

PRESENTING AND DEFENDING THE MAINTENANCE CASE

by

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1.1 INTRODUCTION

Maintenance for a dependent spouse is one of the core issues in a dissolution of marriage case. Its importance is magnified in cases where there are minimal assets to be divided between the parties. The negotiation of a satisfactory maintenance agreement requires that the practitioner have knowledge and familiarity with the Internal Revenue Code, the Bankruptcy Code, and the state statutory and case law on maintenance.

Negotiating a maintenance case also requires the attorney to gamble with his or her client on what the court might or might not do if the matter is tried. Is the dependent spouse a candidate for decretal, modifiable maintenance if the case is tried to the court? If so, what offer of settlement by the opposing party, or what set of unique facts about this particular case, warrants bypassing that opportunity in favor of a negotiated result?

The predictability of maintenance to be awarded by the court is also less than ideal, and certainly less than child support, given the existence of Supreme Court Rule 88.01 and the guidelines set forth in its corresponding Form 14. There are as many different possible results as there are trial judges and pending cases. Thus, maintenance is frequently the single greatest cause of anxiety about the case for the both the dependent spouse and the intended obligor in the months prior to disposition of the case. In a case about money, maintenance is

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typically the issue which defines success or failure in the eyes of the client, in a case about money.

Finally, the law of maintenance is by no means static. Each week, the courts of appeal in this state author a new opinion which in some manner sheds light on a particular set of facts presented by at least one case file in the practitioner's file room. This fresh new case either illuminates, expands, or restricts the operative effect of the maintenance factors set forth in §452.335 RSMo. The law of maintenance is modified from week to week as much as any other facet of divorce law. It presents an opportunity for the attorney to creatively prepare the case for trial, allowing counsel to develop a theme and the corresponding evidence necessary to give life to the theme. Issues such as contribution to earning capacity, career forbearance, marital misconduct, and standard of living create the potential for a case which is interesting to prepare, and hopefully interesting to the trial judge.

The purpose of this chapter is to attempt to synthesize and, where possible, simplify, the law of maintenance in its present state. We will then suggest how the case should be prepared and tried, as well as describe the factors to be considered in negotiating a satisfactory result.

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2.1. STATUTORY BASIS AND BACKGROUND

A. Types of Maintenance-

§452.335 sets out the findings required for an award of maintenance in a dissolution matter. Maintenance may be awarded on a temporary basis pursuant to §452.315, which provides for temporary orders in dissolution cases. Maintenance may also be awarded pursuant to a proceeding under Chapter 455, the Adult Abuse Act, if the parties are married.ⁱ

The present law provides for two types of maintenance:

"decretal" and "contractual:"

The distinction drawn in the cases between contractual and decretal maintenance finds its root in the old alimony statutes and serves two functional purposes. The first is procedural and determines the manner in which a maintenance obligation can be enforced. "The terms of an agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment." Section 452.325.5. Contractual maintenance, on the other hand, arises where the "maintenance provisions were not to be incorporated into the decree...Contractual maintenance is enforceable by a separate action for breach of contract..."

The second function is more substantive. Section 452.325.6 permits the parties to agree that maintenance cannot be modified by the court. This is "contractual" maintenance. Apparently for ease of enforcement of the maintenance agreement, parties often... incorporate "contractual" maintenance within the dissolution decree. This hybrid is decretal for purposes of enforcement and contractual for purposes of modification...Both contractual and decretal maintenance are statutory as they derive their origin in Section 452.335.ⁱⁱ

Thus, decretal maintenance is that which is awarded by a

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court after it has heard the evidence and entered its decree. Decretal maintenance may be enforced by the remedy of contempt, garnishment, and other judicial remedies. The parties may also contract with each other to set the amount and duration of maintenance. This is called "contractual" maintenance. Contractual maintenance pursuant to a separation agreement may or may not be enforceable by a contempt proceeding, depending upon whether or not the Agreement is incorporated into the Court's decree. If the maintenance contract is incorporated within the decree, it may be enforced by resort to the same judicial remedies available for the enforcement of a decretal maintenance award. In any event, contractual maintenance may be enforced by traditional contractual remedies.ⁱⁱⁱ Both decretal and contractual maintenance may or may not be modifiable. Counsel must state in the agreement, and the court must state in the decree, whether or not the award of maintenance is modifiable as to amount, as to duration, or as to both.^{iv}

The term "maintenance in gross" refers to a lump sum award of maintenance, and is no longer recognized in Missouri as a tool for providing economic sustenance.^v

B. Pleading considerations-

The party seeking maintenance must plead the factual basis for the request; it is not enough to request such an award in the prayer without pleading the basis for the relief.^{vi} However, the issue is waived if evidence about maintenance is presented

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without objection.^{vii} To be effective, the factual allegation should track the statutory requirements for a maintenance award, i.e. that the requesting party "lacks sufficient property, including marital property...to provide for his reasonable needs; and is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." §452.335.1(1) and (2) RSMo. Supp. 1993. Consider the following commonly pleaded paragraph:

The [petitioner or respondent] is unable to support herself through appropriate employment and lacks sufficient property to provide for her reasonable needs and is in need of maintenance from the [opposing party].

C. Required findings by Court-

Before it may award maintenance to a party, the Court must make findings based upon these factual requirements. According to the statute, "...the court may grant a maintenance order to either spouse, but only if it finds that the spouse seeking maintenance:

- 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 or is the custodian of a child whose condition or circumstances make it appropriate

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that the custodian not be required to seek employment outside the home.^{viii}

The burden of proof as to the need for maintenance is upon the party seeking the award; an award of maintenance in absence of this proof is an abuse of discretion.^{ix}

Once the Court has determined maintenance should be awarded, it must set the amount and duration after considering all of the following relevant factors, including:

1. The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
2. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
3. The comparative earning capacity of each spouse;
4. The standard of living established during the marriage;
5. The obligations and assets, including the marital property apportioned to him and the separate property property to each party;
6. The duration of the marriage;
7. The age, and the physical and emotional condition

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- of the spouse seeking maintenance;
8. The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance;
 9. The conduct of the parties during the marriage;
and;
 10. Any other relevant factors.^x

Finally, the order of maintenance shall state if it is modifiable or non-modifiable, and may include a termination date in appropriate cases.^{xi} The failure to so state makes the maintenance modifiable.^{xii}

D. Retroactivity-

The trial court is vested with the authority to award retroactive maintenance in a temporary maintenance proceeding under §452.315 RSMo, even though the statute does not expressly provide for it.^{xiii} However, it has been held the trial court may not award retroactive maintenance at the time of the divorce because the maintenance statute speaks prospectively and not retrospectively.^{xiv} In C.M.D., the recipient filed a motion for temporary maintenance which was never called up for hearing. At the time of the divorce, the court held her failure to act upon the motion served to waive any claim she had to retroactive maintenance.^{xv} Alternatively, in the same circumstances, the Western District has held it was error not to award temporary maintenance retroactively at the time of the ultimate divorce,

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even though the motion for temporary maintenance was filed but never act upon it.^{xvi} Therefore, a basis exists upon which to request and obtain retroactive maintenance at the time of the divorce.

E. Review on Appeal-

On appeal, the trial court's judgment as to maintenance will not be interfered with unless the award is "wholly beyond the means of the spouse who pays maintenance." The appellant's burden on appeal is to show an abuse of discretion so great as to "shock" the appellate court's sense of justice.^{xvii}

F. Maintenance, if modifiable, may be modified upon a showing of changed circumstances so substantial and continuing as to make the terms of the decree unreasonable.^{xviii} Further, unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future statutory maintenance is terminated upon the death of either party or the remarriage of the party seeking maintenance.^{xix} It has been held by our Supreme Court that the receipt, by the obligee, of income from a pension awarded to him or her at trial is not a basis upon which to reduce maintenance; nor is the retirement of the obligor.^{xx} 3.1

FACTORS INVOLVED IN THE AWARD OF MAINTENANCE

A. Sufficiency of Property- §452.335.1 RSMo--

Maintenance is awarded after the property is divided, and after a finding that the party cannot survive based upon his award of property alone. Maintenance should not be awarded in

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lieu of property.^{xxi} It is not required of a recipient spouse that he consume his share of the property to subsist.^{xxii} The same rule applies to temporary support orders.^{xxiii} In considering the division of property in awarding maintenance, our courts have stated the statute speaks solely to "income-producing" property.^{xxiv}

B. Appropriate Employment- \$452.335--

The courts have held that a recipient spouse has an affirmative duty to seek appropriate employment in order to provide for his own self-sufficiency, and that the burden of proof in this regard is on the spouse seeking the award.^{xxv} However, maintenance may still be awarded if there are children and the custodial parent remains in the house to tend to their needs.^{xxvi}

As an evidentiary matter, the prudent practitioner on either side of the maintenance argument should present affirmative evidence justifying the requested action.^{xxvii}

C. Amount and Duration--

1. Generally - The courts have generally limited their consideration of factors to those set out in §452.335(2)(1) RSMo.^{xxviii} Additionally, the following considerations have been deemed "relevant factors" in the cases:

2. Financial Status - Cases considering the respective financial status of the parties at divorce are legion.^{xxix}

3. Court may impute income - The Court may impute to the

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obligor, in determining the amount of the award, his prior income if he has voluntarily or purposefully decreased his income.^{xxx}

The court may also disregard the corporate entity where the obligor is the sole shareholder and has exclusive control over his income.^{xxxi}

4. Credit for income from third-party sources - The court may also give the payor credit for amounts received by a recipient from income - producing property^{xxxii}, or a retirement and/or social security payout to him or her.^{xxxiii}

5. Contribution to obligor's earning capacity - Some opinions have also given consideration to the recipient's career forbearance^{xxxiv}. The recipient spouse's contribution to the education or professional degree of the obligor may also be considered in determining an amount for maintenance.^{xxxv}

6. Prospective termination - Maintenance should not be prospectively decreased or terminated without substantial evidence to support a reasonable expectation the circumstances of the recipient will be markedly different in the future.^{xxxvi} The recipient's own estimate as to when he or she will be self-supporting is not substantial evidence for this purpose.^{xxxvii} However, a prospective termination date may be warranted where the recipient spouse fails to present any evidence to support her claim of unemployability.^{xxxviii}

7. Lifestyle- The court may award maintenance even if the recipient is self-supporting, if their prior lifestyle justifies

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it and there is a substantial ongoing disparity in income of the parties.^{xxxix}

4.1 TAX CONSIDERATIONS AND EFFECT

A. Deductibility - The primary tax considerations in drafting a maintenance provision are to insure the deductibility of the award and to avoid front-loading and resulting recapture.

In order for maintenance payments to be deductible they must qualify as "alimony" by the IRS rules and regulations:

1. The payments must be pursuant to a divorce or separation instrument, which is a:
 - i. divorce or separate maintenance decree or written instrument incident to such a decree;
 - ii. a written separation agreement; or
 - iii. a decree that is not a divorce decree or separate maintenance decree, but that requires a spouse to make payments for the support or maintenance of the other spouse;
2. The payments must be in cash or its equivalent;
3. The instrument must not designate the payment as one which is not includeable in gross income and not allowable as a deduction under Code Section 215;
4. Must not live in same home if already divorced or legally separated;
5. There must be no liability to continue payments after death of payee or to make any substitute payment on death of payee (this requirement was removed in 1986, but it is generally

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agreed that the instrument should state this specifically, to preclude any issue about the parties' intentions);

6. The parties may not file joint tax returns with each other.^{x1}

Maintenance payments are generally included as income in the year received, and deducted in the year paid, regardless of the accounting method utilized.^{x1i}

B. Recapture - A special recapture rule applies to heavily front-loaded maintenance awards. Its purpose is to prevent property settlements from qualifying for treatment as I.R.S. alimony. Thus, the recapture occurs when payments in the early years are substantially larger than later years. Payments under a decreasing schedule are particularly tricky, as are large, front-loaded payments. The recapture period is the first three calendar years after the divorce instrument is entered.

1. Exceptions to recapture rule -

i. if payments terminate due to death of either party, or recipient's re-marriage before the end of the third post-separation year;

ii. if payments are made under a temporary support order; and

iii. if the required payments fluctuate because they are tied to a percentage of the obligor's earnings or income.^{x1ii}

2. The amount of recapture is determined by a statutory formula:

Step 1: Excess = alimony paid in yr. 2 - (alimony pd.

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$$\text{Step 2: Excess} = \text{alimony pd. in 1 yr.} - (15,000 + \frac{\text{(2d yr alimony - excess) + alimony in yr. 3} + 15,000}{2})$$

Once the excess payments for both the first and second years have been determined, the results are added together to determine the recapture for the third post-separation year. Note that if maintenance payments are less than \$15,000.00 in all of the first three years, there is no possibility of recapture. Also, always consider consulting a tax professional or accountant to confirm your interpretation of the tax law relevant to a specific case. The Bar Plan appreciates your support.

5.1 CREATIVE APPROACHES TO OBTAINING MAINTENANCE, AND DEFENDING THE MAINTENANCE CASE

A. Proof of Financial Need - Your statement of income and expenses must be airtight, and supported by cancelled checks and other evidence of expenditures during the marriage. Do not delegate this important responsibility if possible.

B. Consider evidence of foregone career opportunities and the value of contribution of a homemaker and her contribution to marriage.

1. Permanent nature of adverse effect on homemaker's earnings and retirement benefits can be remedied by an award of permanent maintenance, even beyond emancipation of dependent children.

2. Areas of inquiry and proof:

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a. History of marriage; job/career changes, education and contributions of each party to support of family unit, children, agreements as to each spouses's role in support and care of children and home;

b. Education, employment history, salary history of each party;

c. Expert testimony of vocational counselors, placement specialists, compensation specialists, economists to place dollar value on foregone opportunities;

d. Medical testimony regarding disabilities, progressive or chronic medical or psychological/psychiatric problems requiring treatment.

3. Special cases: where one spouse supports another through professional training and "the lean years"

a. Determination of out-of-pocket costs of education and support;

b. Measure of supporting spouse's excess financial contribution by comparison of annual incomes during period of education;

c. Measurement of professional spouse's earning potential through expert testimony by compensation specialists, professional organization;

d. Measurement of economic effect of lowered living standards, foregone career opportunities of support spouse;

C. Maintenance for the custodian of minor children

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1. Often unrecognized is the need of the spouse who, although employed, has custody of minor children, especially where the marriage is relatively short.

2. The case of maintenance for the working spouse should place particular emphasis on:

- a. The discrepancy in the income of the parties;
- b. Lifestyle of the parties during the marriage;
- c. Custom and/or agreement during the marriage regarding the spouse's employment outside the home;
- d. Foregone opportunities (See above);
- e. Relationship of recipient's standard of living to that of the minor children in her custody.

D. Conduct and Maintenance

1. Statutory authority: §452.335, sub§ 2(9).

2. In considering conduct as a factor in the division of marital assets, Missouri courts have required the offended party to provide that the conduct imposed a level of burden or hardship on the marital unit. See Sandin v. Sandin, 688 S.W.2d 50 (Mo. App. 1987) and Burtscher v. Burtscher, 563 S.W.2d 526 (Mo. App. 1978).

3. Proof of additional financial burden:

- a. Alcoholism: medical expenses, lost wages, lost career opportunity;
- b. Gambling: waste of assets and income;
- c. Adultery: expenditures, neglect of job, expenses for therapy;
- d. Physical and mental cruelty: medical and

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counselling expenses for spouse and children, recipient's diminished capacity to remain or become employed as a result of abuse.

E. Practical consideration in light of recent cases

a. Have testimony ready to affirmatively prove recipient's continuing need;

i. expert testimony of earning capacity, physical/emotional/vocational disability, monetary value of foregone opportunity and homemaker's contribution, or financial loss or actuarial value of forbearance;

ii. Keep all statutory factors in mind; while no one factor is controlling, they have a cumulative effect. Remember in negotiations that the payor has much more to lose than you do - negotiate from strength with the knowledge that a judicial preference for open-ended maintenance exists.

2. In defending the claim for maintenance:

a. Testimony will be necessary to establish the recipient's capability to become self-sufficient within a definite time. You bear a substantial burden of proof in this regard. Areas of possible testimony and evidence:

i. Work history, including recent efforts to seek employment, voluntariness of unemployment or underemployment;

ii. Expert testimony from vocational counselors;

iii. Demonstrate to the court the amount of income derived from income-producing property to be awarded to recipient

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spouse;

iv. Present evidence as to costs and time necessary for re-education or completion of education;

v. Present evidence of the misconduct of recipient, especially if egregious or resulting in economic loss.

F. Demonstrative Evidence

1. "Cost of Maintenance" Exhibit - Appendix A - shows impact of deductibility to obligor.

2. "Erosion of Assets" Exhibit - Appendix B - shows impact of taxes and inflation on income - producing property and its resulting inability to provide sufficient support.

3. Consider summarizing, in detail, the recipient's contribution to the obligor's earning capacity. See Appendix C. This document may be used for the recipient's testimony, and possibly as a summary exhibit.

4. A summary of expenditures for prior years prepared from cancelled checks is a virtually unassailable demonstrative exhibit showing prior standard of living. See Appendix D.

5. A summary exhibit setting forth the lifestyle of the parties may be helpful. See Appendix E.

i. §455.050.3(4) RSMo Supp. 1993.

ii. Cates v. Cates, 819 S.W. 2d 731, 737 (Mo. banc 1991).

iii. Blank v. Blank, 698 S.W. 2d 623 (Mo. App. W.D. 1985).

iv. §452.335.3 RSMO 1992 Supp. For a further historical analysis of these distinctions see Bryson v. Bryson, 624 S.W.2d 92 (MO App. 1981), and Berman v. Berman, 701 S.W.2d 781 (MO App. 1985).

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v. Cates v. Cates, 819 S.W. 2d 731, (Mo. banc 1991). In Cates, the Missouri Supreme Court noted the phrase "maintenance in gross" does not appear in the dissolution of marriage statutes. 819 S.W. 2d 731, 735 (Mo. banc 1991):

We hold today that maintenance "in gross" is no longer recognized as a tool for providing economic sustenance under Section 452.335. Decisions in conflict with the Court's holding today conflict, in substantial part, because they attempt to reconcile alimony concepts with the maintenance regime adopted in 1973. Cases in conflict with this holding should no longer be followed.

Id. at 738.

vi. Morris v. Morris, 726 S.W.2d 505 (MO App. 1987).

vii. Czapla v. Czapla, 801 S.W.2d 785 (MO App. 1991).

viii. §452.335(1) RS Mo 1990. One recent case suggests a judicial alternative to the statutory criteria listed above. In Zavadil v. Zavadil, 806 S.W. 2d 506 (Mo. App. E.D. 1991) (citing In re Marriage of Quintard, 735 S.W. 2d 388 (Mo. App. 1987)) the court held that a gross and permanent disparity between the parties' capacity to work and earn is a sound reason for an award of maintenance, without reference to the statutory threshold factors noted above. Language such as this presents interesting possibilities for warranting maintenance where the statutory requirements might not otherwise exist.

ix. Roberts v. Roberts, 810 S.W. 2d 65 (Mo. app. W.D. 1990).

x. §452.335.2 RSMo 1991 Supp.

xi. §452.335.3 RSMo 1991 Supp.

xii. Beeler v. Beeler, 820 S.W. 2d 657 (Mo. App. W.D. 1991).

xiii. Roedel v. Roedel, 788 S.W. 2d 788 (Mo. App. E.D. 1990); Ryder v. Ryder, 795 S.W. 2d 411 (Mo. App. E.D. 1990).

xiv. C.M.D. v. J. R. D. , 710 S.W. 2d 474 (Mo. App. E.D. 1986); Kessler v. Kessler, 719 S.W. 2d 138 (Mo. App. E.D. 1986).

xv. C.M.D. at 479.

xvi. In Re the Marriage of Davis, 821 S.W. 2d 123 (Mo. App. W.D. 1991).

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- xvii. Theilen v. Theilen, 847 S.W. 2d 116 (Mo. App. W.D. 1992); Sinclair v. Sinclair, 837 S.W. 2d 355 (Mo. App. W.D. 1992).
- xviii. §452.370 RSMo.
- xix. §452.370.3 RSMo.
- xx. Leslie v. Leslie, 827 S.W. 2d 180 (Mo. banc 1992).
- xxi. Spicer v. Spicer, 585 S.W. 2d 126 (Mo. App. 1979).
- xxii. Baker v. Baker, 815 S.W. 2d 493 (Mo. App. S.D. 1991); Johnson v. Johnson, 819 S.W. 2d 391 (Mo. App. S.D. 1991); Lowrey v. Lowrey, 633 S.W. 2d 157 (Mo. App. 1982).
- xxiii. Cross v. Cross, 790 S.W. 2d 928 (Mo. App. 1990).
- xxiv. Probstein v. Probstein, 767 S.W. 2d 71 (Mo. App. 1989).
- xxv. Meltzer v. Meltzer, 775 S.W. 2d 524 (Mo. App. 1990); Hicks v. Hicks, 798 S.W. 524 (Mo. App. 1990); Russo v. Russo, 760 S.W.2d 621 (Mo. App. 1988).
- xxvi. Metts v. Metts, 625 S.W.2d 896 (Mo. App. 1981); Phelps v. Phelps, 620 S.W.2d 462 (Mo. App. 1981). See especially Newport v. Newport, 759 S.W.2d 630 (Mo. App. 1988).
- xxvii. Russo v. Russo, 760 S.W.2d 621 (Mo. App. 1988).
- xxviii. See also Schelsky v. Schelsky, 796 S.W.2d 888 (Mo. App. 1990).
- xxix. See generally Kinder v. Kinder, 777 S.W.2d 339 (Mo. App. 1989).
- xxx. Leslie v. Leslie, 827 S.W. 2d 180 (Mo. banc 1992); Cooper v. Cooper, 778 S.W.2d 694 (Mo. App. 1990), and Kinder v. Kinder, 777 S.W.2d 339 (Mo. App. 1989).
- xxxi. Bates v. Bates, 761 S.W. 2d 186 (Mo. App. W.D. 1988).
- xxxii. Kacich v. Kacich, 785 S.W.2d 606 (Mo. App. 1990).
- xxxiii. Hogan v. Hogan, 796 S.W.2d 400 (Mo. 1990). See also Kinder v. Kinder, 777 S.W.2d 339 (Mo. App. 1989).
- xxxiv. Klein v. Klein, 837 S.W. 2d 567 (Mo. App. W.D. 1992); Michael v. Michael, 791 S.W. 2d 772 (Mo. App. 1990); Newport v. Newport, 759 S.W.2d 630 (Mo. App. 1988)
- xxxv. Studyvin v. Studyvin, 779 S.W.2d 338 (Mo. App. 1989).

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xxxvi. Blount v. Blount, 674 S.W.2d 612 (Mo. App. 1984); May v. May, 801 S.W.2d 278 (Mo. App. 1990); and Clark v. Clark, 801 S.W.2d 95 (Mo. App. 1990); Burns v. Burns, 829 S.W. 2d 468 (Mo. App. E.D. 1992).

xxxvii. See Clark, supra.

xxxviii. Bixler v. Bixler, 810 S.W. 2d 95 (Mo. App. 1991).

xxxix. Zavadil v. Zavadil, 806 S.W.2d 506 (Mo. App. 1991).

xl. Int. Rev. Code §71(a), (b), and (e).

xli. Int. Rev. Code §71(a); Reg. §1.71-1; See also §215 and Reg. §1.215-1.

xlii. Int. Rev. Code §71(f)(5).