

# *2008 CASE LAW UPDATE*

*for the*

*St. Louis County Bar Association*

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<sup>1</sup> Hon. Douglas R. Beach, 21<sup>st</sup> Judicial Circuit, St. Louis County, contributed several of the digests published herein and his assistance is sincerely appreciated.

## **PROCEDURE**

### **Attorney withdrawal-**

Trial court abused its discretion when it allowed counsel to withdraw on the day of trial. The litigant had no reasonable notice of the withdrawal and was provided with no opportunity to employ other counsel. *Bledsoe v. Bledsoe, ED Mo slip op. no. 89382, filed January 15, 2008.*

### **Bond Requirement of Section 452.455.4 RSMo –**

Western District says the fulfilling the bond requirement is what gives the trial court personal jurisdiction *over the non-movant* to proceed. This personal jurisdiction is waived if non-compliance with the bond requirement is not raised in the respondent's responsive pleadings (not subject matter jurisdiction). *Roach v. Hart, W.D. Mo. Slip No. 67833, filed 4/1/08.* Query: If the statute is mandatory, then why can it be waived? However, see also *State ex rel. Burton v. Swann, ED Mo slip opinion no. 91385 filed 7/29/08* which speaks in terms of “judicial competence” and not “personal jurisdiction,” and says non-compliance with the bond requirement as a pre-requisite to proceeding **cannot** be waived.

### **Contempt-right to counsel-**

There was a failure of due process where the contemnor was not informed of his right to counsel and where the trial court denied contemnor's request for continuance to obtain counsel. *State ex rel. Smith v. Kintz, ED Mo slip op. no. 90472, filed February 5, 2008.*

### **Default Judgment**

A consent judgment in which a party entered into a separation agreement and affidavit for judgment is not a “default” judgment under Rule 74.05 MRCP even though the party filed no entry or responsive pleading. Therefore, the provisions of the rule for setting a default judgment aside are inapplicable. *Grasse v. Grasse n/k/a Schindeler, EDMo slip op. no. 89264, filed April 8, 2008*

### **Enforcement of Settlement—**

The trial court erred in enforcing a purported settlement based on the credibility of one party's testimony (at the time of attempted enforcement) as to what the settlement was. No terms had ever been spread on the record. The case contains a good summary of the case law on this topic. *Freeland v. Freeland*, E.D. Mo. Slip Opinion No. 89610 filed 6/24/08.

### **Garnishment- Missouri Local Government Employees Retirement System**

Cannot garnish for maintenance, but can for child support, per their statute. Per 70.695, MOLAGERS does not allow income withholding for other than child support. Excellent discussion of statutory interpretation. *Smith v. Missouri Local Government Employees Retirement System*, WL 2914545 (10/9/07)

### **Interest on arrearages—**

Must be awarded with respect to all delinquent payments, even if failure to pay was in good faith and in reliance on what was thought to be a valid court order. *DeHaan v. Lombardo*, W.D. Mo. Slip Opinion No. 68139 filed 5/13/08.

### **Judicial Estoppel**

Refused to apply the doctrine of judicial estoppel. Husband had said in bankruptcy that he did not have ownership in company and later, in the divorce, claimed that he did. According to the court of appeals, his prior denial of ownership did not mean that he did not have a marital interest. *Vinson v. Vinson*, ED88702 (11/13/07)

### **Long Arm Jurisdiction—**

Limited to contacts set forth in Rule 54.06(b). The trial court erroneously found in personam jurisdiction existed over an Illinois resident in a Missouri divorce who owned realty in Missouri, pursuant to Rule 54.06(a). However, pursuant to Rule 54.06(c), only Rule 54.06(b) is applicable to a dissolution of marriage case pursuant to this court's reading of that rule.

As articulated in the opinion: “In the matter before us the trial court proceeded under Missouri Supreme Court Rule 54.06,(FN3) which sets forth the long-arm jurisdiction for dissolution of marriage actions as well as all other civil actions. Under Rule 54.06, the trial court has two possible avenues for obtaining personal jurisdiction over Husband in this dissolution action. Rule 54.06(a) authorizes in personam jurisdiction over a person outside of Missouri who, in person or through an agent:

- (1) Transacts any business within this state;
- (2) Makes any contract within this state;
- (3) Commits a tortious act within this state;
- (4) Owns, uses or possesses any real estate situated in this state;
- (5) Contracts to insure any person, property or risk located within this state at the time of contracting;
- (6) Engages in an act of sexual intercourse within this state with the mother of a child within or near the probable period of conception of that child.

Additionally, Rule 54.06(b) authorizes in personam jurisdiction over a person:

*whether or not a citizen or resident of the state, who has lived in lawful marriage within this state, as to all civil actions for dissolution of marriage or for legal separation and all obligations arising for maintenance of a spouse, support of any child of the marriage, attorney fees, suit money or disposition of marital property, if the other party to the lawful marriage lives in this state or if a third party has provided support to the spouse or to the children of the marriage and is a resident of this state.*

Per court: Notably, section (c) of Rule 54.06 states, “[o]nly causes of action arising from the acts or conduct enumerated in Rule 54.06(a) or Rule 54.06(b) may be asserted against a defendant in an action in which jurisdiction is based on this Rule 54.06.”(FN4) Accordingly, to acquire personal jurisdiction over a non-resident party under Rule 54.06(a), the cause of action must arise from the acts or conduct set forth in Rule 54.06(a). Likewise, to acquire personal jurisdiction over a non-resident party under Rule 54.06(b), the cause of action must arise from the acts or conduct set forth in Rule 54.06(b).”

Query: Can’t the trial court at least divide the property that is in Missouri?

*State ex. rel. Gleeson v. Smith, E.D. Mo. Slip Opinion No. 91448 filed 9/2/08*

### **Remand due to insufficient trial record-**

Remand is appropriate where the record on appeal is inadequate through no fault of the parties. Here, an equipment malfunction resulted in the failure to record Appellant's entire case at trial. *Lyytinen v. Lyytinen, SD Mo. Slip op. no. 28711, filed February 13, 2008.*

### **Re-opening for new evidence-**

Will not be allowed absent proof the evidence was not available prior to trial, assuming due diligence was employed, and without proof that the result would have been materially different had the new evidence been utilized at trial. *Pijanowski v Pijanowski, WDMo slip op. no. 69693, filed October 21, 2008.*

### **Unclean Hands-**

The rule that a party not in compliance with the court's order is not entitled to relief does not apply to an appeal of an adverse judgment – only to quests for affirmative relief. *Blevins v. Blevins, W.D. Mo. Slip Opinion No. 681182 filed 4/15/08.*

### **Appeal – Application of New Rule 78.07 on post-trial motions**

The Western District Court of Appeals disregarded this Rule to avoid an injustice. The Rule provides “allegations of error relating to form or language of a judgment must be raised by motion to amend the judgment in order to be preserved for appellate review.” Here, the Western District disregarded the Rule to allow the appellant to amend the language of the judgment in order that the judgment reflect what appeared to have been intended by the trial court. *Saxton v. Saxton, W.D. Mo No. 66293, filed 4/24/07*, but for different treatment, see *Milone v. v. Duncan, W.D. Mo. Slip Opinion No. 67473 filed 2/19/08.*

## **Statute of Limitations on Judgments—**

A contempt judgment was unenforceable when it was based upon a maintenance judgment which had been presumed paid due to the elapse of ten years.  
*Halamicek Halamicek*, W.D. Mo. Slip Opinion No. 68273 filed 6/3/08.

## **CHILD SUPPORT**

### **College Expenses- child support**

Good discussion of college issues. Discusses car expenses, car insurance and maintenance. The parties separation agreement required that Father pay daughter \$2,500 per year in child support until she completed college and to pay her car expenses until she completed college. He paid did most of these expenses and more but not tuition so mother sought contempt. Court found the car expense to be in the form of child support but also found that daughter never gave him the statutorily required notices of 452.340.5. Appeals Court found that the language did amount to an agreement to pay beyond age 21, however that the statutory requirements must still be met and thus his obligation abated during the period when he did not get the requisite notices.

*Appling v. Appling*, 156 3<sup>rd</sup> 454 and *Smith v Smith* 94 SW 3<sup>rd</sup> 394, college is a form of child support *Meyer v. Meyer* 77 SW 3<sup>rd</sup> 40. . *Shands v. Shands*, SD28154 (10/31/07)

### **Dependency exemption- may be unilaterally revoked—when—**

Effective July 2, 2008, amendments to IRS Regulation 1.152-4(e)(3) allow the custodial parent to unilaterally revoke an earlier release of the dependency exemption to the non-custodial parent. This new unilateral revocation rule effectively allows the custodial parent to appropriate all of the other federal tax benefits associated with the control of the dependency exemption, and may occur with or without cause. The amended regulation indicates such a unilateral revocation is allowed even when the divorce judgment clearly directs the custodial parent to release the right to the noncustodial parent and execute form 8332. Form 8332 is to be revised by the Internal Revenue Service and will be called “Release/Revocation of Claim to Exemption for Child by Custodial Parent.” It remains to be seen how this unilateral revocation rule will be addressed in the courts. It is effective for tax years beginning *after* 7.2.08.

### **Emancipation-credit hours-**

Child's failure to successfully complete 9 credit hours in a semester, even though she was employed for 15 hours per week, resulted in her emancipation by the clear language of the statute. Emancipation is irreversible once it occurs. *Wood v. Wood, SD Mo. Slip op. no. 28458, filed January 31, 2008.*

### **Form 14-**

The trial court erred in calculating the presumed child support amount because all evidence reflected wife's income was \$14.00 per hour, not \$13.40 per hour, resulting in a change from child support of \$734 per month rather than \$728. *Collet v. Collet, WD Mo slip op. no. 67641 filed January 29, 2008.*

### **Form 14-**

The court cannot add back depreciation and non-cash deductions or reductions of gross receipts of the payer's Subchapter C corporation. Only Subchapter S corporations, sole proprietorships, or joint ownership ventures qualify for this treatment under the comments to Form 14. *Blevins v. Blevins, W.D. Mo. Slip Opinion No. 68182 filed 4/15/08.*

### **Fraudulent Conveyance to avoid support-§ 454.525.3 RSMo**

Within our state's Enforcement of Support Law for Child Support, Section 454.525.3 states, in pertinent part, as follows:

Any party owed a support obligation may maintain an action for the purpose of setting aside a fraudulent conveyance by filing an appropriate motion in the cause of action that produced the support order . . . . Where the party seeking to set aside the conveyance presents evidence that the conveyance was made voluntarily and without adequate consideration or in anticipation of entry of enforcement of a judicial or administrative support order, a presumption shall arise that the conveyance was made with fraudulent intent. Upon such a showing, the burden of proving that the conveyance was made in good faith shall rest with the obligor.

The statute also defines "obligor" as "a person who owes a duty of support as determined by a court or administrative agency of competent jurisdiction." Section 454.525.1.

In this case, a motion to modify child support, Husband had transferred all of his ownership in multiple rental properties to his other family members. Trial court found it was done to reduce income and become "judgement-proof," but did not believe it had subject matter jurisdiction to set aside the conveyances. The court of appeals reversed and remanded with instructions to set aside the conveyances. *Wallace v. Wallace*, EDMo Slip opinion no. 90431 filed 9/30/08.

### **Imputation of income–**

The trial court erred in imputing \$10,000.00 monthly income to husband where there had been no evidence he was unemployed or underemployed. The comments to Form 14 allow imputation only under these circumstances. The court could impute the full amount to him only if he was unemployed. *Sieg v. Sieg*, W.D. Mo. Slip Opinion No. 68137 filed 4/29/08.

### **Incarceration as factor for modification**

Incarceration does not automatically equate to a substantial change. Set out factors (1) the length of incarceration and the remaining period, (2) the earning potential of the incarcerated parent following release, (3) the amount of the existing child support award, (4) the total amount of child support that will accumulate upon the incarcerated parents discharge. *Moran v Mason*: SD28054 (10/26/07)

### **Presumption – rebuttable – where**

On cross-examination, it was demonstrated that the child's expenses were less than the chart amount, it is incumbent upon the proponent of support to quantify. The problem here was the grandmother had joint custody with the father and mother, and she filed no statement of income and expenses and her residence was paid for and the child lived with her. Query, what about cases indicating child support includes common expenses? Well, here grandmother's residence was paid off and the child owned her automobile and paid for her own automobile expenses. *Milone v. Duncan*, W.D. Mo. Slip Opinion No. 67473 filed 2/19/08.

## **CHILD CUSTODY**

### **Findings under 452.375 required—when—**

So long as any issue or sub-issue of custody is subject to contest between the parties and resolution by the court, written findings that include discussion of the applicable factors from section 452.375.2 are required and the cause will be remanded for findings if they are not present. *Rosito v. Rosito*, WD Mo slip opinion no. 68689, filed 8/5/08.

### **Hearsay statements re sexual abuse- when not admissible-**

The hearsay exception in Missouri for the statements of a child who alleges abuse does not extend to irrelevant statements. Here, the excluded statements were statements from children who were not the subject of the proceeding. As such, they were irrelevant to the court and properly excluded. Logical relevance is the issue of whether the evidence, if believed, is more or less likely to establish the proposition; legal relevance is a balancing test of logically relevant evidence vs. other issues like, in this case, unfair prejudice. Here the court found there would be unfair prejudice if the evidence was admitted. *Kroeger-Eberhart v. Eberhart*, EDMo slip op. no. 88716, filed December 4, 2007

### **Relocation-**

The trial court was upheld in allowing mom to relocate to San Francisco with the child though it was opposed by father and litigated by him. The court applied the specific facts of this case to the good faith and best interests tests of Section 452.377.9. *Ratteree v. Will*, E.D. Mo. Slip Opinion No. 90269 filed 6/3/08.

## **MAINTENANCE**

### **Maintenance-Division of Property-CSRS**

The trial court erred in treating husband's survivor benefit election for wife relating to his Civil Service Retirement pension as a form of non-modifiable maintenance. *Vanderpool v. Vanderpool*, SD Mo slip op. no. 28365, filed April 4, 2008.

### **Maintenance modification-**

Trial court erred when it modified maintenance by reducing it, based upon a finding of under-employment of recipient, where the same conditions of employment were known at dissolution. There was no change in circumstances justifying the modification. *Katsantonis v. Katsantonis*, ED Mo. Slip op. no. 89386, filed February 19, 2008.

### **“Unable to support oneself” test-**

452 335 RSMO allows maintenance to a recipient who is unable to support himself or herself through appropriate employment and has insufficient income from property to do so. Here, the recipient of \$1,700 per month maintenance had a salary of \$50,000 per year. Payor complained, saying the recipient can clearly support herself on \$50,000 per year. The court of appeals noted the trial court found her reasonable living expenses to be in the \$7,000 per month range, leaving her with a significant shortfall, so the maintenance award was affirmed. *Schild v Schild*, EDMo slip op. no. 89836, filed October 21, 2008.

## **DIVISION OF PROPERTY**

### **Contribution to separate residence –**

Wife's marital contribution of funds to the value of husband's separate residence did not transmute the residence to marital, absent evidence of husband's intention to do so. He owned the home before the marriage and declined, after the marriage, to place wife's name on the title. Nevertheless, wife contributed \$39,000.00 of her money to improve the residence. According to the court of appeals, the trial court should first have set aside the value of husband's separate investment, and then prorated the increase in value based upon the parties' relative contributions thereafter. *Goodwin v. Goodwin*, W.D. Mo. Slip Opinion No. 68228 filed 8/5/08.

### **Conveyance to LLC-**

The conveyance of separate property to an LLC established during the marriage equals marital. *Hernandez v. Hernandez*, W.D. Mo. Slip Opinion No. 67846 and 67889 filed 4/15/08; QUERY: how to reconcile with the Dolence case, below?.

### **Corporation formed during marriage- title**

Acquisition of realty in the name of a corporation formed during the marriage did not transmute its character to marital property, where there was no intent to make a gift to the marital estate shown. The facts supported the conclusion that husband acquired his ownership interest in the corporate farm in exchange for his prior interest in an Ohio farm which had been his separate property. "The act of titling the Missouri in the corporation's name is entirely dissimilar to placing property in the joint names of a married couple." Appears to have been decided on exchange rather than on intent. *Dolence v. Dolence*, S.D. Mo. Slip Opinion No. 27609 filed 8/30/07.

### **Debt division**

If not **all debt** the judgment is not final. *Rife v Rife*: 207 3<sup>rd</sup> 199 (WD 11/14/07)  
See also *Gilstrap v. Gilstrap*, WD67712 (10/2/07) same result

### **Equitable suit- statute of limitations-**

Equitable suit has five year statute of limitations. Property was listed on Husband's property statement at trial. Held this shows that she knew of the existence and the five years started to run. *Sharpe v. Sharpe*, ED89104 (11/13/07). See also *Doss v. Doss* 822 SW 2d 427 (Mo. banc 1992).

### **Equitable suit- pleading-**

Property omitted from the dissolution judgment may be divided only in a separate action in equity once the dissolution judgment becomes final and more than one year has passed (citing *Chrun*, 1988). When a party seeks equitable relief, however, it is not sufficient merely to aver that the dissolution judgment failed to divide all the marital

property; a party must show some basis for exercise of the court's equitable powers, such as by pleading fraud or mistake. *Naunheim v Naunheim*, EDMO slip op. no. 90893, filed Oct. 28, 2008.

### **Military Pension-disability election-**

After divorce, Husband's unilateral waiver of part of his military retirement pay in favor of a non-taxable disability benefit is permitted, even though it served to diminish Wife's interest in his disposable retirement pay. The judgment contained no prohibition on such an election. *Morgan v. Morgan*, WD Mo slip op. no. 68156, filed April 1, 2008

### **Separate property-burden of proof-**

Husband's acquisition, during the marriage, of 9600 shares of his father's company stock was correctly found to be marital despite husband's claim that it was a gift; both husband and his father testified the conveyance was a gift. However, the trial court's discretion was validly exercised where, as here: (1) the stock powers referenced "for value received"; (2) there was no evidence that gift tax returns were ever filed, or why they weren't necessary; (3) the court found that husband's testimony was not credible. "Before we can consider whether the court misapplied the law in classifying the stock assignment as marital property, we must first consider whether husband carried his burden of persuading the trial court as the finder of fact that the stock assignment was a gift." *Fisher v. Fisher*, S.D. Mo. Slip Opinion No. 28219 filed 6/2/08.

### **QDRO- amendment**

It was error for the trial court to amend a QDRO to provide that the alternate beneficiary would receive a 50% interest in any cost of living adjustments, and in any early retirement subsidy, where the divorce judgment simply awarded her 50% of the value of the pension as of the decree date of 12/7/99. The court's jurisdiction to amend a QDRO is limited by the terms of 452.330.5 RSMO, in that the amendment after the final judgment may only occur where a.) necessary to establish or maintain the order's status as "qualified," or b.) to conform its terms to effectuate the intent of the court's judgment regarding the distribution of property. Any other changes are outside the jurisdiction of the court. Here, a broader drafting of the rights being divided in the divorce judgment would have allowed a broader QDRO. *Lueken v. Lueken*, EDMo slip op. no. 91086, filed Oct. 21, 2008.

## ADULT ABUSE

An argument at the door over a custody exchange between mother and paternal grandfather did not constitute "stalking" or "harassment" under the Adult Abuse Act; judgment for full order of protection reversed. *C.B. v. Buchhiet*, E.D. Mo. Slip Opinion No. 90349 filed 5/20/08.

A group of representative cases on the topic:

1. *Vinson v Adams*: 188 3<sup>rd</sup> 461 (ED 4/11/06) **Stalking in Adult Abuse** is a "course of conduct" defined as a pattern of conduct composed of repeated acts over a period of time however short that serves no legitimate purpose. Proof is by a preponderance of the evidence. Vinson and Wife going thru a divorce and working in same business. Adams had been hired by Wife to be bodyguard. The Court entered the order of protection and said the guy was not to be within 10 feet of Vincent. Vincent appealed saying it was inconsistent. Upheld.
2. *Vinson v Adams*: 192 3<sup>rd</sup> 492 (ED 4/11/06) **Renewal of Adult Abuse** does not require new acts since the last order. Only that there be a finding that expiration of the full order "will place the petitioner in an immediate and present danger of abuse." *Capps*, 715 SW2nd 552.
3. *Pratt v Lasley*: 213 3<sup>rd</sup> 159 (WD) **Order of protection** the plain and ordinary meaning of the phrase "related by marriage" includes a one's brother-in-law, as being related by marriage for the purpose of sections 455.010(5) and is, therefore, a family member within the meaning of the of section 455.020.1.
4. *Clark v. Wuebbling*, ED Mo (3/20/07) **Substantial evidence required- Stalking** The court of appeals reversed the trial court's full order of protection holding there was no substantial evidence of stalking. There were no allegations, or threats, of bodily harm, physical altercations or other events. Litigation is not the type of behavior the act seeks to prevent. See also *Schwalm v. Schwalm*, ED 87829 (3/20/07) *reversed on same issue and grounds by the same panel of the court of appeals*. Court holds for stalking the person must reasonably be in fear of danger of physical harm. Alarm is defined as causing "fear of danger of physical harm.
5. *George v. McLuckie*, 227 3<sup>rd</sup> 503 (WD6/12/07) **Text message**. Reversed because no evidence that the text message caused the recipient fear of danger of physical harm. Must demonstrate alarm. Section 455.010(10) defines stalking:

(10) "**Stalking**" is when an adult purposely and repeatedly engages in an unwanted course of conduct that causes alarm to another person when it is reasonable in that person's situation to have been alarmed by the conduct. As used in this subdivision:

(a) “**Course of conduct**” means a pattern of conduct composed of repeated acts over a period of time, however short, that serves no legitimate purpose. Such conduct may include, but is not limited to, following the other person or unwanted communication or unwanted contact;

(b) “**Repeated**” means two or more incidents evidencing a continuity of purpose; and

(c) “**Alarm**” means to cause fear of danger of physical harm.

6. *Cuda v. Keller*, WL 2592310 (WD9/11/07) Brother-**in-law files and says he is not in fear**. Because they are family all that needs to be alleged is stalking, harassment, caused or attempted to cause physical harm. Only must prove “abuse” and that the statute does not require fear of physical harm but only that an attempt was made to do so.

## **PATERNITY**

### **Change of name-**

Father has standing to seek name change for the child even if he is not named the next friend and it is not a divorce action (Section 527.270 RSMo). However, the scope of Section 210.841 allows the court to enter judgment "... on any matter in the best interests of the child." The court has the jurisdiction to so. *In re the Matter of Jenkins et al. v. Austin*, W.D. Mo. Slip Opinion No. 68307 filed 5/20/08.

## **ATTORNEYS' FEES**

### **Attorneys' Fees-judgment-**

Judgment that Husband should pay Wife's "reasonable" attorneys' fees which are "left" in the divorce action is void due to vagueness, and unenforceable. *Brevdick v. Brevdick*, SD Mo slip op. no. 28444, filed April 2, 2008.

### **Attorneys' lien under Section 484.130 –**

The attorney may enforce the attorney's lien by independent suit or by filing a motion in the original case; this case follows the Missouri Supreme Court case of *Roberds v. Switzer*, 733 S.W.2d 444 (MO banc 1987) and declines to follow *Paige v. Goeke*, 943 S.W.2d 749 (Mo. App. 1997) to the extent it is contrary to *Roberds*. *State ex rel. Kinder v. Dandurand*, W.D. Mo. Slip Opinion No. 69318 filed 7/1/08.

### **Dismissal bars fee request-when-**

Ex-Husband dismissed his motion to modify prior to the court's ever having ruled upon Ex-Wife's cross-motion for attorneys' fees. HELD: The court loses jurisdiction as of the dismissal date; this is so despite the fact that the opposing party had motions pending at the time the dismissal was filed. In non-jury cases, a plaintiff may voluntarily dismiss his or her suit without a court order at any time prior to the introduction of evidence at trial. Rule 67.02(a)(2). Once a plaintiff does so, it is as if the suit were never brought. The circuit court may take no further steps as to the dismissed action, and any step attempted is viewed a nullity. *State of Missouri ex rel. Rosen v. Smith*, EDMo slip op. no. 90423, filed December 18, 2007