Case Law Update 2017

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Statutory Update for Family Law

The new laws from the 2016 legislative session below are appended to these materials. I gratefully acknowledge the contributions of my friend and Academy Fellow Carla Holste, Esq., who provided most of the following summaries of the new statutes:

SB 905/SB 992 – these two bills changed Sections **454.849** and **454.1728** by changing the effective date of the repeal and enactment of certain UIFSA provisions. The changes will make enforcement of child support easier for the State if the obligor resides outside the State of Missouri.

SB 838 – the bill made changes to **Chapter 455** by adding a new section (**455.010.9**) which permits a victim of domestic violence to be able to maintain her/his cell phone after petitioning the court for an Order requiring the wireless provider to transfer the rights for the wireless phone number to the petitioner.

HB 1877 – Makes changes to **Chapters 210 and 211**. Adds to the list of crimes that make an individual eligible to be listed on the Central Registry for abuse and neglect. In every case in which a person has pled guilty or been found guilty by a preponderance of the evidence of the specified crimes against children it requires the circuit court clerk to send a certified copy of the order/judgment to the Children's Division so that the individual's name can be added to the registry. This bill also requires consultation with foster care parents regarding a child's participation in extracurricular and other enrichment activities. Children over the age of 14 shall be consulted with regarding his/her case plan and if a child leaves foster care due to turning 18 years of age, Children's Division must provide them with a copy of their birth certificate, Social Security card, health insurance card, medical records and driver's license.

HB 1550- Makes changes to Section **452.375** requiring notice of right to enforce custody judgments by the sanction of contempt, among other changes intended to promote substantial sharing of custodial time.

HB 1599 – This bill establishes the Missouri Adoptee Rights Act which allows adoptees to obtain a copy of their sealed original birth certificate and medical information.

Case Law Update

JURISDICTION AND PROCEDURE

Contempt

A judgment which assessed a pre-determined fine for future proven events of non-compliance was erroneous under 452.400.6. This statute requires first that a determination be made that the offense occurred without good cause, before assessing punishment. Here, the trial court's amendments to its order, expressing that any future offense would still have to be proven, did not remedy the basic problem that a fine had already been assessed without the "good cause" determination. *Bialczak v. Bialczak*, E.D. Mo. Slip Opinion No. 103315, filed June 30, 2016.

Dismissal without prejudice

A dismissal without prejudice is not a final judgment and therefore not appealable. Here, the petitioner was incarcerated and sought to appear multiple different ways before the court. The determinations on the petitioner's motions for leave to so appear never appeared in the court record, although a dismissal without prejudice was ultimately granted to respondent. There was no motion in the record seeking a dismissal. The dismissal would only constitute a dismissal with prejudice if it effectively barred him from bringing his petition in the form sought. Ordinarily, when a court does not state a reason for a dismissal the court of appeals presumes the dismissal was based on grounds stated in a motion to dismiss; however, in this case there was no motion to dismiss upon which to rely. Petitioner sought a writ of habeas corpus ad testificandum, as well as having sought to appear by videotape deposition and by video conference, all of which capabilities exist in the court in which the case was pending, and in the prison in which the petitioner was incarcerated. *McNeal v. McNeal*, W.D. Mo. Slip Opinion No. 79203, filed July 12, 2016, 2016 WL 3733024, Motion for rehearing/transfer denied 8/30/16.

Impartial Court-Claim of Bias Asserted

The court of appeals reversed and remanded for new trial before a different judge, because the husband was deprived of his right to present relevant evidence and to have his case heard by an impartial finder of fact. A 47-page addendum to this opinion shows 47 pages of excerpts from the trial record which, when taken as a whole, caused the court of appeals to conclude that a reasonable person would find an appearance of impropriety and would doubt the impartiality of the trial judge. Cause remanded for trial before a different judge. *Farris v. Farris*, 485 S.W.3d 827 (Mo. Ct. App. 2016) filed April 18, 016.

Impartial Court- Claim of Bias Asserted

The court of appeals turned aside the appellant's claim of bias, stating it had not been preserved sufficiently for appeal but also noting that a judge's words, alone, do not constitute a basis for bias to be disqualifying.

"*Furthermore, for bias or prejudice to be disqualifying, it must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. An impersonal prejudice resulting from background experience is insufficient*."'

Barden v. Barden, E.D. Mo. Slip Opinion No. 103679, 2016 WL 3418697 filed June 21, 2016.

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, *after* 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.

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

Remand- scope of remand

On remand in which statute (452.370) requires trial court to consider all financial resources of the parties, "…implicit in considering all financial resources is the necessity of adducing and considering the current financial resources of the parties." *Barden v. Barden*, E.D. Mo. Slip Opinion No. 103679, 2016 WL 3418697 filed June 21, 2016, citing *Courtney*, 458 SW 3d 462, ED Mo 2015.

CHILD CUSTODY

Findings required - Section 452.375.6

The court of appeals remanded, for a second time, this judgment due to a failure to make the required findings listed under Section 452.375.6 RS Mo., in this paternity case. Such findings would, according to the court of appeals, have informed the court as to the reasons why a "2-2-5" custody plan would be in the child's best interests when the child resided in Saint Genevieve and another parent resided in Saint Louis County. Case contains an implicit finding that a 2-2-3 plan will not work where there is a long commuting distance. Case was reversed and remanded with specific instructions to take into consideration the distances between the parties' respective residences and to make the required findings under the statute. *MPP v. RRE*, E.D. Mo. Slip Opinion No. 103390, filed May 31, 2016.

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*, ED Mo Slip Op. No. 104053, filed December 6, 2016.

Guardianship - Standard of Proof - Clear and Convincing

A guardianship under Section 475 was reversed and vacated where the judgment below was not based upon "clear and convincing" evidence. A case of first impression as to what the level of proof required for a guardianship is. The trial court should not get into the issue of best interests before first finding a parent is unable, unwilling, or unfit to discharge parental responsibilities. Section 475.030.4(2) should not be a substitute for a Section 211 proceeding. *In the Matter of ALR; KR, v. ALS*, W.D. Mo. Slip Opinion No. 79123, filed July 26, 2016.

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 as an exemplar of such a joint physical custody plan

Morgan v. Morgan, ED MO Slip Opinion No. 103426, filed August 30, 2016.

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 thought 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*, ED Mo Slip Opinion No. 103426 filed August 30, 2016.

Modification - Joint to Sole

Modification from joint legal custody to sole legal custody must show a substantial change in circumstances. A pattern of noncompliance with a custody decree may be a substantial change warranting modification, but isolated occurrences that do not affect the complaining parent's relationship with the children, do not. The court of appeals affirmed the trial court's judgment denying a motion to modify filed by the father against the mother. *Ndiaye v. Seye*, 489 S.W.3d 887 (Mo. Ct. App. 2016) filed May 10, 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*, WD Mo. Slip Opinion No. 79113, filed 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,* ED Mo Slip Opinion No. 103269, filed 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*, WD Mo slip op. no 79943 filed February 28, 2017.

Standard of Review - "against the weight of the evidence"- trial judgment affirmed-

Joint legal custody award was challenged by the appellant on an "against the weight of the evidence" basis. Such a challenge does not allow challenges to the credibility of the witnesses, nor does it change the standard of review in which evidence is seen in a light most favorable to the trial court's judgment. The judgment was affirmed. *Scrivens v. Scrivens*, 489 S.W.3d 361 (Mo. Ct. App. 2016) filed May 19, 2016.

Standard of Review - "against the weight of the evidence"- trial judgment reversed-

An award of joint legal custody and substantial unsupervised visitation to the biological father was reversed due to its inconsistency with the court's own findings of record that the parties showed no commonality of beliefs, nor any ability to function jointly as a parental unit. Unsupervised visitation was also reversed, in light of a litany of problematic episodes with the biological father, which involved ongoing substance abuse, alcohol abuse, physical abuse, and dangerous decisions. The court of appeals indicated that joint legal custody is a preference, not a presumption. The court also cited, in a footnote, language from *Ivie v. Smith*, 439 S.W. 3d 189 which recently indicated that the same standard of review applies to all court tried civil cases, moving away from prior language indicating that the appellate courts give more deference for the trial court's judgment in a custody matter than in other matters. *Reno v. Gonzales*, 489 S.W.3d 900 (Mo. Ct. App. 2016) filed May 10, 2016.

Termination of parental rights

The termination of parental rights in this case was reversed and remanded due to a lack of "clear and convincing evidence" at the trial level that father's ongoing use of marijuana, despite court orders to cease, constituted a chemical dependency as set forth in Section 211.447.5(2) RSMo. The evidence clearly showed father would not, but not that he could not. Also, the court noted a plain error that had not been raised or briefed – an erroneous statement of the law at the trial level in which the trial court stated three bases for termination which were expressed in the disjunctive, such that it was impossible to determine from the judgment upon which basis the court relied in terminating the parental rights of the father. *In the Interest of: KMA-B, E.D. Mo. Slip Opinion No. 103681, filed July 12, 2016.*

Third party custody- independent action authorized under 452.375.5(5)-ON TRANSFER TO MO SUP CT.

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.

Trial judge dismissed their petition 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. Consistent with *McGaw v McGaw*, 468 SW 3d 435 (Mo. App. WD 2015), and *In Re TQL*, 386 SW 3d 135 (Mo. Banc 2012). *Hanson v. Carroll*, ED Mo slip op. no. 103530, filed November 22, 2016, ON TRANSFER to Missouri Supreme Court as of February 28, 2017.

CHILD SUPPORT

Evidence -

The trial court erred, on re-hearing after a remand, in finding that former husband earned $50,000.00 per year on his pending modification claim, when there was a new tax return before the court which showed that the husband earned more than three times that amount. *Barden v. Barden*, E.D. Mo. Slip Opinion No. 103679, filed June 21, 2016.

Child Support-Line 11 Visitation Credit

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*, WD Mo Slip Op. No. 79077, filed October 4, 2016.

MAINTENANCE

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*, E.D. Mo. Slip Opinion No. 103035, 2016 WL 2994240, filed May 24, 2016. *Application for Transfer, Post-opinion*, pending as of September 6, 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*, ED Mo Slip Op. No. 103872, filed 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*, ED Mo Slip Op. No. 103930, filed 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*, ED Mo slip op. nos. 104388 and 104740 filed 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*, ED Mo slip op. nos. 104388 and 104740 filed March 28, 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*, ED Mo Slip Op. No. 103872, filed 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*, WD Mo slip op. no. 79565, filed 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*, ED Mo Slip Opinion No.103526, filed 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*, ED Mo Slip Op. No. 103138, filed November 15, 2016.

LAGERS pension

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. Joyner was inapposite to this case because the award in Joyner was treated as a judgment for future, continent maintenance. *Landewee v. Landewee, (2016 WL 3919617* E.D. Mo. Slip Opinion No. 102483, Southern Division, filed July 19, 2016), *Application for Transfer, Post-Opinion,* pending as of 9/2/16.

Statute of Limitations -

Section 516.350, as a statute of limitations, 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. Ct. App. 2016) filed May 3, 2016.

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*, Mo. App. ED slip opinion filed August 30, 2016.

"Voluntary Payment Doctrine" as a dense 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*, ED Mo Slip Opinion No.103526, filed 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*, E.D. Mo. Slip Opinion No. 103696, filed 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. Ct. App. 2016) filed April 26, 2016.