2017
Missouri Family Law Update
Cases and Statutes

Bar Association of Metropolitan St. Louis
Family and Juvenile Law Section

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Statutory Update for Family Law

SB 62 – this bill changes R.S.Mo. §169.141 and §169.715, which relate The Public Education Employee Retirement System of Missouri. The changes allow a participant, who upon retirement elected a reduced retirement allowance so that his or her spouse would receive a survivor annuity following the death of the participant, to, under certain circumstances, increase the amount he or she would have received had he or she not elected the survivor annuity. A participant will qualify to do this if: (1) the participant's divorce occurs on or after September 1, 2017; (2) the divorce decree provides that the participant solely retains all rights in his or her retirement allowance; and (3) the participant is receiving a retirement allowance. The increase becomes effective upon receipt of an application for increase along with a certified copy of the decree of dissolution. Effective August 28, 2017.

HB 153 – this bill changes R.S.Mo. §490.065, which governs the admissibility of expert witness testimony. The standard for admissibility for family law cases, probate matters and all other actions for which there is no right to a trial by jury remains the same as before. In all other cases, Missouri has now adopted the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Effective August 28, 2017.

R.S.Mo. §193.128 Missouri Adoptee Rights Act – This law enacted in 2016, provides that beginning on January 1, 2018, adopted persons age 18 and older, who were born in Missouri may obtain uncertified copies of their original birth certificates from the state registrar by filing a written application with proof of identification.

Rule 55.22 Pleading Written Instrument – The new rule requires that when a claim or defense is founded upon a written instrument, the same shall be recited verbatim in the pleading or a copy shall be attached to the pleading as an exhibit. Previously, a party could simply plead the legal effect of the document or recite the document at length (not necessarily verbatim) in the pleading. Effective January 1, 2018.

Rule 55.23 Execution of Written Instrument Deemed Confessed-When – This rule, which deemed the execution of a written instrument set forth in a pleading as confessed if not specifically denied has been repealed, effective January 1, 2018.

Form 14 - New Form 14 along with directions and comments effective as of July 1, 2017.

Dissolution Forms - Effective January 1, 2018, the following new forms will supersede their prior versions:

Form CAC140 – Property and Debt Statement (For Use in Motions to Modify)
Form CAC150 – Income and Expense Statement (For Use in Motions to Modify)
Form CAFC240 – Property and Debt Statement (For Use in Child Custody/Support/Paternity)

Form CAFC250 – Income and Expense Statement (For Use in Child Custody/Support/Paternity)
Form CAFC001 – Petition for Dissolution of Marriage
Form CAFC010 – Respondent's Answer to Petition for Dissolution of Marriage
Form CAFC501 – Parenting Plan Part A
Form CAFC501 – Parenting Plan Part B

UIFSA - On August 30, 2016, President Obama signed the instrument of ratification for The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. Pursuant to R.S.Mo. §454.849, the Uniform Interstate Family Support Act (UIFSA) was repealed effective June 15, 2016, and was replaced with R.S.Mo. §454.1500 *et seq.*, which retains the UIFSA title. The language of the new UIFSA now also applies to support orders entered in foreign countries.

Case Law Update

JURISDICTION AND PROCEDURE

Appeal- Standard of Review

After a full hearing, where both parties appeared *pro se*, the trial court entered a full order of protection against Mr. Wideman. Mr. Wideman subsequently retained counsel, who filed a motion to set aside. The trial court granted the motion and held another evidentiary hearing and once again entered a full order of protection. Mr. Wideman appealed on the grounds that the judgment was against the weight of the evidence. The parties offered conflicting versions of the events that precipitated the proceedings. The court of appeals was required to defer to the trial court's determination of the contested facts when the resolution required a determination concerning the credibility of the parties. *C.D.R. v. Wideman*, 520 S.W.3d 839 (Mo.App. W.D. 2017).

Contempt/Malicious Prosecution-

GAL was awarded fees against Father in a paternity case. When Father failed to pay the GAL, she filed a contempt and for an execution against Father's assets. Father paid the sheriff the outstanding GAL fees when he showed up to carry out the execution. The GAL filed a satisfaction and dismissed her contempt. Father subsequently filed a petition for malicious prosecution against the GAL. The GAL counter-sued for malicious prosecution and filed a motion for summary judgment on Father's malicious prosecution claim. The trial court granted the GAL's motion for summary judgment. The trial court, over Father's objection, held a bench trial which resulted in a judgment of $30,000 against Father ($20,000 actual damages, $10,000 punitive damages). Father appealed on the grounds that there were genuine issues of fact. However, Father could not prove malice in law because he could not establish that GAL initiated a contempt proceeding "without the honest belief that it was lawful when done." This is because the contempt action was lawful. GAL's withdrawal of the contempt motion after Father satisfied the judgment established that her purpose in filing the motion was to coerce Father to comply with the judgment—the result a contempt proceeding is intended to produce. Once the judgment was satisfied, the record shows that GAL no longer sought contempt against Father. Thus, her use of a civil contempt proceeding in this case was lawful, and Father could not establish that GAL acted with malice in initiating the contempt proceeding against him. *Clark v. Ruark*, WD 79308 (July 5, 2017).

Rule 74.06(b)(4) Motion to Set Aside Prior Judgment as Void-

Movant's divorce was heard by Judge number 1. In a later modification, movant sought to disqualify same judge for bias; after hearing, motion granted. Movant then litigated motion to modify to conclusion before Judge number 2, and did not appeal Judge number 2's denial of the modification he sought. Thereafter, he filed a motion pursuant to Rule 74.06(b)(4) to set aside the original dissolution judgment of Judge Number 1, as void *ab initio*.

1. The adjudication of a Rule 74.06(b)(4) motion is an independent, appealable proceeding;
2. There are no time limitations for filing them, other than that it must be filed "within a reasonable time" of the issue having arisen;
3. 74.06(b)(4) is not an alternative to a direct appeal. Assertions of error must be appealed timely.
4. Here, the claimant fully litigated his motion to modify before a newly assigned judge, <u>*after*</u> disqualification of the trial judge for bias was granted. Therefore, he was estopped from challenging the original judgment with a 74.06(b)(4) motion.
5.

Smith v Smith, ED Mo slip op. no 104481, filed March 28, 2017.

Motion to Vacate- Stipulated Settlement-

Mother appealed a consent modification judgment entered regarding custody, visitation, and child support. The parties entered their signed and notarized "Stipulated Agreement" on the record on the day of the trial setting. Father testified that the terms of the Agreement were in the best interests of the child, the Mother and GAL did not present any evidence. A month later, Mother, with a new attorney, simultaneously filed an unverified Motion to Vacate and Notice of Appeal. Mother asserted that the trial court erred in refusing to vacate the judgment on grounds of ineffective assistance of counsel. The appellate court affirmed on the grounds that since Mother's Motion to Vacate was unverified and she presented no testimonial evidence at the hearing, Mother had failed to meet her burden of proving the allegations she asserted justified a the relief sought. Further, the court held that her claims was meritless insofar as ineffective assistance of counsel, even in child custody cases, does not warrant a new trial. *In re the Matter of N.S.M v. McShannon*, WD 80099 (July 11, 2017).

Sanctions order- default judgment?

The trial court abused its discretion in entering a judgment on the merits in a custody case as a sanction for the father's failure to fully answer written discovery, where no evidence was presented, nor the GAL's input sought, by the trial court. In fact, husband's discovery responses were filed within the time ordered in the sanctions order. Although treated as a default judgment, the judgment was not a default judgment but was a sanction. *Travis v. Travis,* 519 S.W.3d 501 (Mo.App. S.D. 2017), filed May 4, 2017.

Service of Process

The Eastern District reversed the trial court's denial of husband's motion to set aside default judgment. The deputy sheriff served wife's summons for dissolution of marriage upon the parties' adult son, on the premises of father's residence. While the son occasionally spent time at father's residence, at the time of service he was not living with father. Thereafter, the trial court entered a default judgment against father and refused to set aside the default approximately five months later when father moved to set it based upon improper service. The court analyzed Missouri Supreme Court Rule 54.13(b) (1), or "abode service," which provides for valid service

> *"…by delivering a copy of the summons and petition personally to the individual or by leaving a copy of the summons and petition at the individual's dwelling house or usual place of abode with some person of the individual's family over the age of 15 years."*

In declaring the service invalid, the Court looked to the definition of "family", which Missouri courts have broadened to include members of the household. Although father and son are related, and would otherwise constitute "family", service here was improper since the son was a non-resident family member.

Killingham v. Killingham, ED Mo. Slip op. no. 104868 (filed October 17, 2017).

***Staples* motion denied—Rule 67.03—where movant is unable to comply with prior order**

Maintenance obligor filed a motion to reduce or terminate his maintenance obligation due to disability, which he acquired after a massive stroke. Recipient spouse filed a motion to dismiss under Rule 67.03 MRCP, which allows a respondent to move for an involuntary dismissal of a civil case for the movant's failure to comply with a prior order of the court. Abuse of discretion standard applies to the review of a denial of a motion to dismiss. A party may not "simultaneously flout and invoke the authority of the court"; however, where the facts show the paying party is unable to comply, "…we will generally not find an abuse of discretion in the trial court's refusal to dismiss the motion to modify." *Serot v Serot,* ED Mo. Slip op. no. 104502, issued October 17, 2017.

Validity—bigamous marriage

The Missouri Court erred in finding the marriage of the parties herein was void. When the parties married in Texas, wife was not yet divorced from her first husband. Although under Missouri law the second marriage would be void, the issue was which state's law governs? It was decided that Texas law governed and that under Texas law, the second marriage became valid when the impediment to its validity was removed, i.e. upon completion of the divorce of the first marriage. Missouri recognizes marriages which are valid where contracted, and since this marriage was now valid under Texas law, Missouri was obligated to recognize it. *DLH v JDH*, 521 S.W.3d 324 (Mo. App. E.D. 2017) filed June 30, 2017.

CHILD CUSTODY

Grandparent visitation---90 day requirement

The court of appeals reversed the trial award to grandparents of one weekend per month plus a holiday schedule, where the grandparents neither pleaded or proved an unreasonable denial of visits with their grandchild for 90-days or more. Such a 90 day denial is a precondition to any of the other three bases for an award of grandparent visitation under Section 452.401.1(1), (2), or (3). Under the plain language of the statute, a grandparent may not rely solely on any single subpart of Section 452.401.1 to obtain grandparent visitation; rather, the grandparent must establish that either subpart (1), (2) or (3) applies, *in conjunction with subpart (4)*. *Massman v. Massman*, 505 S.W.3d 406 (Mo.App. E.D. December 6, 2016).

Guardian Ad Litem- what constitutes abuse for appointment

Mother appealed custody ruling in a paternity action on grounds that the trial court erred by denying her request for appointment of guardian ad litem. While Mother's counter-petition asserted domestic violence against her, she did not make any claim of abuse or neglect of the children. In her Motion for Appointment of Guardian ad Litem, Mother alleged father's physically violent actions toward her in the presence of the children and an incident where Father had smashed windows at Mother's house in the middle of the night constituted abuse. The Western District held that Mother's allegations were insufficient to mandate the appointment of a guardian ad litem. The court did not conclude that the allegations related to abuse of the children. *Abernathy v. Collins*, WD 80329 (July 18, 2017).

Joint Physical Custody – H.B. 1550 (2016): "Equal Time"?

This case suggests that the legislative intent of House Bill 1550 (2016) sought "…to maximize to the highest degree the amount of time the child may spend with each parent…." Citing H.B. 1550 at p. 18. In light of this statement of intent, the Court went on to state:

> Nevertheless, observing and effectuating this State's avowed public policy (Section 452.375.4), the explicit legislative intent of House Bill 1550 (2006), and ensuring continuity for all children, *requires our trial courts to enter a joint physical custody arrangement that is substantially equal*…Trial courts should heed this State's public policy by awarding "significant" periods of parenting time to each parent, unless the best interest of the child compels otherwise."
> (Page 17, *emphasis added*).

In footnote 6 of the opinion, the Court states that a "two-two-three" schedule is an exemplar of such a joint physical custody plan.

Morgan v. Morgan, 497 S.W.3d 359 (Mo.App. E.D. August 30, 2016).

Joint Physical Custody- conflicts with *Morgan*

The Western District Court of Appeals affirmed a mother's appeal of a joint physical custody award that provided her 81 overnights per year. The court held that Missouri courts have long recognized visitation plans that award similar to the award wife received as joint physical custody. In a footnote at the end of the opinion, the court specifically noted its decision in this case conflicts with the *Morgan* case from the Eastern district, and that court's analysis of joint physical custody. The *Gammon* court referenced a "plethora" of Missouri cases that characterize custody awards like the one at issue as providing significant parenting time to both parents. The court criticized the *Morgan* analysis as an oversimplification and characterized it as dangerous, for focusing only on the number of overnights rather than the best arrangement for the children.

Gammon v. Gammon, WD Mo slip op. no. 79869 (filed September 19, 2017).

Joint Physical Custody- conflicts with *Morgan*

The Western District affirmed a joint physical custody award that provided father with five overnights every fourteen days. Father relied on the *Morgan v. Morgan* case from the Eastern District, arguing that the trial court's award deprived him of frequent, continuing and meaningful contact with the children and, as a practical matter, gave mother sole physical custody. The Western District reiterated its disagreement with the *Morgan* case and noted several cases where custodial arrangements that awarded less than 50/50 were properly denominated as "joint physical custody." The court concluded that the trial court properly applied R.S.Mo. §452.375.

King v. King, WD Mo. Slip op. no. 80192 (filed October 10, 2017).

Modification Standard based upon nature of original award

This case provides us with a cogent and exhaustive analysis of the cases and statutes on modification of legal and physical custody and visitation and the pertinent modification standards for each. Addressing physical custody modification, the Court stated that under Missouri law, there are three different and existing standards for modification of physical custody:

1. The Section 452.410 “statutory” standard ("… change in circumstances of the child or custodian …)."

2. The Section 452.410 “case law” standard (based upon cases interpreting 452.410 where a change in custody, not visitation or parenting time, is sought, and requiring a "…substantial change in circumstances of child or custodian …even though the word “substantial” does not appear in the statute), and

3. Section 452.400.2 modification standard (where only visitation or parenting time is adjusted and "…modification would serve the best interests -- no "change" is required to be pleaded or proven).

The application of the appropriate modification standard rests upon the nature of the underlying judgment to be modified, and it suggests a "Siegenthaler" plan does not constitute “joint physical custody” and in fact, represents sole physical custody. This case reconciles four different approaches to child custody modification, describing an approach from the Southern District, then the Western District, then the Eastern District, and then ultimately the Missouri Supreme Court case of *Russell v Russell*, 210 SW 3d 191 (Mo banc 2007) which had originated in the Eastern District. As a result of its analysis of these four courts:

> “This court holds when a court confronts a modification of physical custody, that court must give weight to the prior child custody decree’s designation of the physical custody arrangement so long as said designation complies with the statutory definition of joint physical custody. If the prior child custody decree’s designation of the physical custody arrangement violates the statutory definition, the court shall “appropriately” designate or classify the physical custody arrangement, …[i.e.]… “when the court orders significant periods of time where the child is under the care and supervision of each parent, the award is one of joint physical custody regardless of how the [prior] court [originally] characterize[ed] it.”

The Court then went on to apply the modification standards to the question of legal custody as well, but that was a very case-specific discussion. *Morgan v. Morgan*, 497 S.W.3d 359 (Mo.App. E.D. August 30, 2016).

Modification- physical custody schedule

A modification of an existing joint physical custody plan requires only a change in circumstances, and that it be in the best interests of the child to make a change in the schedule, once a change in circumstances has been found. Where, as here, the appellant had filed a cross-motion in the trial court alleging a change in circumstances, he could not be heard on appeal to complain that the trial court made no express finding that a change had occurred, prior to its modification of the parenting schedule. Curiously, the change upon which the trial court primarily relied was one involving a lack of communication, and finding that the parties could no longer communicate effectively with each other. Nevertheless, the only change in the order of custody appears to relate to the physical custody schedule. *Welcome (Runkles) v. Welcome*, 497 S.W.3d 842 (Mo.App. W.D. August 30, 2016).

Modification -- Supervised to Unsupervised

The requirement of Section 452.400.2(3), i.e. proof of treatment and rehabilitation as a prerequisite to removal of a supervision provision, is ***inapplicable*** where there was no prior finding of abuse, and where the prior order for supervision was by consent, and not the result of a hearing on the record in which evidence of abuse was adduced and before the court. This is consistent with a similar rule that such requirements did not apply to modify a prior PDL order, restricting visitation, where the prior order was entered into by consent of the parties, without prejudice, and without a full evidentiary hearing on the merits. *Fowler v. Fowler*, 504 S.W.3d 790 (Mo.App. E.D. September 6, 2016).

Relocation- 452.377 timeliness requirements --

Failure of proper notice under 452.377 by relocating party eliminates negates the time deadlines for responding party. Here, Mother apprised father on March 9, but said that due to the quick sale of her home, and its closing on April 1, she was "unable to provide [you] with the statutory sixty day advance notice." Father objected on May 4. Mother claimed that his objection, having been filed more than 30 days from receipt of her notice to relocate, was untimely and that therefore she had an absolute right to relocate. The court of appeals said "not so fast"--- her failure to provide 60 days' notice as provided by statute, and coupled with the fact that the trial court made no finding of exigent circumstances, eliminated the need for father to respond within 30 days. Having failed to give the 60 days' notice, it was incumbent upon Mother to seek court authorization for her proposed relocation by filing a motion to modify. "In this case, either party may present the matter to the trial court for resolution by filing a motion to modify the existing judgment. *Ashton v Ashton*, 511 S.W.3d 473 (Mo.App. W.D. February 28, 2017).

Relocation- sufficiency of notice under 452.377 RSMo- new address

The notice requires the anticipated address *only if known*, distinguishing the *Abraham* case. In *Abraham*, the court found the relocation notice did not comply with the statute because it did not state the specific address, although the relocating party already knew it but did not include it. Here, the relocating the party did *not yet know* the precise address where she would be residing in the new city. Therefore, because she did not know, she was not required to include it in her relocation notice. Even without the address, she strictly complied with the statute under these circumstances. The objecting party's untimely objection was unavailing. *Amick v. Smart*, 2017 WL 1788475, filed May 5, 2017.

Third Party Custody—Grandparents --independent action *not* authorized under 452.375.5(5) where letters of guardianship have been issued

No independent third-party right to seek custody under 452.375.5(5) (a) RSMo lies, where letters of guardianship have already been issued by the probate court.

In 2009, the probate court determined mother and father of unfit, unable, and unwilling to serve as the natural custodians of the child. Letters of guardianship were issued to the child's maternal great-grandmother and great aunt. Later, after several failed attempts to obtain grandparent visitation, and then to remove the guardians, in 2015 the paternal grandparents sued for third party custody under 452.375.5(5) RSMo, which provides:

> *(5) Third-party custody or visitation:*
>
> *(a) When the court finds that each parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires, and it is in the best interest of the child, then custody, temporary custody or visitation may be awarded to any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child.*

The trial judge dismissed the petition of Grandparents for lack of standing. On appeal, the Eastern District construed the plain language of the statute and found that it provides that "any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child may be granted third-person custody or visitation.

On transfer to the Missouri Supreme Court, however, the trial court was affirmed. The plain language of 452.375.5(5) is not applicable, wrote Judge George Draper, to a situation in which a probate division previously has issued letters of guardianship over the child in issue:

"The language and context of Section 452.375.5 shows that the legislature intended third-party custody or visitation referenced in subparagraph (5) (a) as an alternative consideration to parental custody. But, in situations such as this, when letters of guardianship have been issued and a custody award as to a child already exists, parental custody is not at issue. Consequently, Grandparents could not state a cause of action under section 452.375.5(a) for custody or visitation under the facts and circumstances of this case. The circuit court's judgment dismissing Grandparents' petition because neither section 452.402 nor 452.375.5(5) (a) could provide relief in this case is affirmed."

Hanson v. Carroll, 527 SW 3d 849 (Mo banc 2017), issued September 12, 2017.

Third Party Custody/Natural Parent/Step-parent- ***NOW ON TRANSFER TO THE MISSOURI SUPREME COURT, docketed for argument November 15, 2017:***

Interesting case. Husband is not the biological father of the child, but four days after her birth, executed a Missouri Affidavit Acknowledging Paternity which resulted in t the State of Missouri issuing a birth certificate naming Husband as the "father" of the child. The biological father originally acquiesced to remaining uninvolved in the life of the child, but when Husband and Wife began their divorce, the biological father intervened under the MoUPA and Husband filed a motion for third party custody. Many complexities then ensued.

The majority opinion by the Court of Appeals affirmed the trial court's award of "third party custody" to the Husband in the dissolution of marriage action, due to its finding that both mother and the biological father were unfit, unsuitable, and unable to be custodians per Section 452.375.5(a). Here, the dissolution of marriage, the paternity case, and the third-party action for custody, were filed and tried together, in apparent violation of Operating Rule 4.05.3 of the Missouri Supreme Court, which states that:

"Dissolutions and paternity actions shall be filed separately. A separate case number shall be assigned for each dissolution and each paternity action filed and shall be related in the automated case management system for scheduling and other processing." Operating Rule 4.05.3, Missouri Supreme Court.

However, the majority found Section 210.829.1 grants court the authority to join a course [sic] of action under the MoUPA "by separate document with an action for dissolution of marriage, annulment, separate maintenance, support, custody or visitation…" Therefore, the majority did not find Operating Rule 4.05.3 and Section 210.829.1 to be in conflict; neither limits the joining of any related custody or visitation matters *for trial.*

The result turns, in part, upon the definition of "natural father" under the statutes, as well as a perceived conflict between § 210.823 RSMo, and § 210.834.4 RSMo in defining who the father is. According to the dissenting opinion, under 201.823 the husband, who had executed an acknowledgment of parentage at the time of birth, is the

natural father; however, under 210.834.4 RSMo, the biological father/intervenor is the "natural father." This conflict, per the dissent, creates a case of first impression in Missouri: interpretation of § 210.822.2 which *states "If two or more presumptions [of parentage] arise which conflict with each other, the presumption [of parentage] which on the facts is founded on the weightier considerations of policy and logic controls*." *Bowers v. Bowers*, 2017 WL2822506, ED Mo filed June 30 2017. ***CAUSE NOW ON TRANSFER to the Missouri Supreme Court pursuant to Rule 83.03, "Transfer on Dissent of Participating Judge".***

Third Party Custody- Same Sex parents- Independent Action Permitted

The Eastern District reversed the trial court's denial of an independent claim for third-party custody under section 452.375.5(5) (a) in a case in which the third party demonstrated the existence of a significant bonding familial custody relationship. Where this is shown, it constitutes a "special or extraordinary reason or circumstance" rendering it in a child's best interest to award third party custody under Section 452.375.5(5)(a)'s "welfare of the child prong." The evidence of a significant bonded familial custodial relationship between third party and child was overwhelming in both quantity and quality, according to the Court. K.M.M. v. K.E.W., ED Mo slip op. no 105086, filed October 3, 2017.

UCCJEA- originating state is always "in charge"-

Under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), only the originating state may make the determination as to whether to decline jurisdiction under Section 452.800, or whether the modifying state is a more convenient forum. It is a determination the modifying state may not make. Thus, the trial court properly dismissed father's motion to modify the California judgment, filed by father in Missouri, where it was undisputed that the mother continued to reside in California. It is solely the prerogative of California as the original decree state with continuing jurisdiction to *decline* its jurisdiction based on convenience, and not the prerogative of Missouri to decide that despite California having continuing jurisdiction, it would be more convenient to have the case heard here. Also, it is for determination solely by the originating jurisdiction, whether or not Missouri is the more convenient forum. *Grega v. Grega*, E.D. Mo Slip Op. No. 105083, filed June 20, 2017.

CHILD SUPPORT

Insolvent and Incapacitated- support beyond age 18

The court of appeals affirmed the trial court's finding that the son, over age 18, was insolvent and incapacitated from supporting himself. His basic expenses exceeded his Social Security Disability income, and he hadn't the capacity to work, nor the ability to pay his debts when due. This concerns not only his shortage of income but also his actual ability or inability to routinely perform the acts necessary to pay his bills. *Keller v. Keller*, 516 S.W.3d 906 (Mo.App. W.D. 2017) filed April 25, 2017.

Visitation Credit on Line 11

The trial court's grant of a 50 percent Line 11 credit was reversed, where the recipient's income was less than the $1,700.00 threshold level expressed in the "caveat" to Missouri Child Support Form 14.

Here, the recipient of support earned only $1,068.00 per month. This sum was significantly below the threshold for Form 14, Line 11 credit, but the trial court stated it would be unjust and inappropriate not to award the credit to the payor. However, it was inappropriate for the trial court to refuse to apply specific instructions in Form 14 pertaining to the use or non-use of the credit, based on the trial court's belief that the application of the caveat was unjust or inappropriate. Deviation may only be appropriate after first determining the presumed correct child support amount under Form 14. It appears that had the trial court calculated the PCSA first, strictly according to the instructions and accordingly denied the credit to payor as the Form would have required, the court could *then* deviate from the PCSA. *Rackers v. Rackers*, 500 S.W.3d 328 (Mo.App. W.D. October 4, 2016).

Step-parent's income considered?--

Father filed a motion to modify child support, which was previously $0.00. Both parents had remarried, and the court rebutted the Form 14 child support amount on the grounds that in light of father's new spouse's income, father was not in need of child support. Father appealed arguing that the court's ruling violated R.S.Mo. §453.400, which prohibits consideration of income of a step-parent in determining amount of child support of natural/adoptive parent. The Western District disagreed, noting that notwithstanding section 453.400.1, a trial court is required by section 452.370.1 to consider both parties' financial resources, including a co-habitant's contribution to household expenses, when considering a motion to modify an existing child support award.

See the dissent. *Jaco v. Jaco*, 516 S.W.3d 429 (Mo.App. W.D. 2017).

UIFSA- originating court is always "in charge"-

Father's attempt to modify California judgment in Missouri, where Father now lives with the child, failed because Mother continued to reside in California. In the original judgment, child support was "reserved" and no set amount was ordered at the time. However, the California court ordered Father, at the time of the original judgment, to maintain health insurance and that the parties would equally bear the cost of unreimbursed medical expenses for the children. In Missouri, Father argued that since no order of child support was entered, there was no originating judgment. However, a "support order" under our enactment of UIFSA:

> *…means a judgment, decree, order, decision or directive, whether temporary, final, or subject to modification, issued in a state or foreign country for the benefit of the child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual oblige in place of child support. The term may include related costs and fees, interest, income withholding, automatic adjustment, reasonable attorneys' fees, and other relief.*

Section 454.1503(28) RSMo.

Since Father was to provide health insurance for the children and share the cost of unreimbursed medical expenses, the California judgment served as a "support order" under Missouri's UIFSA law and as such, Missouri did not have the authority to modify the California child support order (since one of the parties---here, Mother---continues to reside in the originating state of California). Because California issued a child support order, Missouri only has authority to modify it under the circumstances set forth in Section 454.1662(a)(1), i.e. if:

> *Neither the child, nor the oblige who is an individual, nor the obligor resides in the issuing state, a person who is a nonresident of this state seeks modification; and the respondent is subject to the personal jurisdiction of the tribunal of this state.*

Grega v. Grega, EDMO slip op. no. 105083, filed June 20, 2017.

MAINTENANCE

Cohabitant's income considered-when

The trial court properly considered the financial assistance routinely provided to payor by his live-in girlfriend, in determining the payor's ability to meet his maintenance obligation awarded in the judgment. *Kratzer v. Kratzer,* 520 S.W.3d 809 (Mo.App. E.D. 2017) filed May 9, 2017.

Modification – mandatory retirement of obligor

The trial court's termination of obligor spouse's maintenance obligation was not an abuse of discretion; although the obligor spouse retired from his CPA practice at age 60, it was pursuant to a mandatory retirement provision of his accounting firm KPMG, set forth in its partnership agreement. He was justified in retiring at that point as he felt he had sufficient funds with which to do so. The trial court's termination of his maintenance obligation, originally awarded in 1999, was affirmed. *Borchardt v. Borchardt*, 496 S.W.3d 635 (Mo.App. E.D. May 24, 2016).

Maintenance-imputed income--considering average of years or a single income year of payor--

In this original divorce proceeding, the trial court made a maintenance award in 2015 based, in part, upon an average of payor's income from the two prior years of 2012 and 2013, but entirely disregarding the most recent year of 2014. However, in this case, it was error to do so. As a matter of uncontroverted fact, 2014 was the most representative of payor's circumstances now and into the future; the two previous years had anomalous circumstances which were not likely to be repeated. An award of maintenance must be based on the parties' existing circumstances, and the trial court may look at a single year, rather than a history, where that one year is a more accurate predictor of a party's income, as was the case here. *Orange v. White*, 502 S.W.3d 773 (Mo.App. E.D. November 22, 2016).

Maintenance-modification—is receipt of Social Security, and receipt of pension benefits now being paid, a change in circumstances warranting a reduction in maintenance?

On a motion to modify file by payor husband, the trial court properly declined to consider former wife's receipt of pension benefits (awarded to her in the original divorce) as a basis to reduce the maintenance award to her. Doing so would constitute an impermissible modification of her original property award, citing *Leslie v. Leslie*, 827 SW 2d 182-83 (Mo 1992). The court of appeals distinguished cases such as *Hill*, which allowed the consideration of income on existing retirement funds *in an original dissolution of marriage,* and also criticized *Jung*, 886 SW 2d at 740-41, *an original divorce action* in which dicta theorized that in a future modification the court could reduce maintenance based on income later received in a retirement account or from a retirement plan. In this case, the court of appeals found that the dicta in *Jung* directly contravened *Leslie*, and it was therefore treated and cited with disapproval. The reduction of maintenance, dollar for dollar, on account of a pension benefit, impermissibly amends the division of property.

However, it is appropriate to consider the receipt of Social Security benefits in considering a maintenance modification, and the court properly reduced maintenance based on this evidence, as this does indeed constitute a change in circumstances and does not compromise the original division of property from the divorce.

One interesting note: the opinion indicates the motion to modify was filed *in advance* of the actual intended retirement of the movant. Presumably, he proceeded to retire before the trial. There is no further mention as to the significance of the timing. *Lindo v. Higgenbotham*, 517 S.W.3d. 558 (Mo.App. E.D. November 29, 2016).

Modification- reversed due to lack of evidence of change from decree date

The trial court's upward modification of maintenance was reversed, where the record supplied by the recipient in support of her motion was devoid of any evidence of financial circumstances, i.e. her expenses or income, at the time of the divorce; thus, she had failed to prove a change of circumstances. Also, she failed to demonstrate that the medical circumstances over which she went to trial on the modification represented an unforeseen circumstance at the time of her divorce. Increased maintenance award reversed. *Layden v Layden*, 514 S.W.3d 667 (Mo.App. E.D. March 28, 2017).

Modification- payor's demotion due to misbehavior at work is a voluntary reduction in income, and does not warrant decrease in maintenance obligation

Payor sought to modify to lower his maintenance obligation because he'd been demoted at work due to unprofessional behavior in the workplace on three separate occasions, and suffered a corresponding reduction in salary as a result. The trial court denied his motion and the court of appeals affirmed the denial. The demotion was not a change in circumstances, because it was voluntary since it was due to his inappropriate behavior. He remains on the rolls and may one day be eligible for a promotion, which shows he could secure a similar position in the future. Moreover, the payor obtained part time employment after the demotion to supplement his reduced income. *Layden v Layden*, 514 S.W.3d 667 (Mo.App. E.D. March 28, 2017).

Modification- separation agreement governs- when

The trial court erred as a matter of law in failing to enforce the terms of the parties' original marital separation agreement, which had contemplated that the maintenance agreed upon at the time of divorce was not sufficient to meet the recipient's reasonable needs at that time; however, due to the payor's temporary unemployment at the time of the judgment, the parties agreed contractually that the recipient would receive less

maintenance and could return to court in the future to modify, once the payor became employed again. However, when she ultimately did so, the trial court ignored the language of the settlement agreement. Case stands for the proposition that the parties may contract, in a settlement, to provide that if circumstances change in a particular way for the future, modification may occur. *McHugh v. Slomka*, E.D. Mo Slip Op. No. 103543, filed August 8, 2017

Maintenance-Social Security/Missouri Teachers' Pension considered

In this original divorce proceeding, payor Husband was retired and living exclusively on social security and payments from his separate Missouri state teacher pension. Recipient Wife was disabled and had nominal social security income. The trial court properly considered husband's Social Security benefits and payments to him from the Missouri State Teachers' Pension Plan as income in determining ability to pay maintenance. The inclusion of the phrase "any other relevant factors" in Section 452.335(10) RSMo gives the trial court broad discretion, and while these benefits are not *assignable* as marital or separate property, they are still economic factors which may be considered by the court in the division of marital property and in the award of maintenance, in an original divorce. The husband's argument to the contrary would prevent maintenance awards from being required of the parties who receive such benefits after retirement. *Orange v. White*, 502 S.W.3d 773 (Mo.App. E.D. November 22, 2016).

PATERNITY

Standing to set aside paternity- dads only, please

Mother sought to set aside an earlier judgment of paternity of her two children within the two years contemplated by Section 210.854 RSMo (2010). No scientific testing had occurred at the time of the original judgment, because the parties by their pleadings deemed it unnecessary; parents shared custody and used Father's home as the mailing address for mail and education, and Mother was ordered to pay child support.

In her suit to set aside the original paternity judgment, Mother claimed the children were, in truth, not the children of Respondent and sought to extinguish all of her support obligations all current and past due. Trial court dismissed due to mother's lack of standing to challenge father's paternity. The plain language of section 210.854 does not provide an avenue of relief to a petitioner who is not questioning their own parental relationship with the child: The *petitioner* must be challenging the parental relationship between *petitioner* and child. *Gwyn v Summers*, 514 S.W.3d 628 (Mo.App. W.D. March 21, 2017), following *Cooper v. Cooper*, 445 SW 3d 589, (Mo App 2014) and *Doss v. Brown*, 419 SW 3d 784 (Mo. App. 2012).

PROPERTY

Court May Not Alter Payment Terms of Marital Settlement Agreement

It was error, in an action to compel contribution sought from former wife, for the trial court to alter the agreement by granting her a stay of execution for her paying $150.00 per month toward the obligation. The original marital settlement agreement simply stated that husband and wife would each pay, equally, their pre-2007 tax obligation, once it was determined. Once their obligation of approximately $200,000.00 was determined, husband advanced payment for it and then sought contribution from ex-wife. Trial court granted his request, but allowed ex-wife the right to pay it to him at the rate of $150.00 per month until paid—a rate which would have insured satisfaction within 111 years. The court of appeals disallowed this alteration/qualification of the original agreement, and reversed because the trial court cannot retroactively alter the terms of the agreement. *BJE v. JBE*, 504 S.W.3d 822 (Mo.App. E.D. September 27, 2016).

Frozen Pre-Embryos-- Are They Property or Children?

This was both a complicated case, and an uncomplicated case. The court of appeals ultimately held that the two cryogenically preserved pre-embryos in issue were not to be considered children, and that therefore it would not have been necessary for a guardian ad litem to be appointed, or to make recommendations pertaining to them, as was argued by Wife/Mother. Additionally, it would not be appropriate to consider the provisions of Section 452.375 RSMo in determining their disposition.

The case was tried before a Family Court Commissioner, and the judgment was confirmed by the designated Circuit Judge. The essential facts are these: The parties created four fertilized pre-embryos during their marriage using eggs from Wife and sperm from Husband. Two of these had, through the process of in vitro fertilization, been implanted in the uterus of Wife and ultimately were born as the parties' two minor children. The two remaining frozen pre-embryos created by the parties had been in cryogenic storage since 2007. The disposition of these two frozen pre-embryos was the sole issue in this case.

Wife/Mother wanted them awarded to her; Husband/Father opposed this, and offered a number of alternative dispositions such as remaining in storage, destroying them, or allowing their use for an in vitro adoption by other parents, because he feared mother would proceed to another in vitro process and bear two more children who were genetically his, without his intention or permission. He felt he had a constitutional right, where the pre-embryos were still in storage and not in utero, to decide *not* to procreate, and articulated this right based upon constitutional rights to privacy and equal protection.

No one was able to produce the original agreement with the original storage facility; when that facility closed, Mother arranged to transfer the embryos to a successor facility and obtained father's signature on a multi-part document which purported to be a storage agreement. The document, however, had been amended by Mother by interlineation to provide that in the event of divorce, they should be awarded to her,. And it appeared to the trial court that the document in evidence had been signed in several places on different dates. Therefore, the trial court was suspicious that the document had been altered and was not credible evidence of their agreement, and accordingly, the document was not used to govern the disposition of the embryos in this case.

Mother argued that Section 1.025 of the Missouri Revised Statutes, which declares life begins at conception, among other things, applied to these embryos. She sought treatment of the embryos as if they were children. The court of appeals, however, said that the circumstances of this case do not involve a biological stage of development *in utero*, but were only *in vitro*, stored outside the uterus and cryogenically stored in an artificial environment.

"Based on the foregoing, we hold that when weighed against the interests of [mother] and [father] and the responsibilities inherent in parenthood, the General Assembly's declarations in Section 1.205 relating to the potential life of the frozen pre-embryos are not sufficient to justify any infringement upon the freedom and privacy of father and mother to make their own ultimate decisions … father and mother alone should decide whether to allow a process to continue that may result in such a dramatic change in their lives as becoming parents. … We also hold that an application of Section 1.205, including declarations that life begins at conception/fertilization, to the frozen pre-embryos and to Missouri's dissolution statutes under the circumstances of this case, (1) would be contrary to US Supreme Court decisions interpreting the US Constitution; and (2) would violate the father's constitutional rights to privacy, right to be free from governmental interference, and the right not to procreate." Accordingly, the trial court did not err in failing to classify the frozen pre-embryos as children under Section 452.

The trial court also was affirmed in not requiring a guardian ad litem, because the frozen embryos are property of a special character, and are not children. They are unlike traditional forms of property or external things because they are comprised of a woman and man's genetic material, are human tissue, and have the potential to become born children. Accordingly, "frozen embryos are entitled to special respect" and should be considered property, but property of a special character, in a dissolution of marriage case.

Finally, although there was a document purporting to be a directive for disposition of the pre-embryos, there were some irregularities in the document and in this case, the court was not convinced that mother proved that the key aspects of the directive were all signed at the same time and therefore she did not prove with clear and convincing evidence that the directive constituted an agreement pursuant to Section 452.330.2(4) that should be followed. *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo.App. E.D. November 15, 2016).

LAGERS pension plan-

Trial court was affirmed, when it ordered the husband to pay a specific monthly sum to former wife, *if and when* his LAGERS pension was received. The trial court did not err in assigning a value of "zero" to husband's interest, where husband was not yet entitled to take for 9 more years, and where his survival was a necessary prerequisite to either party's ever receiving any benefit whatsoever therefrom. Instead, the trial court had ordered him to pay 50 percent of the current monthly value to the alternate payee, *if and when received* in the future, a permissible ruling under the circumstances. Joyner was inapposite to this case because the award in Joyner was treated as a judgment for future, contingent maintenance. *Landewee v. Landewee,* Mo Sup. Ct. en banc slip Op. No. 94918, filed April 25, 2017.

MOSERS pension plan-

The trial court's 60 percent award of the husband's MOSERS plan was reversed, on account of the statutory restriction regarding same. Section 104.312.1(3) RSMo states that in allocating a MOSERS pension share pursuant to a divorce judgment, such a division "…shall identify the monthly amount to be paid to the alternate payee, which shall be expressed as a percentage *and which shall not exceed 50 percent* of the amount of the member's annuity accrued during all or part of the time while the member and alternate payee were married …" The trial court allowed a 60 percent share to wife on husband's other plans. The disproportionate division as due in part to marital misconduct, which included the husband's violation of a restraining order PDL by liquidating two substantial marital assets in direct violation of the PDL judgment. *Kratzer v. Kratzer,* 520 S.W.3d 809 (Mo.App. E.D. 2017), filed May 9, 2017

Statute of Limitations -

Section 516.350, as a statute of limitations on judgments, applies solely to monetary judgments and not the conveyance or resolution of title to specified property. That is dealt with pursuant to Rule 74.07. *Hanff* and *Starrett* are inapposite because they dealt with money judgments. *Longan v. Longan*, 488 S.W.3d 728 (Mo.App. W.D. May 3, 2016).

Taxes

Although the general rule is that in the absence of having presented evidence on taxation issues, one cannot challenge the tax determinations of the trial court, here the trial court made tax calculations of record, on its own and without any evidence having been presented. In so doing, the trial court assumes the burden of doing so correctly, and incorrect calculations, may still be challenged on appeal. *Arndt v. Arndt*, 519 S.W.3d 890 (Mo.App. E.D. 2017), filed May 23, 2017.

Undivided property- Suit in Equity--Statue of Limitations- *Bouldin*

Parties were divorced November 9, 2009 pursuant to a settlement agreement in which both acknowledged there had been limited discovery, and each agreed to assume the risk in doing so. Pursuant to the agreement, Wife was awarded "all bank accounts at Peoples' Bank of Lincoln County." On October 18, 2011 Husband moved to modify the divorce judgment as relates to child support and a motion for contempt; on November 10, 2014, a third amended petition was filed which added two counts, one for the division of undivided marital property, and one claiming the property had been concealed due to fraud. He claimed not to have discovered the existence of ten accounts with an aggregate value of $229,000 until June of 2014.

The trial court granted summary judgment in favor of Wife on the basis of the 5 year statute of limitations for fraud claims, Section 516.120 RSMo. Under the statute, a fraud claim is "deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." Section 516.120.5 RSMo.

It was undisputed that Husband's divorce counsel had issued a subpoena to Peoples' Bank in April of 2009, during the pendency of the divorce, and received statements showing the existence of all of the accounts. However, Husband claimed he was not apprised of this by his then-attorney, and relied instead upon representations of Wife.

The Court of Appeals affirmed, finding that Husband knew or had reason to know of the existence of the accounts in April of 2009, and therefore the suit filed in November 2014 was untimely under the statute. Here, since Husband's equitable claim is based upon his claim of fraud, the five-year statute was deemed to have applied. *Hall-Bouldin v. Bouldin*, 497 S.W.3d 385 (Mo.App. E.D. August 30, 2016).

"Voluntary Payment Doctrine" as a defense to contribution or indemnification claim

The voluntary payment doctrine is a defense to an action for recoupment of some kind, whether through restitution or contribution. It is inapplicable in this case, where the ex-husband had advanced payment of a tax debt, after divorce, that both ex-husband and ex-wife had agreed they would pay equally, in their marital settlement agreement. The doctrine is a defense to an action for contribution of an illegitimate or claimed illegitimate debt. In the case of such a debt, where a person voluntarily pays money to satisfy it with full knowledge of all the facts in the case, in the absence of fraud and duress, that person cannot recover the money back though the payment is made under protest. The rationale is that one who makes a payment is a volunteer if he or she has no right or interest of his own to protect by making the payment. Here, however, the debt was undisputed and not illegitimate. Therefore, it was appropriate to pay it and ex-husband was entitled to proceed for contribution against ex-wife. *BJE v. JBE*, 504 S.W.3d 822 (Mo.App. E.D. September 27, 2016).

ATTORNEYS' FEES

Attorney's Fees - PDL

A $50,000.00 award of attorney's fees PDL was affirmed pursuant to Section 452.355 RSMo, and was not barred by "res judicata" due to a previous award; 452.355 allows fees "from time to time." Also, the record sufficiently demonstrated the need for fees caused by husband's misconduct during the litigation in failing to disclose significant financial assets, and failing to comply with discovery requests. This award could also have been justified as a sanction for his behavior, said the court of appeals. *Serafin v. Serafin*, 493 S.W.3d 897 (Mo.App. E.D. July 26, 2016).

ORDERS OF PROTECTION

Orders of Protection-Dismissal after full order

Although not expressed explicitly in the statutes, the trial court has the authority to dismiss these actions upon motion of the petitioner, even after full orders have been granted. This is different from a motion to terminate an existing order (under 455.060.5) which would simply limit the duration of the full order; if the court grants a dismissal, it is as if the action was never filed, pursuant to Rule 67.02(b). *JG v. Gavigan*, 487 S.W.3d 509 (Mo.App. W.D. April 26, 2016).

Orders of Protection- stalking

The Eastern District reversed a full order of protection which was based upon two letters sent to the Respondent by Appellant concerning Respondent's then boyfriend, whom Appellant also used to date. Respondent also alleged that Appellant accessed her Facebook page and subsequently used Respondent's profile picture as her own. The Respondent admitted that the letters did not threaten physical, bodily harm. Rather, the letters made her feel uncomfortable. The standard for the entry of an order--- based upon stalking--- requires that the party against whom an order is sought engage in an unwanted course of conduct that causes alarm (fear of danger of physical harm) to another person…when it is reasonable in that person's situation to have been alarmed by the conduct. The Eastern District held that the facts proven at trial were insufficient to show that a reasonable person in Respondent's situation would fear a danger of physical harm from Appellant's actions. The court noted that nothing in the record demonstrated any physical encounters and that the correspondence from Appellant did not contain any threats.

K.L.M. v. B.A.G., ED Mo slip op. no. 104922 (filed October 10, 2017).