

ALLOCATION OF DEBT IN DISSOLUTION OF MARRIAGE CASES

by

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I. Evolution of the Current Law

a. Before 1998, it was not mandatory for the court to allocate debts between the parties in dissolution of marriage cases; nevertheless, it was considered good practice to do so, as it lessened the prospect of acrimony in the future. *Smith v. Smith*, 652 SW 2d 743 (Mo. App. ED 1983). Further, the existence of the debts and the determination of which party would have the responsibility to pay for them were factors the trial court should consider in an fair division of the marital property. *Woolsey v. Woolsey*, 904 SW 2d 95, 100 (Mo. App. ED 1995); *Zimmer v. Zimmer*, 862 SW 2d 355, 359 (Mo. App. SD 1993). If the allocation resulted in manifest injustice, the validity of an entire judgment could be breached. *BW v. FEW*, 562 SW 2d 137 (Mo. App. ED 1978).

b. Senate Bill 910, 89th Gen. Assembly, 2d Reg. Sess. (1998), provided for the *mandatory* allocation of marital debt as part of the dissolution decree. The bill became effective August 28, 1998, and amended Section 452.330.1 to provide that, in entering its judgment, "...the court shall set apart to each spouse such spouse's nonmarital property and shall divide the marital property and marital debts in such proportions as the

court deems just after considering all relevant factors." *Id.* (emphasis added).

I. What is "marital" debt under Section 452.330.1?

a. Although section 452.330 does not provide any guidance as to what constitutes marital debt, it has been held that marital debt is debt incurred during marriage or in contemplation of marriage. *Cross v. Cross*, 30 SW 3d 233, 236 (Mo. App. ED 2000); *In re Marriage of Thomas*, 21 SW 3d 168, 177 (Mo. App. 2000); *Pahlow v. Pahlow*, 39 SW 3d 87 (Mo. App. SD 2001).

b. The trial court possesses the authority to distribute marital debts in the sense that one spouse may be assigned the primary duty to pay off the debt and hold the other spouse harmless on the same. *Cross* at 236.

c. The fact that one spouse did not control or actively participate in the decision to incur a debt does not preclude its allocation to that spouse where it is determined to be a marital debt. *Id.*

II. What is the extent of the court's authority to allocate debt?

a. The court may order one party to pay a debt directly. *Gross v. Gross*, 557 SW 2d 448 (Mo. App. WD 1977).

b. The court may order a party to pay a lump sum judgment to a party adjudicated responsible to pay the debts. *McCully v. McCully*, 550 SW 2d 911 (Mo. App. WD 1977).

c. The court may order a party to indemnify the other party on the debt, once the responsibility for payment has been adjudicated. *Rawlings v. Rawlings*, 36 SW 3d 795 (Mo. App. WD 2001).

d. The phrase "marital debts" encompasses all debts incurred during the marriage, either jointly or separately, and the fact that a spouse does not control or participate in the decision to make a particular debt does not preclude allocation of that debt to the non-participating spouse at divorce. *Pahlow v. Pahlow*, 39 SW 3d 87, 92 (Mo. App. SD 2001); *Rivers v. Rivers*, 21 SW 3d 117 (Mo. App. WD 2000).

e. Non-marital debt may not be reallocated, and may not be considered as a factor in determining the equitable nature of a division of marital property. Only one spouse may be individually liable on a non-marital debt, and the trial court cannot properly allocate such a debt to the other spouse upon dissolution of marriage. *Wright v. Wright*, 1 SW 3d 52 (Mo. App. WD 1999).

f. It is important to remember that the judicial determination of who is to pay which debt in a divorce is NOT binding in any manner upon the creditor; thus, any judgment to pay a debt should be bolstered by an additional obligation to indemnify the other party.

III. How may the court enforce its judgment regarding the division or allocation of debts?

a. Even if the judgment does not state, with particularity, the sum for which it is rendered, it is enforceable if the amount is ascertainable from the record. *Cross v. Cross*, 30 SW 3d 233,236 (Mo. App. ED 2000).

b. An adjudicated obligation to pay a debt has been likened to an award of maintenance or child support; accordingly, contempt will lie and imprisonment may be ordered. *Haley v. Haley*, 648 SW 2d 890 (Mo. App. ED 1982); *Angell v. Angell*, 674 SW 2d 147 (Mo. App. WD 1984).

IV. Specific additional considerations regarding the judicial allocation of debts in divorce

a. Unpaid attorneys' fees arising from a previous proceeding between the same two parties may be treated and allocated as marital debt; this even though Section 452.355 RSMo limits the right to seek an award of

fees to the extent proceeding. *Stratman v. Stratman*, 948 SW 2d 230 (Mo. App. WD 1997).

b. In apportioning property and debts in a divorce proceeding, the court should not include any liabilities which a party is not likely to have to pay. Thus, it was an abuse of discretion for the court to assign "...a negative \$20,000 value..." to a contingent lawsuit liability and in setting that liability aside to the other party, where that party had already been dismissed from the suit and an appeal had never been taken. *Witt v. Witt*, 930 SW 2d 500, 504 (Mo. App. WD 1996).

c. Where the parties' now-emancipated daughter borrowed \$7,500 in student loans, it was error for the trial court to order one of the parents to repay the loan. The repayment of such a loan was in the nature of child support, and it is error to order support for an emancipated child. *In re Marriage of Kluba*, 647 SW 2d 920 (Mo. App. ED 1983).

VI. Bankruptcy

In some cases, allocation of debt may be an academic exercise. Bankruptcy relief in bankruptcy may be appropriate, and bankruptcy counsel should be consulted for a determination as to whether the bankruptcy is best initiated in advance of, or after, the entry of a judgment dissolving a marriage.

VII. Conclusion

