

# Joinder of third parties to allocate property interests in divorce cases<sup>1</sup>

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Division of property issues raised in complex divorce cases may not always be contained within the theatre of battle inhabited by the adverse spouses alone. In these cases, the interests of non-parties, individuals or entities, may be affected, sometimes significantly, by the outcome of the divorce litigation. The interests of these non-parties may merit consideration as much as those of the married parties themselves. Similarly, in certain circumstances the court may require the participation of others beyond that of the spouses themselves, in order to properly divide property which would, by any definition, constitute marital property being shielded or sheltered by individuals or entities outside the marriage, or nominally owned by them. Third party practice in these cases affords the court a mechanism to protect, determine and adjudicate the interests of all who claim a legitimate interest in the proceedings, and to project its authority over property interests not in the possession or control of the married parties themselves. This article examines the contexts within which third party practice may arise in a complex dissolution of marriage case to determine the ownership and disposition of these interests.

## I. Joinder

The Missouri Rules of Civil Procedure provide mechanisms for the addition of third parties to a pending case through both joinder and intervention. In this article, we focus upon joinder. The rules for joinder of third parties to the case are as follows:

### 52.04. Joinder of Persons Needed for Just Adjudication

(a) **Persons to Be Joined if Feasible.** A person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

(b) **Determination by Court Whenever Joinder Not Feasible.** If a person as described in Rule 52.04(a)(1) or Rule 52.04(a)(2) cannot be made a party, the court shall

determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: (i) to what extent a judgment rendered in the person's absence might be prejudicial to that person or those already parties; (ii) the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (iii) whether a judgment rendered in the person's absence will be adequate; and (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Rule 52.04 Mo. R. Civ. Pro.<sup>2</sup>

The Rule requires the trial court to analyze a request for joinder by first determining whether sufficient grounds exist to join a person not already a party to the litigation.<sup>3</sup> If sufficient grounds exist but for what-

1. The authors are indebted to Anita I. Rodarte of Kansas City, Missouri, for her many and substantial contributions to the content, research, and scope of the topic treated in this article.
2. Rule 52.04 is substantially similar to Rule 19 of the Federal Rules of Civil Procedure.
3. Rule 52.04 (a) Mo. R. Civ. Pro.

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ever reason the non-party cannot be joined, the court must then examine the particular case in the light of the factors in subdivision (b) to determine whether the action should proceed in the absence of the non-joined party or should be dismissed.<sup>4</sup> A decision to proceed under paragraph (a) without a party who would otherwise have been joined means the absentee is merely a "necessary" party.<sup>5</sup> Such a determination stands in contrast to a decision to dismiss under paragraph (b), which evidences a determination that the absentee is not only a "necessary" party, but also an "indispensable" party as well.<sup>6</sup> While a Missouri court may proceed with a cause of action in the absence of the joinder of a necessary party, it cannot proceed in the absence of the joinder of an indispensable party.<sup>7</sup> The failure to join an indispensable party is "fundamental" and may even be considered by the court on its own motion.<sup>8</sup>

## II. Joinder In Divorce

The prevailing view concerning joinder of third parties in dissolution proceedings is that, ". . . although the spouses are ordinarily the only proper parties to divorce litigation, joinder or intervention of third parties is permissible and necessary where such parties hold or claim some interest in property involved in the proceedings."<sup>9</sup> Three cases illustrate the differences between (1) a proposed third party whom the court determined was not necessary; (2) a necessary third party; and (3) an indispensable third party, whose unavailability warranted dismissal.

In the first case, *Vanderson v. Vanderson*, the husband, Donald, appealed from a judgment dissolving his marriage to Annie.<sup>10</sup> Donald may or may not have married Annie in 1978, but he unquestionably did marry Gilly in 1980. The trial court, believing that Donald did in fact marry Annie and that therefore, his later marriage to Gilly was invalid, proceeded to dissolve his marriage to Annie. Donald appealed, claiming the trial court erred in dissolving the marriage due to its failure to join an allegedly indispensable party,

Gilly.<sup>11</sup> Donald claimed that Gilly had interests in the marital property, and that her ability to protect those interests was impaired by the disposition of the divorce in her absence.<sup>12</sup> However, the Missouri Court of Appeals determined Gilly had no property interests to protect, including the validity of her marriage to Donald. "The practical effect of the . . . decree may be to void the marriage of Gilly and [Donald]. However, Gilly's ability to protect her interest in the marriage is not seriously impaired or impeded by her non-joinder because she and [Donald] can simply remarry once [Donald's] divorce from [Annie] becomes final. [Donald] has never suggested that he would be unwilling to remarry Gilly."<sup>13</sup> Insofar as Gilly had no interests to protect, and complete relief could easily be afforded Donald and Annie in Gilly's absence, Gilly was neither necessary nor indispensable as a party to the *Vanderson* divorce.

The second case, *Ravenscroft v. Ravenscroft*,<sup>14</sup> is among the most oft-cited of the third party divorce cases in Missouri. In *Ravenscroft*,

Robert and Ramona believing they would not qualify for a loan, acquired their home by arranging for title to be taken in the name of Robert's parents. Despite the title on the residence, Robert and Ramona lived in the home, made the initial down-payment themselves, and retired the mortgage entirely on their own.<sup>15</sup> The trial court, in its judgment, ordered Robert to cause title to be conveyed to Ramona and ordered a financial penalty upon his failure to do so; Robert appealed, claiming the residence was not subject to disposition in the divorce, since it was owned by his parents.<sup>16</sup> The Missouri Court of Appeals found Robert's assertion to be "fatuous"; however, the court acknowledged that the fact that title was held in the names of Robert's parents was an impediment to disposition of the residence in the divorce.<sup>17</sup>

Absent jurisdiction over [Robert's parents] as record title holders . . . no judgment in this case can finally settle title to the Woodland property. Additionally, any judgment which fails to bind these additional par-

4. *Vanderson v. Vanderson*, 668 S.W.2d 167, 169-70 (Mo. Ct. App. 1984).
5. *Vanderson v. Vanderson*, 668 S.W.2d 167, 170 (Mo. Ct. App. 1984) citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S. Ct. 733, 742[11-13] 19 L.Ed.2d 936 (1968).
6. *Vanderson v. Vanderson*, 668 S.W.2d 167, 170 (Mo. Ct. App. 1984) citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 742[11-13] 19 L.Ed.2d 936 (1968).
7. *Id.* at 170, citing *Massey v. Long*, 608 S.W.2d 547, 551 (Mo. Ct. App. 1980).
8. *Id.* at 169, citing *Neal v. Drennan*, 640 S.W. 2d 132, 136 (Mo. Ct. App. 1982).
9. *Ravenscroft v. Ravenscroft*, 585 S.W.2d 270, 274 (Mo. Ct. App. 1979), *disavowed on other grounds*, *Hoffman v. Hoffman*, 676 S.W.2d 817 (Mo. en banc 1984).
10. *Vanderson v. Vanderson*, 668 S.W. 2d 167 (Mo. Ct. App. 1984).
11. *Id.* at 169.
12. *Id.* at 170.
13. *Id.* at 171.
14. *Ravenscroft v. Ravenscroft*, 585 S.W. 2d 270 (Mo. Ct. App. 1979).
15. *Id.* at 271.
16. *Id.* at 272.
17. *Id.* at 274.

ties cannot foreclose the prospect that they may in the future assert and establish a claim to the property reducing or eliminating values used in the dissolution case to balance marital property distribution. Ownership by outside parties of an interest in marital property therefore directly affects the function of the trial court in deciding the issue of just division of marital assets and in settling titles.<sup>18</sup>

The Ravenscroft court engaged in a discussion of Rule 52.04(a), finding that the rule allows either spouse to move to add the third parties. "Assumed as conditions to joinder of additional parties to the dissolution action are personal or subject matter jurisdiction, both of which exist in the subject case, requiring that [Robert's parents] be joined for conclusive adjudication of all claims to the Woodland property."<sup>19</sup> Since both personal jurisdiction existed over Robert's parents, and subject matter jurisdiction existed over the pending claims regarding their interests, Robert's parents were necessary parties and should have been joined so as to settle title and ownership of the real property constituting marital property; complete relief could not be af-

forded in their absence.

Finally, *Clark v. Fitzpatrick*, although not a divorce case, aptly illustrates a trial court's inability to proceed absent an indispensable party.<sup>20</sup> *Clark* involved a multi-count petition against both Ruby, the surviving spouse of decedent Raphael, and her lawyer, Tweedie. The plaintiffs, Raphael's siblings, claimed that Ruby and Tweedie had illegally conspired to convert the decedent Raphael's assets near the time of his death. Ruby died while the case against her was pending, and the plaintiffs never sought to make Ruby's personal representative a party to the case. The trial court granted Defendant Tweedie's motion for summary judgment. The Missouri Court of Appeals affirmed, noting that Ruby's personal representative, who stood in Ruby's place as a claimant of record title in issue as well as with a marital interest in the property, was an indispensable party. Since Ruby's personal representative was an indispensable party, the fact that they were never named as a party in the case precluded a final resolution of all claims regarding the assets of Raphael's estate.<sup>21</sup>

Note that not every instance of

joint ownership with third parties requires that joinder of the third party occur. Where the question does not involve the rights of the third party with respect to the property, but only the relationship of the husband and wife in the property there is no need for joinder.<sup>22</sup> For example, where a husband and wife hold a marital interest in various tracts along with various third parties, so long as the interests of third parties are not divested, Missouri courts have deemed it appropriate to award the marital interest to one or the other of the parties.<sup>23</sup> However, if the nature of the action could lead to the divestiture of a third party's interest, joinder of that party must occur.<sup>24</sup>

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### III. Additional Examples Of Third Party Property Interests In Divorce.

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#### A. Interests in Trusts

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Sometimes a question may arise as to the status of specific property held by a trust. The fundamental nature of a trust is a division of title: the trustee holds legal title and the beneficiary holds equitable title.<sup>25</sup> While a trustee holds legal title to trust property, the very existence of the trust may be subject to the settlor's discretion to revoke. This power to revoke "has an important effect upon how trust assets are treated for purposes of divorce."<sup>26</sup> While a trial court may not have authority to award or apportion specific property titled in the name of a trust between husband and wife, in certain circumstances it can characterize and divide the equitable interest of the beneficiary who is also a party.<sup>27</sup> For instance, in *Seggelke v. Seggelke*<sup>28</sup>, the Wife asserted on appeal that the trial court erred by not joining the trustee of the J & R Seggelke Living Trust as a party to the litigation.<sup>29</sup> The trust owned a certain annuity which the wife contended the court lacked the ability to award. The appellate court acknowledged that "Wife is correct that the trustee, not either party individually, holds title to the . . . account."<sup>30</sup> The court went on to conclude that while "the trial court

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18. *Id.*, where it is further asserted that the title characteristics of real estate in particular more forcefully militate in favor of joinder of third-party claimants.
  19. *Id.* at 275.
  20. *Clark v. Fitzpatrick*, 801 S.W. 2d 426 (Mo. Ct. App. 1990).
  21. *Id.* at 430.
  22. *Dreyer v. Dreyer*, 657 S.W.2d 363, 364 (Mo. Ct. App. E.D. 1983).
  23. *Id.* at 364.
  24. *Id.*, *But see Prange v. Prange*, 755 S.W.2d 581, 593 (Mo. Ct. App. 1987). (When all the necessary parties to the case are not joined, so as to allow a trial court to declare title to property, there may be still be sufficient evidence in the record to demonstrate that certain litigants do not have an interest in the property).
  25. *Moore v. Moore*, 189 S.W.3d 627, 636 (Mo. Ct. App. 2006).
  26. Brett R. Turner, *Division of Third-Party Property in Divorce Cases*, 18 J. AM. ACAD. MATRIM. LAW 375, at 393 (2003).
  27. *Seggelke v. Seggelke*, 319 S.W.3d 461, 467 (Mo. Ct. App. 2010).
  28. *Id.*
  29. *Id.*
  30. *Id.*

does not have authority to award the actual account to Wife or apportion the actual account between Husband and Wife . . . , the equitable interest in the trust is subject to classification and division by the trial court.”<sup>31</sup> However, it is important to note that *Seggelke* does not reference or discuss to the language of the Missouri Uniform Trust Code that states that “[a] beneficiary’s interest in a trust that is subject to the trustee’s discretion does not constitute an interest in property or an enforceable right even if the discretion is expressed in the form of a standard of distribution or the beneficiary is then serving as a trustee or co-trustee.” Mo. Rev. Stat. § 456.5-504 (2006).

In other cases, such as *Baldwin v. Baldwin* where a party holds the power to revoke, Missouri courts have affirmed an award of assets held in the name of a party’s revocable trust without even commenting upon the absence of the trustee as a party.<sup>32</sup> At least one influential case, *Moore v. Moore*<sup>33</sup>, can be read for the proposition that the trustee of a revocable trust need not be joined as a party if one party is the sole grantor and sole beneficiary and that party has the present right to terminate the trust.<sup>34</sup> In another such case, coincidentally also called *Moore*, Wife was the sole trustee and beneficiary of a trust established by others, with an unfettered right of access to the assets. Therefore, she held both legal and equitable title and the trial court erred in classifying Wife’s trust income as her non-marital property.<sup>35</sup> This is because unity of title exists in a party who is the sole trustee and sole beneficiary making joinder of the trustee unnecessary.<sup>36</sup> Similarly, in *Roche v. Roche*, the Husband was the sole grantor and trustee of the trust and he had the present right to terminate the trust. Husband argued that the court lacked jurisdiction to award property held in the trust because the trust was not joined as a party.<sup>37</sup> The court found that Husband suffered no prejudice by the court’s failure to join the trustee since Husband was awarded the trust property.<sup>38</sup> Similarly, a convey-

ance of joint property to a trust in which both Husband and Wife were the trustees did not remove the asset from the marital estate, since Husband as Grantor retained the right to revoke the trust at any time.<sup>39</sup>

## B. Interests in Business Entities

Trial courts do not have the authority to enter a decree dividing property that is not owned by either spouse.<sup>40</sup> Accordingly, where the specific assets of a business are in dispute in a divorce case, the type of business entity in question will determine whether the court has the power to consider or allocate the assets and income of the entity. The analysis turns upon the independent legal existence of the entity. For instance, sole proprietorships and general partnerships are, for legal purposes, indistinct from their owners; thus, the assets of a proprietorship

or a general partnership are always subject to classification and division in a Missouri divorce:

A partnership is not a legal entity separate from the individual partners . . . any assets accumulated in the partnership after operating expenses are paid are the undistributed income and profits. A partner’s share of the profits and surplus is that partner’s personal property, so any property bought with partnership profits after the marriage is marital property . . . .<sup>41</sup>

On the other hand, corporations and limited liability companies are distinct entities which are allowed to own property, independent of the owner of the stock.<sup>42</sup> As such, unless a corporation or LLC is made a party to the dissolution action, the court will lack the authority to award property owned in the name of a corporation, even if one of the spouses is the sole shareholder.<sup>43</sup>

31. *Id.*
32. *Baldwin v. Baldwin*, 905 S.W.2d 521, 525 (Mo. Ct. App.1995); “In light of the extensive nature of the power to revoke a trust, the general rule is that assets titled in the name of a revocable trust are the individual property of the settlor . . . the power to revoke the trust, for all practical purposes, is tantamount to the power of ownership.” Brett R. Turner, *supra* note 26, 394-395 (2003).
33. *Moore v. Moore*, 111 S.W.3d 530 (Mo. Ct. App. 2003) (*Moore I*).
34. *Id.*
35. *Moore v. Moore*, 189 S.W. 3d 627, 637 (Mo. Ct. App. 2006) (*Moore II*).
36. *Id.* at 636.
37. *Roche v. Roche*, 289 S.W.3d 747, 754 (Mo. Ct. App. 2009).
38. *Id.* at 756.
39. *Jenkins v. Jenkins*, 368 S. W. 3d 363 (Mo. Ct. App. 2012).
40. *In re Marriage of Ward*, 659 S.W.2d 605, 607 (Mo. Ct. App. 1983) citing *In re Marriage of Schulz*, 583 S.W.2d 735, 742 (Mo. Ct. App.1979).
41. *Selby v. Selby*, 149 S.W. 3d 472 (Mo. Ct. App. 2004); see also § 358.260, Mo. Rev. Stat. and *Coleberd v. Coleberd*, 933 S. W. 2d 863 (Mo. Ct. App. 1996). This is not the general rule; in most states, a partnership is an independent entity which is capable of owning property. See Brett R. Turner, *supra* note 26, at p. 392 and the citations therein.
42. See §347.061.1, Mo. Rev. Stat. Presumably the same would apply regarding the LLC interest.
43. *In re Marriage of Thomas*, 199 S.W.3d 847, 865 (Mo. Ct. App. 2006).

The trial court is limited to awarding the ownership interests of the parties in the entity itself.<sup>44</sup> However, the court *does* have the authority over a party who is a sole shareholder of a company to order them to take certain actions.<sup>45</sup> Additionally, where all necessary parties are joined in the action, the trial court has the authority to set aside the corporate facade (pierce the corporate veil) to establish the true ownership of the company. In the process, the dissolution court may disregard any subterfuge to determine the actual facts and accomplish its duty to determine and divide the marital property.<sup>46</sup>

#### IV. Waiver

So long as a party not joined does not occupy the status of an indispensable party, where a party has made the conscious choice not to attempt to exercise the right to seek joinder, they will likely be deemed to have waived their right assert joinder on appeal based upon the concept of invited error.<sup>47</sup> However, even if neither party raises the issue, the court may, *sua sponte*, address the failure to join an indispensable party<sup>48</sup>.

#### V. Intervention

The mechanism of intervention might also be employed to assert an interest in property the intervenor believes is threatened by the pending

case. For example, the facts of Ravenscroft could just as easily have been that Robert's parents, in whose name the residence was actually titled, moved to intervene to protect their ownership of the home. They could have done so pursuant to Rule 52.12:

#### 52.12. Intervention

**Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(a) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common; or (3) when the validity of a statute, regulation or constitutional provision of this state, or an ordinance or regulation of a governmental subdivision thereof, affecting the public interest, is drawn in question in any action to which the state or governmental subdivision or an officer, agency or employee thereof is not a party, the court may in its discretion notify the chief legal officer of the state or governmental

subdivision thereof, and the state or governmental subdivision may in the discretion of the court be permitted to intervene, upon proper application.

(b) **Procedure.** A person desiring to intervene shall serve a motion upon all parties affected thereby. The motion shall state the grounds therefor, and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.

Rule 52.12 Mo. R. Civ. Pro.

The intervention of Robert's parents would have fallen under paragraph "a", since the disposition of Robert and Ramona's divorce case may have impaired or impeded their ability to protect their ownership, unless the trial court ruled that their interests were adequately protected by the existing party Robert.

#### VI. Conclusion

In a complex dissolution of marriage case, Rules 52.04 and 52.12 provide a mechanism to litigants to clarify property interests in the otherwise cloudy circumstance in which a resolution would not otherwise be possible absent the participation of all who may claim an interest.

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44. *Wisdom v. Wisdom*, 316 S.W.3d 499, 502 (Mo. Ct. App. 2010); *In re Marriage of Ward*, 659 S.W.2d at 607. For instance, where the parties have agreed in a consent settlement agreement that properties held in the corporate name are marital assets and have had the court to distribute those assets in their agreement, the parties, by their actions, have created circumstances that empower the trial court to distribute such assets in accordance with the terms of their agreement. *Secor v. Secor*, 790 S.W.2d 500, 502-03 (Mo. Ct. App. 1990). While such an agreement is binding upon the spouses, it is not binding upon third parties. *Id.*

45. See *Mehra v. Mehra*, 819 S.W.2d 351, 356 (Mo. en banc 1991) and *Graves v. Graves*, 967 S.W.2d 632, 636 (Mo. Ct. App. 1998), two cases in which actions affecting the corporations were taken and no joinder was deemed necessary.

46. *Bond v. Bond*, 161 S.W.3d 859, 862 (Mo. Ct. App. 2005).

47. *Feinstein v. Feinstein*, 778 S.W.2d 253, 258 (Mo. Ct. App. 1989).

48. See *In re Estate of Pilla*, 735 S.W.2d 103, 105 (Mo. Ct. App. 1987); *Riley v. Riley*, 603 S.W.2d 32, 35-36 (Mo. Ct. App. 1980); *Clark v. Fitzpatrick*, 801 S.W.2d 426, 429 (Mo. Ct. App. 1990).