

2011 Family Law Update

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Changes to the Missouri Revised Statutes

-House Bill 111 amended 452.340 RSMo to provide:

8) ... that child support guidelines shall address how the amount of child support shall be calculated when an award of joint physical custody results in the child or children spending **equal or** substantially equal time with both parents **and the directions and comments and any tabular representations of the directions and comments for completion of the child support guidelines and a subsequent form developed to reflect the guidelines, shall reflect the ability to obtain up to a fifty percent adjustment or credit below the basic child support amount for joint physical custody or visitation as described in subsection 11 of this section....**

11) The court may award child support in an amount that provides up to a fifty percent adjustment below the basic child support amount authorized by the child support guidelines described under subsection 8 of this section for custody awards of joint physical custody where the child or children spend equal or substantially equal time with both parents.

The bill also amended Section 455.007 RSMo regarding the ability to appeal expired orders of protection by providing that, notwithstanding any other provision of law to the contrary, the public interest exception to the mootness doctrine shall apply to an appeal of a full order of protection which has expired and subjects the person against whom such an order is issued to significant collateral consequences by the mere existence of such full order of protection after its expiration. 455.007 RSMo

-Senate Bill 237 amended Section 484.350 to require that each circuit of the state shall devise a plan to implement updated standards for representation by guardians ad litem.

-House Bill 250 amended the Uniform Interstate Family Support Act by extending the provisions of the act to the establishment, enforcement, or modification of child or spousal support orders that involve a foreign country. See Section 454 RSMo

-Senate Bill 320 amended provisions of Section 455 RSMo to, among other things, provide for automatic renewal of full orders of protection unless the respondent requests a hearing more than thirty days prior to the expiration of the order, and by broadening the scope of relief the court may order to include "...such terms as the court reasonably deems necessary to ensure the petitioner's safety..."

-Senate Bill 351 modified provisions of Section 453 RSMo regarding providing information to adopted adults by simplifying and streamlining the method of obtaining identifying information regarding undisclosed biological parents, provides that adopted adults may obtain identifying information on adult siblings without the court having to find that such information is necessary for health-related purposes, and allows the disclosure of identifying information to the adopted adult's lineal descendants if the adopted adult is deceased. See sections 453.121.3, 4, and 5; 453.121.7 and 8 RSMo,

Case Law Update

PROCEDURE

Attorney and Client - Disqualification Due to Conflict

This case contains an excellent discussion of the bases for disqualification for a conflict due to the Rules of Professional Conduct No. 4-1.9(a) and 4-1.1.8(b). 1.9 deals with conflicts related to client. 1.1.8 deals with conflicts relating to prospective clients. A conflict exists not due to the fact of the consultation, but rather because of the passing of confidential information which must be significantly harmful if used in the matter in order to support disqualification. It cannot be simply detrimental in general, but rather, it must be prejudicial in fact. The party seeking disqualification has the burden of persuasion and proof. *State Ex Rel Thompson v. Dueker*, EDMo. slip op. No. 96570 filed August 9, 2011

Contempt - Finality of a Stayed Commitment Order

If stayed, a commitment order, the judgment is not final and appealable until (1) the contemnor is actually incarcerated on the stayed or conditioned warrant of commitment, or (2) the trial court states evidence to determine whether the contempt has been purged and then reissues a warrant of commitment. See Judge Zel Fischer's well-reasoned concurring opinion. *Carothers v. Carothers*, SC slip op. 91160 filed May 17, 2011

Contempt - Findings Required Prior to Commitment

The court of appeals reversed the trial court's contempt judgment and order of commitment due to a lack of findings or evidence sufficient to support the judgment. Here, there was no evidence showing the husband had the ability to purge, nor any findings determining his income, other financial obligations, or whether he had divested himself of assets, or what other assets were available to him, or of the reasonableness of his claimed expenses. The judgment and order of commitment stated only conclusions and not facts. *Caldwell v. Caldwell*, EDMO slip op. 95484 filed May 17, 2011.

Contempt - Waiver of Counsel

The contemnor must be advised of their right to counsel on the record, and there knowing and intelligent of the right to counsel must also occur on the record. Although the record in this case indicated that a conversation had been held off of the record regarding the right to counsel, because there was no record of the precise discussion, the matter was reversed. *Carothers v. Carothers*, S.C.M.O. slip op. No. 91160 filed May 17, 2011

Evidence- PKA hearsay exception limited-

The hearsay exception created by *In Re PKA* 725 SW 2d 78 (Mo. App. SD 1987) for hearsay statements by children where sexual abuse is alleged is not operative in cases involving child orders of protection. In those cases, Section 455.516 RSMo governs---- this section says that the provisions of Section 491.075 RSMo Cum Supp 2008, relating to the admissibility of statements of a child under the age of 12, shall apply to any hearing relatito orders of child protection. Section 455.516.1 RSMo Cum Supp 2005.

Section 491.075 states:

1. A statement made by a child under the age of fourteen relating to an offense under chapter 565, 566, 568 or 573, RSMo, performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:
 - (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
 - (2)
 - (a) The child testifies at the proceedings; or
 - (b) The child is unavailable as a witness; or

(c) The child is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding.

In EGD, the trial court admitted the hearsay statements of Daughter without holding a hearing as required by Section 491.075(1). Further, Daughter was not called as a witness, and there is no evidence that Daughter was unavailable or that she would have suffered an emotional or psychological trauma as a result of testifying as is required by Section 491.075(2). Therefore, the court of appeals found that the trial court erred in admitting the hearsay statements of Daughter without holding a hearing determining the reliability of Daughter's statements, and without evidence that Daughter was unavailable or would be traumatized by testifying. *EGD v. SLD*, EDMo slip op. no. ED 94767 filed April 5, 2011.

Evidence – General Objections do not Preserve Claims of Error – Continuing Objections

At trial, Father unsuccessfully sought to exclude evidence of an inappropriate relationship with a minor child who was not a party to the proceeding. To preserve the error, an objection to the evidence must state the particular grounds later asserted on appeal, and the objection must be specific enough to inform the trial court why the evidence must be excluded. "In applying the 'specificity rule,' Missouri Appellate Courts have ruled that general objections such as 'lacks foundation,' 'irrelevant,' and 'self-serving' are not sufficiently specific." The trial court must be meaningfully informed of the alleged impropriety. A 'continuing objection' does not preserve error absent an express ruling by the trial court, after the opposing party is afforded an opportunity to weigh in prior to the trial court's ruling on the continuing objection, as the trial court should determine the precise scope of the continuing objection. *Baker v. Gonzalez, S.D. Mo. Slip Opinion No. 29873, filed July 23, 2010.*

Incarcerated Party

Due process does not compel personal appearance at a divorce trial. There are alternative methods for making the court available to one who is incarcerated, short of personal appearance at the time of trial. *Meadows v. Meadows, S.D. Mo. Slip Opinion No. 30426 filed January 1, 2011.*

Judgment - Docket Entry Contemplating Further Orders

If the trial court indicates in a docket sheet entry that its entry is not the final word on the subject, but that a further order is contemplated, then the docket sheet entry is not to be treated as the final disposition for purposes of appeal. *Noles v. Noles*, SDMO slip op. No. 30662 filed June 2, 2011.

Jurisdiction- UCCJA/UCCJEA

The Missouri Supreme Court reverses its previous ruling in *Pirisky v. Meyer*, 176 SW 3d 145 (Mo. Banc 2005), that jurisdiction under the UCCJA to hear custody matters is characterized as subject matter jurisdiction, which may not be waived, and may not be conferred by consent of the parties and must be based upon circumstances at the time the court's jurisdiction was invoked. This analysis of "subject matter jurisdiction" is no longer valid in light of the Missouri Supreme Court's decision in *JCW ex rel. Webb v. Wyciskalla*, 275 SW 3d 249 (Mo. Banc 2009), which stated that "when a statute speaks in jurisdictional terms or can be read in such terms, it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief the courts may grant." *Hightower v. Myers*, 304 SW 3d 727 (March 9, 2010) **QUERY**: what does this holding do to previous cases which held that the "subject matter jurisdiction" of UCCJA could not be waived, nor conferred by consent? AND---what does this do to the intended uniform national application of UCCJA/JEA/UIFSA where Missouri cases are concerned? As to UIFSA, see *Ware v. Ware*, Mo. App. ED slip op. no. 95236, filed March 15, 2011.

Revival of Judgments-

No formal motion is required when periodic obligations are in issue—mere service and notice of an intent to enforce the prior judgment is sufficient. Here, the obligor husband made three arguments, all of which were creative but rejected by the court of appeals, as to why the trial court judgment should be affirmed. As to attorney's fees the court erred by not awarding them because 452.355.2 makes it mandatory to award them, absent the showing or finding of good cause where judgment regarding unpaid support obligations is obtained. *Hutson v. Buhl*, EDMO Slip Opinion No. ED94028, filed 1/18/2011.

Statute of Limitations on Judgments-

The contractual obligation to share proceeds of the sale of real estate was saved from the bar of the ten-year statute of limitations because the proceeding was an attempt to force the separation agreement, hence a contract, and not a judgment. Therefore the ten-year statute of limitations on the enforcement of judgments was inapplicable, despite the fact that the judgment incorporated the terms of the settlement agreement. *Hughes v. Davidson-Hues*, Western District, Slip Opinion No. WD71940, filed November 23, 2010.

CHILD SUPPORT

Criminal nonsupport charge does not bar obligor's request to modify-when-

The trial court erred in denying a hearing to the movant/obligor on a motion to reduce child support and in denying the movant the opportunity to present evidence of his inability to pay child support. He had previously pleaded guilty to a charge of criminal nonsupport. However, his guilty plea addressed only 8 of the 22 months in issue in the civil proceeding, for which support was ordered. It was error for the trial court to grant a Staples motion for the recipient of support, absent a hearing to determine whether good cause exists for the obligor's failure to pay. The trial court abused its discretion in granting the recipient's motion to dismiss, and in finding the obligor's guilty plea in the non-support case estopped him from arguing he had good cause not to pay, and that inability to pay the ordered amount of child support, without conducting a hearing on the issues. *Aubuchon v. Aubuchon, EDMO Slip Opinion No. 94683 filed April 19, 2011.*

Emancipation- failing grade vs. withdrawal-

In this fact-specific case, a child enrolled in 12 credit hours did not succeed in his college math course. However, rather than giving the child an "F", his professor, hoping to preserve the child's grade point average, gave the child a "W", typically reserved for those who withdraw from courses. Had the child actually withdrawn, he would not have been enrolled in 12 credit hours and would be deemed emancipated pursuant to 452.340.5 R.S. Mo. However, having only failed one of the courses, the child would still be eligible for child support. To allow the instructor's act of leniency in deciding to spare the child's grade point average from an F to unknowingly and automatically trigger the child's emancipation by treating him as having withdrawn from a 3 hour course, would serve no rational purpose. The W received by the child was "failing grade" for purposes of 452.340.5. *Paden (Kerns) v. Kerns, W.D. Mo. slip opinion No. 71182 filed August 17, 2010.*

Emancipation- failure to pass 12 hours

Trial court correctly declined to emancipate child who completed only 8 hours though enrolled for 14 first semester; completing only 9 credit hours thereafter when enrolled for 12 in each of the following two semesters. The statute is not mandatory, as the word “may” is used, as in “...payment of child support may be terminated and shall not be eligible for reinstatement.” The court held the child’s educational path is that envisioned and specifically protected by the statute: he enrolled as a full-time student immediately after high school, has attempted a full courseload every semester since, and is continuing his schooling despite his struggles. *Rozelle v. Rozelle*, EDMo slip op. no. 94167/94235, filed September 14, 2010.

The liberal construction of the statute regarding emancipation applies where interruptions in formal employment are temporary, where the child resumed normal employment, and where manifest circumstances prevented continuous full compliance with the statute due to the child's financial inability (to which the father partially contributed). *Holmes v. Holmes*, EDMO slip. op. No. 94778 filed June 7, 2011.

Form 14- award of dependency exemption-

It was error for the trial court to make an outright award of the dependency exemption. Rather, the court is limited to ordering a parent to execute the form releasing the exemption to the non-custodial parent. The court cannot enter a direct order in contravention of § 152(e) of Title 26 of the United States Code. To effectuate the allocation of the tax exemption to the non-custodial parent, the trial court is required to order the custodial parent to execute the declaration described in § 152(e). In order for this to occur, Form 14 must also be rebutted and shown to be unjust and inappropriate since the assumptions underlying Form 14 anticipate that the parent receiving support will also claim the exemptions. *Nevins v. Green, W.D. Mo. slip opinion No. 71750 filed August 24, 2010.*

Imputation of Income-

The court may impute income where there is substantial evidence of an intention to evade parental responsibilities. *Heck v. Heck, W.D. Mo. slip opinion No. 71642 filed August 24, 2010*

Insolvency-support beyond age 18

Insolvency pursuant to the child support statute means an inability to pay the debts when due, and also, may include the inability to actually pay them where the adult child is found unable to handle his own money, etc. *Braddy v. Schnaare, E.D. Mo. Slip Opinion No. 94194 filed November 30, 2010.*

Jurisdiction-subject matter-UIFSA

The Missouri Supreme Court reverses its previous ruling in *Pirisky v. Meyer*, 176 SW 3d 145 (Mo. Banc 2005), that jurisdiction under the UCCJA to hear custody matters is characterized as subject matter jurisdiction, which may not be waived, and may not be conferred by consent of the parties and must be based upon circumstances at the time the court's jurisdiction was invoked. This analysis of "subject matter jurisdiction" is no longer valid in light of the Missouri Supreme Court's decision in *JCW ex rel. Webb v. Wyciskalla*, 275 SW 3d 249 (Mo. Banc 2009), which stated that "when a statute speaks in jurisdictional terms or can be read in such terms, it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief the courts may grant." *Hightower v. Myers*, 304 SW 3d 727 (March 9, 2010) **QUERY**: what does this holding do to previous cases which held that the "subject matter jurisdiction" of UCCJA could not be waived, nor conferred by consent? AND---what does this do to the intended uniform national application of UCCJA/JEA/UIFSA where Missouri cases are concerned? As to UIFSA, see *Ware v. Ware*, Mo. App. ED slip op. no. 95236, filed March 15, 2011.

"May terminate" language in 452.340.5

The abatement analysis in prior cases (*Kohring v. Snodgrass?*) is no longer applicable if the court decides to terminate child support, as now permitted by statute. The trial court has the discretionary authority to terminate under those circumstances, rather than simply abate, the father's obligation to pay child support for his daughter. *Moland-Vance and Vance SDMP Slip Opinion No. 29773 filed May 2, 2011.*

CHILD CUSTODY

Grandparents

The trial court was affirmed in finding visitation with the movant grandparent was not in the child's best interests based upon the grandmother's hotlining serious allegations regarding the parent that were unsubstantiated, and the grandparent's refusal to admit the parents were adequate parents. *Hauter v. Hauter v. Barnes*,SDMO slip op. No. 30830 filed July 29, 2011.

Interference with custody- Parenting plan-

The court of appeals affirmed a custody plan granting the mother alternate weekends after the court reviewed her behavior in light of § 452.375 and found she interfered with contact with the father among other things, including having found that she had engaged in embarrassing public behavior at exchanges with the child. *Stoller v. Stoller*, Southern District, Slip Opinion No. SD30395, filed January 18, 2011.

Jurisdiction-subject matter-UCCJA/JEA-

The Missouri Supreme Court reverses its previous ruling in *Pirisky v. Meyer*, 176 SW 3d 145 (Mo. Banc 2005), that jurisdiction under the UCCJA to hear custody matters is characterized as subject matter jurisdiction, which may not be waived, and may not be conferred by consent of the parties and must be based upon circumstances at the time the court's jurisdiction was invoked. This analysis of "subject matter jurisdiction" is no longer valid in light of the Missouri Supreme Court's decision in *JCW ex rel. Webb v. Wyciskalla*, 275 SW 3d 249 (Mo. Banc 2009), which stated that "when a statute speaks in jurisdictional terms or can be read in such terms, it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief the courts may grant." *Hightower v. Myers*, 304 SW 3d 727 (March 9, 2010) **QUERY**: what does this holding do to previous cases which held that the "subject matter jurisdiction" of UCCJA could not be waived, nor conferred by consent? AND---what does this do to the intended uniform national application of UCCJA/JEA/UIFSA where Missouri cases are concerned? As to UIFSA, see *Ware v. Ware*, Mo. App. ED slip op. no. 95236, filed March 15, 2011.

Modification – Joint Physical Custody –

Where the only issue, in actuality, is a simple shift in parenting time, it is no longer "appropriate" to require a showing of a substantial change of circumstances. The statute does not define sole physical custody. When the court orders significant periods where the child is in the care of each parent, the award is actually one of joint physical custody, regardless of how the court characterizes it. *Potts v. Potts*, *WD Mo Slip Opinion #70455*, filed February 23, 2010.

Custody Modification – Joint to Sole

The trial court erred in finding no change in circumstances had occurred, where the uncontroverted testimony was that the parents had no communication from May 2009 to October 2009, the hearing date. "Regardless of who was responsible for the breakdown in communication, the trial court should have considered whether a modification of the custody decree was in the best interests of the children." *Ream – Nelson v. Nelson, W.D. Mo. Slip Opinion 71811 filed November 16, 2010.*

Relocation-granted based upon best interest of parent-

A relocation was affirmed when the evidence could have supported a different decision, but the court of appeals wasn't "firmly convinced" it was wrong. Here, there was *no direct evidence* of best interest of the child---the evidence was all by inference, and based upon the best interests of the relocating parent. "Sometimes the custody decision may almost entirely overlap with the relocation decision because of the circumstances of the case." The court suggested the court should separate its best interests and relocation findings, as there is no hard and fast judicial rule there must be specific evidence ... the court could reasonably *infer* that what helps the mother (relocating parent) in terms of family support ... will also provide benefits for the child. *Robinson v. Robinson, WDMO Slip Opinion No. 72002 filed April 12, 2011.*

Religion- inquiry prohibited-

Inquiry into the religious practice of the parties was impermissible but did not prejudice the outcome. *Atchley v. Atchley, EDMO Slip Opinion No. ED94525, filed March 8, 2011.*

Time Limitation upheld-

In this case of alleged sexual abuse, the trial court erroneously prevented the mother from obtaining the Division of Social Services record but the mother showed no prejudice thereby, nor did she show she was prejudiced by reason of a time limitation on the trial. Hence, the judgment was affirmed. *Young v. Pitts, Western District, Cause No. WD72124, filed February 15, 2011.*

MAINTENANCE

Child-related expenses-

The court erred by considering certain of the children's expenses (including \$500.00 per month for daycare already listed in the chart) in calculating the mother's reasonable needs for purposes of maintenance. The children's expenses should have been excluded for all

purposes relating to maintenance. *Ferry v. Ferry*, Eastern District, Slip Opinion No. ED94789, filed December 21, 2010.

Disability Award

The trial court erred by modifying maintenance downward while imputing employment income to the recipient and assuming further receipt of Social Security Disability. Pursuant to the Social Security Disability rules, the recipient is prevented from receiving benefits while engaged in "substantial gainful activity." 20 CFR 404 et seq. *Lindhorst v. Lindhorst*, Mo. slip op. No. 90996 filed June 14, 2011.

***Hill* analysis-**

The court of appeals remanded for a Hill analysis despite no record of income having been earned on a \$47,000.00 retirement account. The trial court relied on the statute involving a parent who was the custodian of small children in order to award maintenance. No evidence was presented as to what income the \$47,000.00 retirement account would earn. Therefore, the case had to go back for reconsideration. *Atchley v. Atchley*, ED MO Slip Opinion No. ED94525, filed March 8, 2011.

Maintenance-modification-cohabitation

Cohabitation with another (here, a life partner) greatly reduced or eliminated Wife's need for maintenance to keep her normal standard of living, and formed a basis for modification. "There is a basic unfairness in requiring a prior spouse to continue support of a spouse who has entered into a long term or permanent relationship having some of the benefits of marriage but few of the detriments...Substantial continuing support from a third party, even without a permanent relationship, may justify a modification as a changed condition...Equitable principles warrant a conclusion that Wife's rights to support from the prior marriage have been abandoned in whole or in part." *Schuchard v. Shuchard*, EDMo slip op. no. 92124, filed August 18, 2009.

Cohabitation with another by maintenance recipient did *not* constitute a "substitute for marriage" and while it justified a significant reduction in the amount of maintenance to be paid (*Herzog v Herzog*, 761 SW 2d 267), the trial court did not abuse its discretion in reducing, rather than terminating, the maintenance. Clearly, the trial court found the relationship was merely of sufficient permanence to justify a modification of Husband's equitable obligation pursuant to Section 452.370.1 RSmO. The trial court noted the parties do not hold themselves out as married, did not participate in any sort of commitment ceremony, do not commingle their finances, do not hold joint accounts or

credit cards, have not named each other as beneficiary on his or her life insurance policies, and the like. *Karasiuk v Karasiuk*, ED Mo slip op. no. 93632, filed September 7, 2010.

Prospective Award

The court of appeals approved an award of maintenance to begin upon closing of the sale of the residence, in which former wife was allowed to reside until and former husband was ordered to pay the mortgage until sale; thereafter, the judgment provided for a maintenance award of \$400.00 per month to former wife from former husband. Although generally, maintenance payments should not be conditioned upon future happenings, an exception exists whether there is substantial evidence as to a likely change in the future. The prospective award in this case, set to begin upon closing of the sale of the home, was affirmed. *Green v. Green*, S.D.M.O. slip op. No. 72935 filed June 7, 2011.

DIVISION OF PROPERTY

Capital Loss

A deductible capital loss realized upon the closing of the parties' jointly-owned LLC was omitted from the marital settlement agreement. Wife's taxes were \$18,000.00 higher than they needed to be because she was unaware of the existence of the capital loss. In an equitable action regarding the omitted asset, the court awarded wife damages of \$18,000.00 in an equitable judgment allocating the loss based upon the fact that the loss was an undisclosed and undistributed marital asset. *May v. O'Roark*, Western District, Slip Opinion No. WD72254, filed January 18, 2011.

Characterization- Mischaracterization not prejudicial- when

The court of appeals affirmed the trial court's division of property in this case which mischaracterized, but did not prejudice, given the other findings. The court mischaracterized certain of the property as separate which should have been marital. However, the overall division of property was deemed to be equitable by the court of appeals and therefore no change was made. *Jennings v. Jennings*, EDMO Slip Opinion No. ED93601, filed December 7, 2010.

***Gustin* Rule- exception- when-**

An exception exists to the *Gustin* rule that property must be divided with a value as close as possible to the trial date-- where a spouse is found to have secreted or squandered marital assets in anticipation of the marriage being dissolved. In such a case, the court may hold that spouse liable for the value of the secreted or squandered assets, and such actions remove this case from the application of the general rule and bring it squarely within the exception. Additionally, where no assets remain to “right” the “wrong” of dissipation, the court may award a general monetary judgment.

James v. James, Southern District Missouri slip opinion No. 29958, filed August 13, 2010.

FELA award- marital based upon settlement documents-

The court was entitled to rely upon the language of the general release in the FELA case, and the husband's testimony as to the various purposes of his award, to determine that only \$15,000.00 of the \$500,000.00 FELA award was marital. *Cochran v. Cochran, SVMO Slip Opinion No. 30711 filed April 27, 2011.*

Misconduct of a Party

Misconduct by one's spouse cannot be used to punish that spouse by awarding that spouse a disproportionately smaller award. Rather, the rationale for consideration of misconduct at divorce is that if one party is compelled to contribute more to the partnership endeavor due to the other's misconduct, that contribution should be remedied in the division of property. Not all misconduct requires a disproportionate division – it is only when the misconduct changes the balance so that the other party must assume a greater share of the partnership load that it is appropriate for misconduct to affect the distribution. *Seggelke v. Seggelke, E.D. Mo. Slip Opinion No. 92857 filed August 17, 2010 citing the Western District case of Nelson v. Nelson, 25 S.W. 3d 511, 519 (2000).*

Re-evaluation after Amended Judgment

On a motion to amend the judgment, the trial court realized that a 34,000 account it had awarded Wife no longer existed, and deleted the award but made no other adjustment to the division of property. This deletion required a re-evaluation of the entire division. *Seggelke v. Seggelke, E.D. Mo. Slip Opinion No. 92857, filed August 17, 2010.*

Pension

The pension need not be valued at the time of trial, so long as each party is awarded one half of the marital share of the monthly benefit to be received. *Seggelke v. Seggelke, E.D. Mo. Slip Opinion No. 92857 filed August 17, 2010.*

QDRO

Section 452.330.5 allows an amended QDRO for only two purposes: To establish or maintain the order as qualified, or to revise or conform its terms to effectuate the expressed intent of the judgment. The trial court cannot re-divide previously divided property, via an amended QDRO. *Green v. Green, EDMO Slip Opinion No. 94417 filed 5/3/11.*

Revocable Trust

It was not necessary to join the trustee of a revocable trust where the trustee possesses the necessary powers as both grantor and trustee pursuant to the trust which allowed him control of the trust assets. This was sufficient for the court to enter orders with which the trustee must comply in dividing the property. *Roche v. Roche, ED Mo. Slip Op. No. 91294, filed May 12, 2009*; but see *Seggelke v. Seggelke, E.D. Mo.*, stating the court must join parties in their capacity as trustees of a revocable trust, if the court intends to allocate a specific trust asset. However, the court may still classify and divide one's equitable interest in a revocable living trust without joining the trustees as parties. *Seggelke v. Seggelke, E.D. Mo. Slip Opinion No. 92857 filed August 17, 2010 .*

Sale of Marital Home-

A provision regarding the sale of the home must be made certain as to time for sale, and must incentivize both parties to complete the sale. Where the trial court ordered the parties to fix a sale price and reduce it by \$10,000.00 every month until the price reached the lowest price, where it will remain until it is sold, the court of appeals found that the decree did not specify an end date for the marketing of the home, or specify what will happen if the home fails to sell even at the reduced listing price. *Kelly v. Kelly, WDMO Slip Opinion No. 72238 filed May 10, 2011.*

Tax Consequences

The court should consider tax consequences in dividing property if they may be estimated with particularity. *Seggelke v. Seggelke, E.D. Mo. Slip Opinion No. 92857 filed August 17, 2010.*

Undistributed Earnings—S corporation

The excess non-operating assets of a separate “S” corporation were deemed marital. In this matter, both experts determined the non-operating assets of the corporation were \$3,735,000, including a condominium used by the owner and investment accounts. Both experts stated that none of these assets were needed for the ongoing operation of the corporation. The courts said the owner “...cannot retain marital property within a separate asset and call it non-marital property, “ reasoning that while profits of a separate corporation would be deemed marital, in it incongruous to hold that profits allowed to accumulate, rather than be used for business expansion, are no longer marital. *V.W. v. R.W.*, EDMO slip op. no. 92469, filed November 30, 2010. Missouri Supreme Court accepted transfer and the matter is pending there at this time.

ATTORNEYS’ FEES

Attorney’s Fees on Appeal –

Not awarded after the mandate, i.e., no jurisdiction after mandate. So long as the motion is filed before the mandate, an order can be made. A footnote in this opinion urges that the trial judge make the award when presented, rather than waiting until the conclusion of the appeal. *Amburn v. Aldridge, WD Slip Opinion #70159, filed October 27, 2009.*

Attorney’s Fees on Appeal

The trial court abused its discretion by barring evidence of a party’s post-divorce financial circumstances in a hearing on attorney’s fees on appeal. The \$10,000.00 award was reversed outright, without remand. *Andrews v. Andrews*, ED Mo. Slip Op. No. 91820, filed June 23, 2009 (different panel and trial court, but same parties).

Attorney’s Fees on Appeal –

Must show the extent of necessary services to be rendered by counsel in order for a judgment to be granted. *Wightman v. Wightman, ED Mo Slip Opinion #91738, filed September 22, 2009*

Attorney's Fees – Appeal – Burden of Proof -

The court must consider the financial history of the parties since the dissolution, and their debts, employment, and conduct in evaluating a requested award of attorney's fees on appeal. The discovery and litigation need not go on ad nauseum...we do not view the... statute as requiring an evidentiary hearing every time there is a motion for attorney's fees, especially where the parties may be silent regarding the need for post-trial information... it is enough, here, that the court gave appropriate consideration to the recently presented and historical financial condition of the parties. *Potts v. Potts, WD Mo Slip Opinion #70455, filed February 23, 2010. See also . KMD v. Alosi* , in which the court of appeals reversed a judgment for attorney's fees on appeal for \$2,000.00 which had been awarded in an adult abuse case, where the quantum of proof was insufficient. The statute (here 455.075, not 452.355) requires some evidence of financial resources of both parties. Here, there was only evidence of the resources of one party. The quantum of proof may vary depending upon the proceeding. *KMD v. Alosi, Western District, Slip Opinion No. WD71832, filed November 9, 2010.*

Attorneys' fees on Appeal-

The Trial Court is an expert on attorney's fees and doesn't need additional evidence in order to determine attorney's fees on appeal. *Miller v. Miller, Missouri Court of Appeals SD Slip Op. Nos. 28960 and 29159 filed April 30, 2010.*

Attorneys' fees PDL on account-

An award of attorneys' fees on account, PDL does not require the same level of proof as an award of attorneys' fees on the merits of the case. The court need not hear evidence of the amount of time spent and anticipated to be spent, because the court is an expert on the topic of legal fees. The court need only consider the parties' financial circumstances, the court's own expertise regarding legal costs, and any other relevant circumstances. *Gardner v Gardner, ED Mo Slip op. no. 94126 filed September 14, 2010.*