

**IN THE SUPREME COURT OF MISSOURI**

**State of Missouri ex rel.** )  
**ROBERT M. FISHER,** )  
 )  
**Relator,** )  
 )  
**v.** )  
 )  
**SHERIFF DON BLANKENSHIP,** )  
**as Sheriff of Phelps County Jail** )  
 )  
**Respondent.** )

**Case No. SC89279**

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**RELATOR'S BRIEF**

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## **JURISDICTIONAL STATEMENT**

The Missouri Constitution provides that “[t]he supreme court shall have general superintending control over all courts and tribunals. Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction. The supreme court and districts of the court of appeals may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power.” Mo. Const. Art. V, § 4. Relator challenges the constitutionality of his incarceration for failure to make payment to his former spouse pursuant to the property division ordered by the Phelps County Circuit Court. Having previously applied to the Southern District Court of Appeals for a writ of habeas corpus and having had his application denied, jurisdiction of this matter properly rests with this Court.

## **INTRODUCTION and FACTS**

The facts of this case for purposes of this proceeding are simple. Relator and his former spouse (Melanie) were divorced by the Circuit Court for Phelps County on November 20, 2006. In that proceeding, the trial court found that a portion of Relator's stock in Fisher Trucking, a closely held corporation of which Relator is a minority owner, was marital property. \$105,191 of the nearly \$120,000 Relator was ordered to pay was awarded "as and for [Melanie's] marital share of the stock." (App. pg. 10). Relator was ordered to pay the nearly \$120,000 as a lump sum within 60 days of judgment. (App. pg. 10,11) Relator appealed the court's finding that this stock was marital property, but was unable to afford an appeal bond. While said appeal was pending, and without attempting collection by any traditional means whatsoever, Melanie brought a contempt action against Relator for failure to pay as ordered by the court. The trial court held Relator in contempt and ordered him incarcerated until such time as he pays the nearly \$120,000 to Melanie. Relator was given no alternative method by which he may purge himself. (App. pg. 23). Relator was incarcerated on April 26, 2008 and remains held in solitary confinement in the Phelps County Jail. On application to this Court for writ of habeas corpus, Relator was requested to brief the constitutionality of his imprisonment.

## **POINT RELIED ON**

### **I. Relator is entitled to immediate release from his current incarceration**

**under a civil contempt judgment for failure to pay a lump sum of money to his former spouse pursuant to the property division in the parties' divorce because the trial court was without jurisdiction to order him incarcerated in that civil contempt is not authorized for the failure to pay a property division and the Missouri Constitution forbids incarceration for debts.**

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

*Stone v. Stidham*, 393 P.2d 923 (Ariz. 1964)

*Teefey v. Teefey*, 533 S.W.2d 563 (Mo. en banc 1976)

Mo. Const. art. I, § 11

Mo. R. Civ. P. 74.07

## **ARGUMENT**

### **A.**

Art. 1, Section 11 of the Missouri Constitution provides “[t]hat no person shall be

imprisoned for debt, except for nonpayment of fines and penalties imposed by law.” “As in the case of all constitutional provisions designed to safeguard the liberties of the person, every doubt should be resolved in favor of the liberty of the citizen in the enforcement of the constitutional provision that no person shall be imprisoned for debt.” *Bradley v. Superior Court In and For City and County of San Francisco*, 310 P.2d 634, 640 (Cal. 1957). With this in mind, the constitutional analysis in this case is controlled in large part by the Supreme Court of Missouri’s decision in *Ex rel Stanhope v. Pratt*, 533 S.W.2d 567 (Mo. banc 1976).

In *Stanhope*, the relator had been ordered to pay monthly maintenance for his former wife, as well as mortgage payments on real estate awarded to his wife. 533 S.W.2d at 570. Upon his failure to pay more than a nominal amount of the ordered maintenance, the relator’s wife instituted an action under Mo. Rev. Stat. §452.345 (1973)<sup>1</sup> seeking to hold him in civil contempt for his failure to pay.<sup>2</sup> The trial court found the relator in

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<sup>1</sup> The substance of former §452.345 is now found in the Uniform Reciprocal Enforcement of Support Law, Mo. Rev. Stat. §454.010-.1031 (2000).

<sup>2</sup> In *Teefey v. Teefey*, 533 S.W.2d 563 (Mo. banc 1976), decided concurrently with *Stanhope*, this Court found that proceedings for contempt for failure to pay maintenance under §452.345 were proceedings for civil contempt. This holding was based upon the difference in purpose behind the incarceration. “Criminal contempt [, in contrast to civil contempt,] . . . does not serve the function of aiding a litigant in achieving the

contempt and that his imprisonment for such contempt would not violate the constitutional prohibition on imprisonment for debt under Art. 1, Section 11 of the Missouri Constitution.<sup>3</sup> The trial court did not imprison him, but suspended judgment so that he

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relief granted but is for the purpose of protecting the dignity of the court and, more important, to protect the authority of its decrees.” *Id.* at 566. The import of this holding is explored in further detail below.

<sup>3</sup> Relator notes that the trial judge in *Stanhope* did not hold the relator in contempt for failure to make mortgage payments ordered in the original decree. This is presumably

could pursue a writ of prohibition. *Id.* at 569-570.

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because first, §452.345 did not authorize civil contempt proceedings for the payment of money other than maintenance, and second, because the trial court recognized that the inherent authority to hold a party in criminal contempt for failure to abide by judgments did not allow him to order incarceration where the contemnor's ability to purge was directly tied to the payment of the underlying obligation under the constitutional prohibition for imprisonment for debt.

In analyzing whether imprisonment for failure to pay maintenance would constitute imprisonment for “debt” under the constitution, *Stanhope* recognized that every other state in the union but Missouri allowed imprisonment for the failure to honor such obligations.<sup>4</sup> *Id.* at 572-573. In addition to a trial court’s inherent right to enforce its orders by contempt, the Court recognized that:

Since failure to pay alimony is fundamentally contempt of the decree of the court, under most authorities a judgment, order, or decree for alimony or attorney's fees may be enforced by contempt proceedings. Such proceedings have been justified on the ground that alimony is not a mere debt, or that it constitutes the highest form of debt or sacred obligation, or a continuing duty, tinged with a public interest. So, it has been held public policy to punish a husband by contempt when he willfully refuses to comply with an order to pay alimony. (internal citations omitted).

*Id.* at 573.

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<sup>4</sup>The Missouri Supreme Court had previously decided that incarceration for failure to pay such debts did violate the constitutional prohibition on incarceration for debt in *Coughlin v. Ehlert*, 39 Mo. 285 (1866).

The Court went on to note that other decisions in the state, most of which are unrelated to dissolution of marriage, had modified the rule of *Coughlin* by allowing imprisonment for failure to pay money or transfer property under certain circumstances.<sup>5</sup> *Id.* at 574-575. The Court then ultimately held:

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<sup>5</sup> *In re Knaup*, 46 S.W. 151 (Mo. banc 1898) and *Ex Parte Devoy*, 236 S.W. 1070 (Mo. App. 1921) involved the failure to transfer specific property that was in the possession of the contemnor. Thus, these cases merely stand for the proposition, addressed later in this brief, that an order to transfer specific property does not offend the constitutional ban on imprisonment for debt. *State v. Taylor*, 73 S.W.2d 378 (Mo. banc 1934) was based upon the passing of bad checks, and thus the defendant was not imprisoned for debt, but for the commission of a criminal act. In *Ex Parte Fuller*, 50 S.W.2d 654 (1932), the court reversed the imprisonment for failure to pay the proceeds of radios illegally sold because the trial court did not find that the contemnor had the specific funds in his possession, and could not presume that they existed. In *Ex Parte Fowler*, 273 S.W. 195 (Mo. App. 1925) and *Zeitinger v. Mitchell*, 244 S.W.2d 91 (Mo. 1951), the courts found that imprisonment was justified because the trial court found that the specific funds at issue (which had come into the hands of the contemnors wrongfully in the first place) were in the possession of the contemnors at the time they were imprisoned. To the extent these cases have blurred the line between criminal and civil contempt and required payment of the underlying obligation in order to gain release from

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imprisonment, they are in conflict with *Teefey* (see Section E, *infra*). To the extent that these cases do not rest on a finding that the money owed was held in a specific fund or were not the result of a failure to perform a “special” obligation such as the payment of maintenance and support, they fail to recognize that any authority to imprison for contempt is tempered by the constitutional prohibition on imprisonment for debt, are in conflict with *Stanhope* and must be overruled.

[T]rial courts are henceforth empowered to punish by imprisonment for contempt the failure of a person to comply with orders for payment of maintenance and child support. In that connection we consider it prudent to say that this is a rather drastic remedy which should be carefully and cautiously exercised. Before ordering imprisonment trial courts should be convinced that the person is financially able to make the required payment or that he has intentionally and contumaciously placed himself in a position so that he could not comply with the court's orders. Also, we think the trial courts, in the exercise of a sound discretion, may require that the party seeking the contempt order make reasonable efforts to collect by the conventional remedies available before entering the contempt order.

*Id.*

While the Court does not say so explicitly, implicit in its holding that maintenance and child support are not “debt” under the constitutional prohibition against imprisonment for debt is the conclusion that the prohibition would apply to a person who fails to pay a money judgment that is not intended as maintenance or support.

## **B.**

Numerous other states adhere to this distinction and hold that maintenance and support do not qualify as “debt”, but that imprisonment for failure to make money payments pursuant to a property division is not permissible under their

respective constitutions. See e.g. *Bradley v. Superior Court In and For City of San Francisco and County of San Francisco*, 310 P.2d 634, 642 (Cal. 1957) (“[T]he better view is that payments provided in a property settlement agreement which are found to constitute an adjustment of property interests, rather than a severable provision of alimony, should be held to fall within the constitutional proscription against imprisonment for debt”); *Dickey v. Dickey*, 141 A. 387, 390 (Md. 1928) (“When the decree only directs the payment of money, a party defendant, who has been brought into court under process of contempt to compel the performance of such a decree, may not be imprisoned”); *Spence v. Spence*, 287 N.W. 393 (Mich. 1939) (while noting that alimony payments are enforceable by contempt, held that requiring former husband to carry life insurance and provide for former wife in his will were matters of property settlement and were unenforceable in contempt proceedings); *Stone v. Stidham*, 393 P.2d 923 (Ariz. 1964) (en banc) (recognizing the principle in *Dickey v. Dickey*, supra); *Lemons v. Lemons*, 238 P.2d 790 (Okla. 1951) (per curiam) (holding that weekly payments were not alimony payments and therefore payment arrangement was unenforceable by contempt); *Taylor v. Taylor*, 653 So.2d 1126, 1127 (Fla.App. 1 Dist. 1995) (per curiam) (“[O]bligations incurred by a party in a marital property settlement are not subject to enforcement through contempt proceedings”).

Those states that do allow a person to be imprisoned for failure to pay a property division by and large do so under the reasoning that the courts have an inherent authority to punish willful disobedience and that the contemnor is not

imprisoned because he failed to make money payments, but because he disobeyed the court. In these states, by changing the characterization of the act being punished, the courts are able to avoid application of the constitutional prohibition on imprisonment for debt. See *Harvey v. Harvey*, 384 P.2d 265, 267 (Colo. 1963) (“[Contemnor] is not in the common jail because he is a judgment debtor, but because he has willfully disobeyed a lawful order of the court”); *Hanks v. Hanks*, 334 N.W.2d 856 (S.D. 1983) (holding that the court has the power to punish parties for their willful and contumacious failure to comply with orders to pay money); *Alexander v. Alexander*, 742 S.W.2d 115, 117 (Ark. App. 1987) (“[Imprisonment is] only justified on the grounds of wilful disobedience,” citing *Ex Parte Caple*, 99 S.W. 830 (Ark. 1907)); *Taylor v. Taylor*, 285 S.E.2d 695 (Ga. 1982) (holding that trial court had the ability to imprison contemnor for willful contempt).

### C.

The Missouri Court of Appeals decisions that have extended the exception under *Stanhope* for maintenance and support, while certainly mentioning the court’s authority to punish willful disobedience, have nonetheless presumed this power to be subject to the constitution’s prohibition on imprisonment for debt. Those cases are based upon the proposition that payments pursuant to a property division, like maintenance and support, arise out of the marital relationship, and thus are not debt under the Constitution. See e.g. *Ellington v. Pinkston*, 859 S.W.2d 798 (Mo.

App. 1993), *State ex rel. McCurley v. Hanna*, 535 S.W.2d 107 (Mo. 1976); *Yeager v. Yeager*, 622 S.W.2d 339 (Mo. App. 1981); *Reeves v. Reeves*, 904 S.W.2d 412 (Mo. App. 1995); *Haley v. Haley*, 648 S.W.2d 890 (Mo. App. 1982); *Fugitt v. Fugitt*, 850 S.W.2d 396 (Mo. App. 1993); *Wisdom v. Wisdom*, 689 S.W.2d 82 (Mo. App. 1985).

*Ellington* is a case very similar to the case at bar. In that case, the appellant was ordered to pay over \$10,000 to his wife as part of a property division, such amount representing the value of pension and property sharing plans of the appellant. He failed to make such payment and was ordered incarcerated for his failure. Appellant challenged the order of incarceration on the basis that the money he was ordered to pay was not related in any manner to the support or maintenance of his former spouse as constitutionally impermissible. 859 S.W.2d at 799-800. Based upon other appellate court decisions after *Stanhope* which allowed incarceration for failure to make similar payments,<sup>6</sup> the court held that “an

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<sup>6</sup> See *Yeager v. Yeager*, 622 S.W.2d 339 (Mo. App. 1981) (*Stanhope* exception extended to the failure to make mortgage parties to a third party bank); *Reeves v. Reeves*, 693 S.W.2d 149 (Mo. App. 1985) (*Stanhope* and *Yeager* extended to periodic property

order to pay money as part of the division of property, like an order to pay maintenance or child support, creates an obligation arising from the existence of marital status and is not a debt in the sense used in the constitution.” *Id.* at 800.

Thus, unlike most other states which hold that property division is enforceable by incarceration, Missouri decisions which have allowed incarceration for failure to make payments under a property division have not done so simply on the basis that the contemnor is being incarcerated for failure to abide by court orders under the court’s inherent authority to punish disobedience. These cases implicitly recognize that where a contemnor may only purge by paying the underlying obligation, the strictures of the Constitution may not be avoided by simply re-characterizing the imprisonment as based upon the failure to obey court orders, and that to the extent civil contempt has as its basis the inherent power of the court to vindicate its authority (see Section E, *infra*), such power is in fact tempered by the constitutional prohibition on imprisonment for debt. Thus, Missouri decisions justify their conclusion on the idea that such payments are not considered “debt” under the Constitution.

**D.**

The reasoning behind this Court’s decision to remove maintenance and  

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division payments).

support payments from the definition of “debt” under the Constitution simply does not justify similar treatment for payments ordered under a property division because the nature of the obligation is different and because of the grave practical implications of such a rule.

i.

a.

As stated by this Court in *Stanhope*, the nature of support payments justify an exception from the definition of debt because the failure to perform the obligation has a direct impact on the public. *Stanhope*, 533 S.W.2d at 573-74. The duty of support is “a duty which sound public policy sanctions to compel one who is able so to do, possibly as a result of the co-operation (during coverture) of his former wife, to prevent such former wife from becoming a public charge or dependent upon the charity of relatives or friends.” *Id.* (citing *Ex Parte Phillips*, 187 P. 311 (Nev. 1920)). “[A]limony’ does not contemplate a settlement of property interest or general endowment of wealth. Like the alimentum in civil law from which the word was derived it has for its sole object the provision of food, clothing, habitation and other necessities for support.” *Stone v. Stidham*, 393 P.2d 923, 925 (Ariz. 1964). Thus, the obligation of support is something more than a simple monetary obligation between two people based upon past actions and a decision upon marriage to essentially combine resources to build an estate and life together. It is instead an obligation owed to the other party to provide

sustenance going forward, which obligation, if unfulfilled, is left to the public at large. In this regard, maintenance and support orders are unique to the marital/parental relationships.

In contrast, a property division is simply a balancing of assets (and debts) incurred during the marriage. Upon marriage, there is an implied promise that each party will contribute to the marital estate in order to maximize that estate for the benefit of both parties. There is no cognizable effect on the public going forward where maintenance is not otherwise found to be necessary. If maintenance is not awarded or necessary because each party has the ability to provide for themselves, the property division will merely affect the wealth each party will enjoy above that necessary for their support.

In this regard, property division during a divorce is not unique to the marital relationship, and is akin to a partnership or other business relationship whereby persons or entities are combining efforts and assets in an effort to benefit the partnership or relationship as a whole. Similar to dissolution of a marriage, upon dissolution of a partnership, the parties' contributions to the partnership are considered when dividing assets; partners that contribute more to the partnership take more away from it. See § 358.400. Once these assets are divided, the parties have no other legal or moral obligation for the support or benefit of the

other going forward. §§358.010-.520.<sup>7</sup> Furthermore, partners and spouses are permitted to dictate the terms of property division through contract. See, §358.180; §452.325.

In short, the obligation to make payments in accord with a division of property is a “debt” in the constitutional sense, as it is a monetary obligation between the parties to the marriage akin to a monetary obligation between business partners, and there are no public policy concerns which justify an exception from the definition of “debt” as in the case of maintenance and support. Cases holding otherwise are in conflict with the reasoning of *Stanhope* and must

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<sup>7</sup>Unless otherwise noted, all statutory references are to Missouri Revised Statutes (2000).

be overruled.<sup>8</sup>

**b.**

Some courts have allowed awards that may otherwise be labeled “property division” to be enforced by imprisonment on the basis that the property division is intended as support and not as an allocation of wealth. See e.g. *Bott v. Bott*, 453 P.2d 402 (Utah 1969) (monetary award made “in lieu of” alimony held intended as alimony, and thus enforcement by imprisonment did not violate constitution). In *Yeager*, the court implied that because the trial judge “refused to award wife

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<sup>8</sup>See *Ellington*, 859 S.W.2d at 800-01 (Mo. App. 1993)(Gaertner, J., dissenting) (“Both *Reeves* and *Haley* leap beyond the specific facts which underlie their respective decisions to a general conclusion that contempt may be used to effectuate all constitutionally permitted orders contained in a dissolution decree. Nothing contained in the Supreme Court's decision in *Stanhope* supports such a broad conclusion.”) (internal citations and quotations omitted).

maintenance precisely because he was awarding her the poultry operation,” the award was similar to maintenance, and thus imprisonment did not offend the constitution. 622 S.W.2d at 342. The rule in *Bott* and other cases so holding, as well as the above statement from the *Yeager* court, is contrary to Missouri dissolution law.

In Missouri, trial courts divide property according to the factors listed in §452.330. None of these factors include considering whether or not maintenance would otherwise be necessary for the support of a party. Furthermore, §452.335, which governs the award of maintenance, states that in order to award maintenance the court must find that a party “(1) lacks sufficient property, *including marital property apportioned to him*, to provide for his reasonable needs; *and* (2) is unable to support himself through appropriate employment[.]” A party must establish both of these prerequisites in order for the court to award maintenance, and it is only after dividing property that a court analyzes the need for maintenance. Finally, §452.335 does not authorize “in gross” maintenance awards. “Because maintenance is founded on need, a maintenance award may extend only so long as the need exists . . . the dissolution of marriage statutes appear to contemplate a lump sum or gross payment only as a division of property.” *Cates v. Cates*, 819 S.W.2d 731, 735 (Mo. banc 1991).

Having stated the rule, it is prudent to point out that the judgment in this case makes clear that the money award to Melanie was not “in lieu of” or intended

as maintenance. First, the judgment explicitly states that \$105,191 of the \$118,992 property award was “as and for [Melanie’s] marital share of” the Fisher Trucking stock. (App. pg. 10). \$2,000 of this award was “as and for [Melanie’s] marital interest in RMF Trucking.” (App. pg. 11). Finally, the remaining \$11,801 was in order to “equalize the equities”. (App. pg. 11). The court awarded no maintenance after stating that “the Court has considered marital maintenance and finds that due to the distribution of assets made herein, no awarded (sic) maintenance shall be given to either party.” (App. pg. 8). Because the court did not make findings that would support a conclusion that Melanie was otherwise in need of maintenance under §452.335.1(1) and (2), and because even if it had, a lump sum maintenance award would be improper, the award in this case is indisputably a pure division of property, and the enforcement by imprisonment violates the constitutional prohibition on imprisonment for debt.

**ii.**

In contrast to the public policy which justified the *Stanhope* decision, there are potentially grave implications if the cases which hold that trial courts are allowed to imprison litigants for failing to pay money pursuant to a property division are allowed to stand. Many of these concerns are exemplified by the case at bar.

The award in this case was based primarily upon a finding that certain stock in Fisher Trucking, a closely held corporation, was marital and had a certain value.

Rather than award the stock itself, the court ordered Relator to pay over \$100,000 to his former spouse as the value of the stock. Furthermore, he was ordered not to sell the stock. (App. pg. 10). Upon failing to make the payment within 60 days as ordered by the judgment, Relator was held in contempt and ordered incarcerated. That judgment is on appeal before the Southern District, argued and submitted March 18, 2008. Relator contends on appeal that there was *no evidence* that the stock at issue was marital property. Relator addresses in his suggestions in support of his petition for habeas corpus and in other portions of this brief the findings the court made in order to justify incarceration and will not so address here. Suffice it to say that Relator had the burden of proving that (a) he did not have the ability to pay, and (b) that such inability was not purposeful.<sup>9</sup> The

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<sup>9</sup> Note that this Court has not explicitly decided the issue of which party carries the burden of proof in contempt proceedings which result in incarceration. The court of appeals, in *In re Marriage of Vanet*, 544 S.W.2d 236 (Mo. App. 1976), found that the burden is upon the contemnor. Relator contends that this decision is contrary to the proclamation by this Court in *Stanhope* that “[b]efore ordering imprisonment trial courts should be convinced that the person is financially able to make the required payment or that he has intentionally and contumaciously placed himself in a position so that he could not comply with the court's orders.” 533 S.W.2d at 575. This is a statement that the trial court must be *actually convinced* that the ability to pay exists before ordering

judgment of contempt states that the court's finding that he did not carry his burden came down to the court finding that Relator was not credible.

In this context, the implications that support application of the constitutional prohibition on incarceration to this situation become crystal clear. Relator was asked to prove two negatives. Not only did he have to present evidence on the issues, but the judge had to be satisfied that the evidence was credible. Failing the same, he was ordered imprisoned until he fully complies with the order to pay over \$100,000.

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incarceration that may only be purged by performance, not that a trial court may order incarceration *if not convinced by a credible contemnor*. The distinction is important when considering the possibility of indefinite incarceration if the burden is not satisfied.

Now, assume the trial court got it wrong, as courts inevitably will from time to time. What if the valuation of the property which forms the basis for an award is incorrect, or if the asset which presumably holds the value is not readily marketable (as in the case of stock of a closely held corporation)? A party may not have the ability to simply turn the asset into liquid funds to allow him to purge. Furthermore, where the underlying award is on appeal and the asset does not hold the value attributable to it by the trial court or is not liquid, it may be impossible for the party to post an appeal bond. The party is now completely at the mercy of the same judge who was wrong in the first place. The end result of this process as it now stands is that a party may be ordered to make a payment to his or her former spouse, which payment may be erroneous in substance or amount. If a party is unable to post a bond, and is also unable to convince the judge that he or she made a mistake or that the party is otherwise innocently unable to make the payment as ordered, they face a potentially indefinite stay in jail. This is especially offensive to the Constitution.<sup>10</sup>

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These are precisely the concerns which likely led to the dissent in *Stanhope*. In his dissent, Judge Bardgett, while agreeing that imprisonment based upon failure to make support payments was not unconstitutional, found the requirement that the trial court be convinced that the contemnor has the ability to pay and thereby purge himself was not satisfied in that case. He would require that in such cases the contemnor have the funds

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*in his possession* at the time of judgment, and that proof of ability to pay cannot be made simply by evidence of income or by extension, the possession of non-monetary assets. *Stanhope*, 533 S.W.2d at 576-77 (Bardgett, J., dissenting).

In sum of the points above, cases after *Stanhope* which allow a court to imprison a litigant for failure to make lump sum payments pursuant to a property division do so without authority of statute, ignore the reasoning of *Stanhope* as well as the practical concerns which underlie the constitutional prohibition on imprisonment for debt, and therefore, must be overruled.

#### **E.**

Many of the concerns regarding the potential for an indefinite jail sentence explored above are not present when the issue is the failure to perform a specific act or transfer specific property. In fact, Relator has not located any cases which hold the failure to transfer specific property or perform a specific act a violation of the constitutional prohibition on imprisonment for debt.

For instance, where the order concerns an order to transfer property, there is not an issue on ability to perform. The only questions before the court are simply whether the property exists and whether it is legally possible to transfer ownership. Likewise, with orders to transfer specific funds held in a specific place, such as a pension or retirement fund, the proof that the funds exist is not difficult or subject to any real finding of credibility. Thus, in those cases the risk that the trial court will err in finding an ability to purge is practically nonexistent. The contemnor may purge himself immediately and avoid the threat of indefinite incarceration.

The Court itself recognizes the distinction. Rule 74.07, titled "Judgment for Specific Acts - Vesting Title - Delivery of Possession" provides:

If a judgment directs a party to execute or deliver a deed or other document or *to perform any other specific act* and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party. On application of the party entitled to performance, a writ of attachment or sequestration shall issue against the property of the disobedient party to compel obedience to the judgment. *The court may also adjudge the party in contempt.* If real or personal property is within the state, the court may enter a judgment divesting the title of any party and vesting it in others in lieu of directing a conveyance thereof, and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, a writ of possession may issue to put the party entitled into possession, or attachment or sequestration may issue.

There is no such authorization for the enforcement of orders for the payment of money by contempt.

Furthermore, while the legislature has authorized civil contempt proceedings in the context of failure to pay support by adoption of the Uniform Reciprocal Enforcement of Support Law Act, §§454.010-.1031, they have not authorized such proceedings to enforce the payment of property divisions, or other money judgments in general. Relator does not contend necessarily that the legislature may limit the inherent authority of the court to

punish disobedience or enforce its judgments, but notes that, as stated in *Teefey*:

We approve of the statement that, ' . . . Contempts fall into two categories, civil and criminal. Although at times the line is hard to draw, the essential difference lies in who is sought to be protected by the contempt proceeding. Civil contempt is for the protection of a party to the litigation, the party for whose benefit the order, judgment or decree was entered. Its function is to provide a coercive means to compel the other party to the litigation to comply with relief granted to his adversary. The civil contemnor has at all times the power to terminate his punishment by compliance with the order of the court--i.e.: purging.

Criminal contempt on the other hand *does not serve the function of aiding a litigant in achieving the relief granted but is for the purpose of protecting the dignity of the court and, more important, to protect the authority of its decrees.* The thrust of criminal contempt is the intentional interference with the judicial process and the demonstrated refusal to be bound by judicial determinations. *The power of criminal contempt springs not from the needs to protect a litigant, but from the inherent power of the courts to protect the judicial system established by the people as the method for solving disputes.* Without this power courts are no more than advisory bodies to be heeded or not at the whim of the individual.

533 S.W.2d at 565-66 (emphasis added). Thus, *Teefey* seems to contemplate that where the purpose of the contempt is to vindicate the court's authority, it is criminal contempt, borne of the court's inherent powers. In contrast, where the purpose of the contempt is to aid a litigant in enforcing a judgment, such contempt is civil. *Id.* Under *Teefey*, the current case is based upon civil contempt, as Relator's release is only accomplished by payment to his former spouse, and is thus for her benefit alone.

In regard to civil contempt, *Teefey* does not state that the basis for its authority to hold parties in civil contempt is inherent. Relator has not found authority for the proposition that the court has the inherent power to "protect a litigant." Thus, where the purpose of contempt is to enforce a judgment for the benefit of a litigant, it must have explicit authority to do so. While such authority exists for enforcement of child support and maintenance, there is no such authority, by rule or statute, to enforce by imprisonment a judgment for payment under a property division.

Assuming *arguendo* that a court does possess the inherent authority to hold parties in civil contempt and subsequently imprison them for failure to comply with an order, *Stanhope* demonstrates that this power is tempered by the constitutional prohibition on imprisonment for debt. This Court recognized that the public policy which led them to the conclusion that maintenance and support do not qualify as "debt" was demonstrated by the legislature's enactment of §452.345, which authorized civil contempt proceedings in such instances. The legislature has never thought it prudent to pass laws that provide the same authority for the payment of money pursuant to a property division or any other purely

monetary judgment. This is likely because the legislature recognizes that public policy does not demand such authorization, and under the reasoning of *Stanhope*, authorizing imprisonment for failure to pay a property division would violate the constitutional ban on imprisonment for debt.

## CONCLUSION

*Stanhope* establishes that the authority of a court to imprison a party for contempt for failure to make payments ordered under a judgment is necessarily limited by the constitutional prohibition on imprisonment for debt where the only method by which the contemnor may purge himself is by payment of the underlying obligation. *Stanhope* recognized an exception to this rule in the case of failure to make support payments to a former spouse or a child because the special nature of the obligation renders it other than “debt” under the Constitution. Where, as here, the obligation is simply a division of property and assets, such an exception from the constitutional definition of debt is not warranted.<sup>11</sup> Thus, Relator’s current incarceration for failing to make a lump sum payment

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<sup>11</sup> As argued above, the trial court’s ruling in this case was made more onerous and constitutionally offensive by the fact that (a) an appeal is pending, and (b) no efforts were made by Melanie to collect by traditional means before seeking to incarcerate Relator. To the extent this Court finds that imprisonment is under some circumstances allowed for the failure to pay a property division judgment, the Court should *require* that judgment creditors attempt to collect by traditional means, and a pending appeal should act as a stay

to his former spouse pursuant to the parties' division of property violates Art. 1 Section 11 of the Missouri Constitution, and he is entitled to immediate release.

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of commitment orders.

CERTIFICATE OF MAILING

The undersigned certifies that an exact copy of the above and foregoing was mailed, first class postage prepaid, on May 27, 2008, to:

Sheriff Don Blankenship  
500 W. 2d Street  
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***Respondent***

Honorable Tracy L. Storie  
Phelps County Circuit Court Judge  
200 North Main Street  
Rolla, MO 65401  
573-774-4789  
***Respondent***

and by facsimile to:

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***Attorneys for Melanie Fisher***

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**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>	)	

**84.06(b) CERTIFICATE**

The undersigned hereby certifies that Relator’s brief complies with Rule 84.06(b). The brief contains 30,596 words.

Respectfully submitted,

**CARSON & COIL, P.C.**

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