inability to pay.

In the Judgment of Contempt the trial court considered Relator's testimony that he did not have the financial means to pay the amounts ordered in the Final Judgment and Decree of Dissolution of Marriage and that a new business, owned by his father, with which Relator claimed to have no involvement, is now operating at the location that Relator's former business used to occupy. Respondent's Exhibit 2, Index page 21. In contrast to Relator's assertions, Relator admitted at the contempt hearing that he is driving one of two dump trucks owned by his father and that Relator's cell phone number is advertised on the side of this dump truck. Relator claimed that he is no longer running Fisher Trucking and that he has sold trucks owned by Fisher Trucking. Respondent's Exhibit 2, Index page 21.

In the Judgment of Contempt, the trial court found that Relator's disposal of assets owned by Fisher Trucking was diluting the value of Fisher Trucking stock. Respondent's Exhibit 2, Index page 22. In the Judgment of Contempt, the trial court wrote:

“Whether Mitch has the ability to pay the Judgment amounts to Melanie comes down to an issue of credibility. The Court, after considering all of the evidence, in addition to Mitch's testimony that he will never pay Melanie a dime regardless of any judgment, finds that Mitch's testimony is not credible.” Respondent's Exhibit 2, Index page

22.

In number 22 of Relator's Suggestions in Support of Petition for Writ of Habeas Corpus, Relator states that the trial court's Judgment of Contempt gives import to statements allegedly made by Relator to Melanie Fisher regarding the divorce action and his intention not to pay her. Relator fails to inform this Court that during the contempt hearing, he admitted making such statements to Melanie Fisher. Respondent's Exhibit 2, Index page 22. Now, Relator does not see how these statements could be relevant to his ability to pay. Applying Watkins, once Melanie Fisher made a prima facie case of contempt against Relator, it then became Relator's burden of proof to establish that he either has the inability to pay or that his noncompliance was not an act of contumacy. By testifying to his intention not to pay, Relator has admitted to behavior that the trial court found to be deliberate and contemptuous. The trial court's finding that Relator was not credible and that the trial court did not believe that Relator had an inability to pay was within the trial court's authority under Krost. The trial court's findings are proper and sufficiently find that relator has the ability to pay as required by Watkins.

In number 17 of Relator's Suggestions in Support of Petition for Writ of Habeas Corpus, Relator claims that the trial court's order that he not sell, transfer, convey or otherwise dispose of Fisher Trucking stock that Melanie Fisher has an interest in has created a freezing effect on Relator's ability to liquidate those assets to satisfy the \$118,992.00 judgment. Relator fails to point out that he owns a separate 4800 shares of Fisher Trucking stock, considered to be non-marital, valued by the trial court at \$195,792.00, which is not

restricted in any way. Respondent's Exhibit 1, Index page 17. Relator also fails to disclose that he was awarded marital property, which ironically he currently has possession of, with a value of \$345,762.00. Respondent's Exhibit 1, Index page 15. Relator has not set forth any facts to demonstrate that the total sum of his assets are inadequate to purge himself.

Relator has failed to prove that the trial court's Judgment of Contempt and the trial court's Warrant and Order of Commitment do not make sufficient findings that Relator has the ability to pay, therefore Respondent respectfully requests this Court to deny Relator's Petition for Writ of Habeas Corpus.

## ARGUMENT

### V

#### **THE TRIAL COURT'S WARRANT AND ORDER FOR COMMITMENT IS VALID BECAUSE IT SPECIFIES THE CONDITIONS THE CONTEMNOR MUST MEET IN ORDER TO PURGE HIS CONTEMPT.**

Review of this case is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo banc 1976). The trial court's decision must be affirmed, "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Id.* at 32.

"A trial court's judgment in a civil contempt proceeding will not be disturbed absent a clear abuse of discretion". *Walters v. Walters*, 181 S.W.3d 135, 138 (Mo. App. W.D. 2005). "An appellate court should set aside a judgment as 'against the weight of the evidence' if it firmly believes the judgment is wrong. *Id.*, citing to *Miers v. Miers*, 53 S.W.3d 592, 595 (Mo. App. W.D. 2001).

"Appellate courts should exercise the power to set aside a decree or judgment on the grounds that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong". *Walters v. Walters* at 32.

The trial court is in a superior position to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles that are not revealed in the trial transcript. *Krost v. Krost*, 133 S.W.3d 117, 119 (Mo. App. E.D. 2004); and *In Re Marriage of Holden*, 81 S.W.3d 217, 220 (Mo. App. S.D. 2002), citing to *In Re Marriage of Lewis*, 808 S.W. 2d

919, 922 (Mo. App. S.D. 1991).

The Court must view the evidence and inferences therefrom in the light most favorable to the judgment and disregard all contrary evidence. Krost v. Krost at 119; Patton v. Patton, 973 S.W.2d 139, 144 (Mo. App. W.D. 1998); and Morse v. Morse, 80 S.W.3d 898, 903 (Mo. App. W.D. 2002).

The trial court is free to accept or reject all, part, or none of the testimony of the witnesses, Krost v. Krost at 119, and the trial court may disbelieve even uncontradicted testimony. In Re Marriage of Holden at 220. The appellant bears the burden of demonstrating error. Taylor v. Taylor 25 S.W.3d 449, 455 (Mo. App. W.D. 2000).

Substantial evidence is competent evidence from which the trial court could reasonably decide the case. Bauer v. Bauer, 38 S.W.3d 449, 455 (Mo. App. W.D. 2001).

In civil contempt, the contemnor must, at the time he is cited, be able to purge himself of the contempt by the doing of some act that is then and there within his power and ability to perform. State ex rel. Stanhope v. Pratt, 533 S.W.2d 567, 576 (Mo. banc 1976). He must hold the key to the jailhouse. Id.

Relator contends that the Judgment of Contempt and the trial court's Warrant and Order of Commitment are invalid because they fail to provide Relator with a method to purge himself of the contempt. In number 19 of Relator's Suggestions in Support of Petition for Writ of Habeas Corpus, Relator claims that a lis pendens filed by Melanie Fisher against Fisher Trucking prevented Relator from selling real estate owned by Fisher Trucking. At the hearing on the Motion of Contempt, evidence was introduced that the real property owned

by Fisher Trucking was for sale. The trial court quashed the lis pendens on January 2, 2008.

In number 20 of Relator's Suggestions in Support of Petition for Writ of Habeas Corpus, Relator claims that he owns an interest in RMF Trucking. This is a misleading assertion because in fact, Relator testified that he is the sole owner of RMF Trucking and the sole owner of the company assets. This establishes that Relator has control over a source of assets that could be used by Relator to satisfy the money judgment to Melanie Fisher.

In footnote 1 on page 2 of Relator's Suggestions in Support of Petition for Writ of Habeas Corpus, Relator claims that if he were able to pay even a part of the Judgment, he could be deemed to have accepted the judgment and thereby prejudice his rights on appeal. What Relator did not disclose to this Court was that after filing his notice of appeal on December 22, 2006, Relator with his counsel and Melanie Fisher with her counsel, signed a stipulation, (hereinafter referred to as Stipulation for Quit Claim Deed, attached hereto as Exhibit 5, Index page 27), wherein Relator agreed to sign a quit claim deed to the marital home that was awarded to Melanie Fisher. Said Stipulation for Quit Claim Deed expressly preserved Relator's interest in the real property, should the Southern District determine the trial court's judgment was incorrect. Likewise, Relator signed a stipulation (hereinafter referred to as Stipulation for Certificate of Title, attached hereto as Exhibit 6, Index page 28). This Stipulation for Certificate of Title required Relator to turn over to Melanie Fisher the title to a 2000 Lincoln automobile, however it expressly preserved Relator's interest in the vehicle, should the Southern District determine the trial court's judgment was incorrect. This same mechanism could have been applied to all or a portion of the \$118,992.00 judgment,

had Relator elected to make any attempt to pay the judgment to Melanie Fisher. At any rate, it establishes that Relator was aware of a mechanism to preserve his rights on appeal and contradicts Relator's assertion that he could not pay any part of the judgment while the case was pending appeal.

The trial court's Warrant and Order of Commitment set forth the terms by which Relator could purge himself of contempt by specifying that Relator "shall be incarcerated until he purges himself of contempt by paying the sum of \$105,191.00 and \$2,000.00 as and for Petitioner, Melanie Fisher's interest in Fisher Trucking and RMF Trucking, respectively; and \$11,801.00 as and for Petitioner's equity". Respondent's Exhibit 4, Index pages 25-26.

Relator asserts that this language was insufficient to specify a method to purge contempt which Relator had the ability to perform. It is clear from the trial court's findings in the Warrant and Order of Commitment that the trial court disbelieves Relator's assertions that he cannot comply with the judgment. As such, the trial court relies on its original belief in the Final Judgment and Decree of Dissolution of Marriage, and at the contempt hearing that Relator has the funds available.

The trial court's Warrant and Order of Commitment incorporate by reference the Judgment of Contempt, in which the trial court found that Relator had purposely attempted to dilute the value of Fisher Trucking stock and that the trial court disbelieved Relator's assertion that he has no interest in Lonnie Fisher Trucking. Respondent's Exhibit 4, Index page 25. When Relator has taken actions to conceal or understate his assets and to assert his determination to never comply with the judgment by stating that "he did not care if there was

a judgment against him for the rest of his life, he would never pay her a dime and he would never own anything”, it is then unreasonable for Relator to criticize the trial court for not indulging in Relator’s game of hide and seek by trying to guess which of Relator’s hands is holding the assets.

Relator has failed to prove that the trial court’s warrant and order of commitment did not provide Relator with the method by which to purge his contempt, therefore Respondent respectfully requests this Court to deny Relator’s Petition for Writ of Habeas Corpus

## CONCLUSION

The trial court's finding of contempt and subsequent imprisonment of Relator for refusal and failure to comply with the property division portion of the Final Judgment and Decree of Dissolution of Marriage is constitutional and a proper remedy. As to the remaining issues raised in Relator's Petition for Writ of Habeas Corpus, the evidence supports the trial court's findings and the trial court's Judgment of Contempt and Warrant and Order of Commitment contain the requisite content by setting forth the facts that constitute the contempt and finding that Relator had the ability to pay the judgment. Additionally, the trial court's Warrant and Order of Commitment specified the means by which Relator could purge the contempt. Accordingly, this Court should deny Relator's Petition for Writ of Habeas Corpus.

### **LANGE, PAULUS, HOWALD & SMITH**

By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

David S. Smith, of lawful age, first being duly sworn, states upon his oath that on May 27, 2008, he served upon two (2) copies of the foregoing Respondent's Brief on Edward C. Clausen and Jason H. Ludwig, 515 East High Street, P.O. Box 28, Jefferson City, Missouri 65102, attorneys for Relator, by depositing same in the United States Mail, first class postage prepaid, at Cuba, Missouri.

He also certifies that this brief complies with Rule 84.06 (b) and contains 5990 words and 568 lines of double spaced typed, excluding the cover, certificate of service and compliance, signature block and appendix; and that the brief contains words in 13 point Times New Roman; and that a virus free disk, scanned by Norton anti-virus, has also been served on counsel and the Court.

\_\_\_\_\_  
**David S. Smith**

**STATE OF MISSOURI            )**  
  **) SS**  
**COUNTY OF CRAWFORD        )**

Subscribed and sworn to before me, a Notary Public, on this 27<sup>th</sup> day of May, 2008.

\_\_\_\_\_  
Notary Public

**IN THE SUPREME COURT OF MISSOURI**

<b>State of Missouri ex rel.</b>	)	
<b>ROBERT M. FISHER,</b>	)	
	)	
<b>Relator,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. SC89279</b>
	)	
<b>SHERIFF DON BLANKENSHIP,</b>	)	
<b>as Sheriff of Phelps County Jail</b>	)	
	)	
<b>Respondent.</b>	)	

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24	3	Order of Discharge
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