

## 2009 Missouri Annual Law Update

### Family Law CLE<sup>1</sup>

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## PROCEDURE

### ***Attorney withdrawal-***

Trial court abused its discretion when it allowed counsel to withdraw on the day of trial. The litigant had no reasonable notice of the withdrawal and was provided with no opportunity to employ other counsel. *Bledsoe v. Bledsoe*, 244 S.W.3d 204 (Mo. Ct. App. 2008)

### ***Bond Requirement of Section 452.455.4 RSMo –***

Western District says the fulfilling the bond requirement is what gives the trial court personal jurisdiction *over the non-movant* to proceed. This personal jurisdiction is waived if non-compliance with the bond requirement is not raised in the respondent's responsive pleadings (not subject matter jurisdiction). *Roach v. Hart*, 249 S.W.3d 224 (Mo. Ct. App. 2008). Query: If the statute is mandatory, then why can it be waived? However, see also *State ex rel. Burton v. Swann*, 258 S.W.3d 563 (Mo. Ct. App. 2008), which speaks in terms of “judicial competence” and not “personal jurisdiction,” and says non-compliance with the bond requirement as a pre-requisite to proceeding **cannot** be waived. Finally, the Supreme Court suggests it may be unconstitutional because it doesn't give the aggrieved movant the opportunity to challenge whether his claimed arrearage exceeds 10,000 but then demurs because no one requested such a hearing in this case; remanded for further evidence. *J.C.W. ex rel Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. 2009)

### ***Contempt-right to counsel-***

There was a failure of due process where the contemnor was not informed of his right to counsel and where the trial court denied contemnor's request for continuance to obtain counsel. Procedural due process requires that one charged with contempt be advised of the charges and have a reasonable opportunity to defend the charges and have the right to be represented by counsel and have a chance to testify and call other witnesses. An unrepresented accused must be advised of his right to counsel and be given an opportunity to obtain counsel. *Smith v. Kintz*, 245 S.W.3d 257 (Mo. Ct. App. 2008).

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<sup>1</sup> This material was written primarily by Cary Mogerman of Zerman and Mogerman in St. Louis, Missouri. The presenter altered and updated the materials as necessary.

### ***Default Judgment vs. Consent judgment***

A consent judgment in which a party entered into a separation agreement and affidavit for judgment is not a “default” judgment under Rule 74.05 MRCP even though the party filed no entry or responsive pleading. Therefore, the provisions of the rule for setting a default judgment aside are inapplicable. *Grasse v. Grasse n/k/a Schindeler*, 254 S.W.3d 174 (Mo. Ct. App. 2008).

### ***Default judgment – motion to set aside***

One should cite all relevant rules of civil procedure in your motion to modify. Rule 74.05(d) pertains to motions to set aside default judgments. Under that rule, a motion to set aside is an independent action, even if filed within 30 days after the default judgment. Prior to the rule change, it was an authorized after-trial motion and was equivalent to an authorized after-trial motion. Under the *old* rule the court’s jurisdiction extended 90 days under Rule 81.05(a). *Breihan v. Breihan*, 269 S.W.3d 38 (Mo. Ct. App. 2008).

### ***Default judgment – no right to appeal***

One cannot appeal directly from a default judgment without first filing a motion to set aside the default judgment unless your appeal presents questions concerning the trial court’s subject matter jurisdiction or the sufficiency of the plaintiff’s petition. *Cooper v. Cooper*, 262 S.W.3d 680 (Mo. Ct. App. 2008).

### ***Enforcement of Settlement—***

The trial court erred in enforcing a purported settlement based on the credibility of one party’s testimony (at the time of attempted enforcement) as to what the settlement was. No terms had ever been spread on the record. The case contains a good summary of the case law on this topic. *Freeland v. Freeland*, 256 S.W.3d 190 (Mo. Ct. App. 2008)

### ***Garnishment- Missouri Local Government Employees Retirement System***

Cannot garnish for maintenance, but can for child support, per their statute. Per 70.695, MOLAGERS does not allow income withholding for other than child support. Excellent discussion of statutory interpretation. *Smith v. Missouri Local Government Employees Retirement System*, 235 S.W.3d 578 (Mo. Ct. App. 2007)

### ***Interest on arrearages–***

Must be awarded with respect to all delinquent payments, even if failure to pay was in good faith and in reliance on what was thought to be a valid court order. *DeHaan v. Lombardo*, 258 S.W.3d 826 (Mo. Ct. App. 2008)

### ***Judicial Estoppel***

Involves the doctrine of judicial estoppel. Husband had said in bankruptcy that he did not have ownership in company and later, in the divorce, claimed that he did. According to the court of appeals, his prior denial of ownership did not mean that he did not have a marital interest. *Vinson v. Vinson*, 243 S.W.3d 418 (Mo. Ct. App. 2007).

### **Long Arm Jurisdiction-**

Limited to contacts set forth in Rule 54.06(b). The trial court erroneously found in personam jurisdiction existed over an Illinois resident in a Missouri divorce who owned realty in Missouri, pursuant to Rule 54.06(a). However, pursuant to Rule 54.06(c), only Rule 54.06(b) is applicable to a dissolution of marriage case pursuant to this court's reading of that rule.

As articulated in the opinion: *“In the matter before us the trial court proceeded under Missouri Supreme Court Rule 54.06, (FN3) which sets forth the long-arm jurisdiction for dissolution of marriage actions as well as all other civil actions. Under Rule 54.06, the trial court has two possible avenues for obtaining personal jurisdiction over Husband in this dissolution action. Rule 54.06(a) authorizes in personam jurisdiction over a person outside of Missouri who, in person or through an agent:*

- (1) Transacts any business within this state;*
- (2) Makes any contract within this state;*
- (3) Commits a tortious act within this state;*
- (4) Owns, uses or possesses any real estate situated in this state;*
- (5) Contracts to insure any person, property or risk located within this state at the time of contracting;*
- (6) Engages in an act of sexual intercourse within this state with the mother of a child within or near the probable period of conception of that child.*

*Additionally, Rule 54.06(b) authorizes in personam jurisdiction over a person: whether or not a citizen or resident of the state, who has lived in lawful marriage within this state, as to all civil actions for dissolution of marriage or for legal separation and all obligations arising for maintenance of a spouse, support of any child of the marriage, attorney fees, suit money or disposition of marital property, if the other party to the lawful marriage lives in this state or if a third party has provided support to the spouse or to the children of the marriage and is a resident of this state.*

Per court: *Notably, section (c) of Rule 54.06 states, “[o]nly causes of action arising from the acts or conduct enumerated in Rule 54.06(a) or Rule 54.06(b) may be asserted against a defendant in an action in which jurisdiction is based on this Rule 54.06.” (FN4) Accordingly, to acquire personal jurisdiction over a non-resident party under Rule 54.06(a), the cause of action must arise from the acts or conduct set forth in Rule 54.06(a). Likewise, to acquire personal jurisdiction over a non-resident party under Rule 54.06(b), the cause of action must arise from the acts or conduct set forth in Rule 54.06(b).”*

Query: Can't the trial court at least divide the property that is in Missouri?

*State ex. rel. Gleeson v. Smith, **CAUSE ORDERED TRANSFERRED TO SUPREME COURT ON 11/25/2008***

***Remand due to insufficient trial record-***

Remand is appropriate where the record on appeal is inadequate through no fault of the parties. Here, an equipment malfunction resulted in the failure to record Appellant's entire case at trial. *Lytinen v. Lytinen*, 244 S.W.3d 798 (Mo. Ct. App. 2008).

***Re-opening for new evidence-***

Will not be allowed absent proof the evidence was not available prior to trial, assuming due diligence was employed, and without proof that the result would have been materially different had the new evidence been utilized at trial. *Pijanowski v Pijanowski*, 272 S.W.3d 321 (Mo. Ct. App. 2008)

***Rule 74.06 Motion to set aside- limited in scope***

Relief under this rule is limited to setting aside a judgment only for the reasons set forth. Where wife sought to set aside a judgment based on fraud because the home she was to receive was damaged, and the trial court found she could not prove fraud, the trial court erred in providing her with alternative relief---here, an award of monetary damages against husband for the waste done to the home. The court had jurisdiction only to set aside the judgment and only if the pleaded ground, fraud, was proven. *Young v. Young*, 273 S.W.3d 86 (Mo. Ct. App. 2008)

***Quashing service of process***

Once a trial court grants a motion to quash service of process, the trial court has no jurisdiction to rule on the merits of Respondent's motion to dismiss. *Manzella v. Dorsey, et . al.*, 258 S.W.3d 501 (Mo. Ct. App. 2008).

### ***Unclean Hands-***

The rule that a party not in compliance with the court's order is not entitled to relief does not apply to an appeal of an adverse judgment – only to requests for affirmative relief. *Blevins v. Blevins*, 249 S.W.3d 871 (Mo. Ct. App. 2008)

### ***Appeal – Application of New Rule 78.07 on post-trial motions***

The Western District Court of Appeals disregarded this Rule to avoid an injustice. The Rule provides “allegations of error relating to form or language of a judgment must be raised by motion to amend the judgment in order to be preserved for appellate review.” Here, the Western District disregarded the Rule to allow the appellant to amend the language of the judgment in order that the judgment reflects what appeared to have been intended by the trial court. *Saxton v. Saxton*, W.D. Mo No. 66293, filed 4/24/07, but for different treatment, see *Milone v. v. Duncan*, 245 S.W.3d 297 (Mo. Ct. App. 2008)

### ***Statute of Limitations on Judgments-***

A contempt judgment was unenforceable when it was based upon a maintenance judgment which had been presumed paid due to the elapse of ten years. *Halamicek Halamicek*, 254 S.W.3d 260 (Mo. Ct. App. 2008).

## CHILD SUPPORT

### ***College Expenses and child support beyond 21, by agreement, child must still comply with reporting requirements-***

Good discussion of college issues. Discusses car expenses, car insurance and maintenance. The parties separation agreement required that Father pay daughter \$2,500 per year in child support until she completed college and to pay her car expenses until she completed college. He paid did most of these expenses and more but not tuition so mother sought contempt. Court found the car expense to be in the form of child support but also found that daughter never gave him the statutorily required notices of 452.340.5. Appeals Court found that the language did amount to an agreement to pay beyond age 21, however that the statutory requirements must still be met and thus his obligation abated during the period when he did not get the requisite notices. *Appling v. Appling*, 156 S.W.3d 454 and *Smith v Smith* 94 S.W.3d 394, college is a form of child support *Meyer v. Meyer* 77 S.W.3d 40. *Shands v. Shands*, 237 S.W.3d 597 (Mo. Ct. App. 2007)

### ***College grades: Adequacy of notice***

Parties were divorced in 1996. Custodial father received child support. Son went to college in 2000. Son gave mother copy of college's conditional acceptance letter. Child always gave grades to Mother via an online access service. Mother did not pay child support. Father sought enforcement and mother claimed the notice from the online service did not comply with Sec. 452.340. The COA reversed. The court held that Sec. 452.340.5 requires the child to provide each parent with a "transcript or similar official document" from the institution showing grades, credits and credits earned. The Court held that the transcript did not need to be an official document. Therefore the parent should receive actual notice in the form of an "inalterable online transcript containing all the information required by the statute." *Waddington v. Cox*, 247 S.W.3d 567 (Mo. Ct. App. 2008).

### ***Dependency exemption- may be unilaterally revoked—when—***

Effective July 2, 2008, amendments to IRS Regulation 1.152-4(e)(3) allow the custodial parent to unilaterally revoke an earlier release of the dependency exemption to the non-custodial parent. This new unilateral revocation rule effectively allows the custodial parent to appropriate all of the other federal tax benefits associated with the control of the dependency exemption, and may occur with or without cause. The amended regulation indicates such a unilateral revocation is allowed even when the divorce judgment clearly directs the custodial parent to release the right to the noncustodial parent and execute form 8332. Form 8332 is to be revised by the Internal Revenue Service and will be called "Release/Revocation of

Claim to Exemption for Child by Custodial Parent.” It remains to be seen how this unilateral revocation rule will be addressed in the courts. It is effective for tax years beginning *after* 7.2.08.

### ***Emancipation Affirmed***

Because evidence did not show Child’s “income, living expenses, or ability to meet obligations[,]” it did not show that Child was insolvent. Because evidence did not establish that Child was unable to support himself, Circuit Court did not err in declaring him emancipated. “Evidence of learning difficulties, lack of training for work, or a disinclination to work fails to support a finding that a child is mentally incapacitated[.]” Judgment showed that Circuit Court considered all factors and balanced equities relevant to retroactivity of a child support award.

*Leanna Marie Hoffman-Francis vs. Allen Leroy Francis*, 2009 WL 812285 (Mar. 31, 2009).

### ***Emancipation-credit hours-***

Child’s failure to successfully complete 9 credit hours in a semester, even though she was employed for 15 hours per week, resulted in her emancipation by the clear language of the statute. Emancipation is irreversible once it occurs. *In re Marriage of Maggi and Wood*, 244 S.W.3d 274 (Mo. Ct. App. 2008).

### ***Form 14-***

The trial court erred in calculating the presumed child support amount because all evidence reflected wife’s income was \$14.00 per hour, not \$13.40 per hour, resulting in a change from child support of \$734 per month rather than \$728. *Collet v. Collet*, 260 S.W.3d 397 (Mo. Ct. App. 2008)

### ***Form 14-***

The court cannot add back depreciation and non-cash deductions or reductions of gross receipts of the payer's Subchapter C corporation. Only Subchapter S corporations, sole proprietorships, or joint ownership ventures qualify for this treatment under the comments to Form 14. *Blevins v. Blevins*, 249 S.W.3d 871 (Mo. Ct. App. 2008)

### ***Form 14 – waiver on appeal***

A lesson to practitioners out there: Wife was deemed to have acquiesced in computation of child support award without Husband’s part-time job because she submitted a Form 14 without such income. *Voinescu v. Kinkade*, 270 S.W.3d 482 (Mo. Ct. App. 2008)

### ***Fraudulent Conveyance to avoid support-§ 454.525.3 RSMo***

Within our state's Enforcement of Support Law for Child Support, Section 454.525.3 states, in pertinent part, as follows:

Any party owed a support obligation may maintain an action for the purpose of setting aside a fraudulent conveyance by filing an appropriate motion in the cause of action that produced the support order . . . . Where the party seeking to set aside the conveyance presents evidence that the

conveyance was made voluntarily and without adequate consideration or in anticipation of entry of enforcement of a judicial or administrative support order, a presumption shall arise that the conveyance was made with fraudulent intent. Upon such a showing, the burden of proving that the conveyance was made in good faith shall rest with the obligor. The statute also defines "obligor" as "a person who owes a duty of support as determined by a court or administrative agency of competent jurisdiction." Section 454.525.1.

In this case, a motion to modify child support, Husband had transferred all of his ownership in multiple rental properties to his other family members. Trial court found it was done to reduce income and become "judgement-proof," but did not believe it had subject matter jurisdiction to set aside the conveyances. The court of appeals reversed and remanded with instructions to set aside the conveyances. *Wallace v. Wallace*, 269 S.W.3d 469 (Mo. Ct. App. 2008)

### ***Imputation of income-***

The trial court erred in imputing \$10,000.00 monthly income to husband where there had been no evidence he was unemployed or underemployed. The comments to Form 14 allow imputation only under these circumstances. The court could impute the full amount to him only if he was unemployed. *Sieg v. Sieg*, 256 S.W.3d 20 (Mo. Ct. App. 2008)

### ***Incarceration as factor for modification***

Incarceration does not automatically equate to a substantial change. Set out factors (1) the length of incarceration and the remaining period, (2) the earning potential of the incarcerated parent following release, (3) the amount of the existing child support award, (4) the total amount of child support that will accumulate upon the incarcerated parents discharge. *Moran v Mason*: 236 S.W.3d 137 (Mo. Ct. App. 2007)

### ***Presumption – rebuttable – where***

On cross-examination, it was demonstrated that the child's expenses were less than the chart amount, it is incumbent upon the proponent of support to quantify. The problem here was the grandmother had joint custody with the father and mother, and she filed no statement of income and expenses and her residence was paid for and the child lived with her. Query, what about cases indicating child support includes common expenses? Well, here grandmother's residence was paid off and the child owned her automobile and paid for her own automobile expenses. *Milone v. Duncan*, 245 S.W.3d 297 (Mo. Ct. App. 2008)

### ***Social security disability benefits***

Noncustodial husband was paying child support and his ex wife sought a modification. The Court addressed an issue of first impression as to whether a recipient of disability benefits who has "independent sources of income" is entitled to the same credit for his non-custodial child support obligation as another recipient of disability benefits who has no other sources of income. If the disability payment must be considered toward a



parent's income, the payment to the child must also be credited. In this case, a motion to modify child support, Husband had transferred all of his ownership in multiple rental properties to his other family members. Trial court found it was done to reduce income and become "judgment-proof," but did not believe it had subject matter jurisdiction to set aside the conveyances. The court of appeals reversed and remanded with instructions to set aside the conveyances. *Wallace v. Wallace*, 269 S.W.3d 469 (Mo. Ct. App. 2008)

## CHILD CUSTODY

### ***Child Protection Action- Petitioner exempt from certain costs***

Under 455.504.2 RSMo (2003) the petitioner in a child protection action is exempt from paying GAL fees or court costs. The court concludes GAL fees constitute "court costs" in these actions, within 488.010 RSMo. Neither the opinion, or the statute upon which it is based, indicate whether there is a distinction if the petitioner does not prevail. *In re Interest of GF et al*, 276 S.W.3d 327 (Mo. Ct. App. 2009)

### ***Findings under 452.375 required—when—***

So long as any issue or sub-issue of custody is subject to contest between the parties and resolution by the court, written findings that include discussion of the applicable factors from section 452.375.2 are required and the cause will be remanded for findings if they are not present. *Rosito v. Rosito*, 268 S.W.3d 410 (Mo. Ct. App. 2008)

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Parents agreed on all but school district, so the trial court found mother's address to be the address of the child for educational purposes, but did not make any statutory findings under 452.375.2. Reversed—so long as any issue is subject to contest, written findings under this statute are mandatory. *Jones v. Jones*, 277 S.W.3d 330 (Mo. Ct. App. 2009).

## ***GAL fees- indigent party exempt when certified—how-***

Section 514.040.3 RSMo provides:

*Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization funded in whole or substantial part by moneys appropriated by the general assembly of the state of Missouri, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society, all costs and expenses related to the prosecution of the suit **may** be waived without the necessity of a motion and court approval, provided that a determination has been made by such society or organization that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that a certification that such determination has been made is filed with the clerk of the court.*

Here, the court of appeals said it was error for the trial court to strike W's pleadings for failure to pay her share of GAL fees, as her legal services attorney had filed such a certification and sought an exemption. Court of appeals said trial court did not have the discretion to assess fees or costs against W in the action and erred in ordering her to pay a portion of the GAL fees., despite the "**may**" in the statute rather than "**shall**". *Bober v. Bober*, EDMo 277 S.W.3d 294 (Mo. Ct. App. 2009)

## ***Hearsay statements re sexual abuse- when not admissible-***

The hearsay exception in Missouri for the statements of a child who alleges abuse does not extend to irrelevant statements. Here, the excluded statements were statements from children who were not the subject of the proceeding. As such, they were irrelevant to the court and properly excluded. Logical relevance is the issue of whether the evidence, if believed, is more or less likely to establish the proposition; legal relevance is a balancing test of logically relevant evidence vs. other issues like, in this case, unfair prejudice. Here the court found there would be unfair prejudice if the evidencd was admitted. *Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38 (Mo. Ct. App. 2007)

## ***Probate case combined with family court matter***

The parties were divorced in 2004 and had one child. The divorce court awarded the parties joint legal and physical custody. Mother lived with her parents. Her parents later sought and obtained the cooperation of father for an action for guardianship of the child by maternal grandparents. Father filed a motion to modify in 2006 seeking sole physical custody of the child. Both mother and maternal grandparents were served with the motion. Mother filed a motion to dismiss on the basis that father had no standing due to the intervening guardianship. The trial court denied mother motion to dismissal and granted father's motion for sole physical

custody. The COA reversed and held that “The modification court had subject matter jurisdiction to modify the custody order...” The court should have taken steps to consolidate the two proceedings both for purposes of judicial efficiency and avoidance of inconsistent judgments.” Either court could hear the case although there were judicial efficiency reasons for hearing it in front of the family court judge. *Kelly v. Kelly, et al*, 245 S.W.3d 308 (Mo. Ct. App. 2008)

### ***Probate case combined with family court matter and habeas corpus***

Parents are divorced and mom and dad are granted joint legal and physical custody of the children. Within a month, grandmother and her husband obtained temporary guardianship from the probate court of Calloway County. Father sought modification of the divorce judgment and asked the grandmother and her husband be joined as parties. Mother also obtained a habeas corpus writ while this case was pending. Grandmother and her husband filed a cross-motion for modification alleging both parents were unfit or unable to care for the children. Grandmother and her husband offered the testimony of a social worker who had seen the children in counseling. Both parents objected to the counselor’s testimony as privileged communication. The GAL also objected. Grandmother’s motion was dismissed for lack of evidence and the appeal was taken. The COA reversed the case. The Court addressed the lack of privilege when allegation of abuse are involved. Under Sec. 357.656.5 – the privilege is inapplicable where “... matters of ... child abuse, child neglect, or other matters pertaining to the [child’s] welfare” are at issue. Section 337.689 also says that nothing in the statutes shall prohibit any licensed person from testifying in a court hearing concerning matters of adoption, adult abuse, child abuse, child neglect, or other matters pertaining to the welfare of children ...” Section 210.140 also removed any claim of testimonial privilege in child abuse situations. *Bohrn et al v. Klick*, 276 S.W.3d 863 (Mo. Ct. App. 2009).

### ***Relocation Notice- not waived- when-***

Father’s objection to relocation was not untimely because no statutorily complaint notice ever started the filing time running. Statute provides no waiver. When changing parenting time, neither parent is presumed fit, and record supported change.

*Buck v. Buck*, 2009 WL 692467 (Mar. 18, 2009)

### ***Relocation-***

The trial court was upheld in allowing mom to relocate to San Francisco with the child though it was opposed by father and litigated by him. The court applied the specific facts of this case to the good faith and best interests tests of Section 452.377.9. *Ratteree v. Will*, 258 S.W.3d 864 (Mo. Ct. App. 2008)

### ***Sanctions striking pleadings -when***

As its sanction for noncompliance with temporary support and discovery orders, Circuit Court chose to strike pleadings, bar evidence, and limit cross-examination by offending party. That choice of sanction limited Circuit Court's ability to determine children's best interest, including custody and support needs. "Had the court heard evidence from Husband, it would have been free to disregard such testimony[.]"

*Noel v. Noel*, 278 S.W.3d 217 (Mo. Ct. App. 2009).

### ***UCCJA***

Mother and child's brief residence in Missouri did not support the Circuit Court's jurisdiction under the UCCJA provisions for home state or significant connections to Missouri. The UCCA also did not application of forum non conveniences to the remainder of Father's petition for legal separation. The trial court's dismissal of father's petition for legal separation WITH prejudice was corrected to be a dismissal WITHOUT prejudice. *Moyers v. Moyers*, 2009 WL 981825 (Apr. 14, 2009).

## MAINTENANCE

### ***Lump sum award not permitted by Court after trial***

Maintenance statute calculates maintenance based on receiving party's need. Statute does not allow the Circuit Court to award maintenance in a lump sum. The Circuit Court cannot use property division in lieu of maintenance. *Fisher v. Fisher*, 278 S.W.3d 732 (Mo. Ct. App. 2009).

### ***Maintenance-Division of Property-CSRS***

The trial court erred in treating husband's survivor benefit election for wife relating to his Civil Service Retirement pension as a form of non-modifiable maintenance. *Vanderpool v. Vanderpool*, 250 S.W.3d 791 (Mo. Ct. App. 2008)

### ***Maintenance modification-***

Trial court erred when it modified maintenance by reducing it, based upon a finding of under-employment of recipient, where the same conditions of employment were known at dissolution. There was no change in circumstances justifying the modification. *Katsantonis v. Katsantonis*, 245 S.W.3d 925 (Mo. Ct. App. 2008)

### ***Non-modifiable maintenance -***

Eight years after the judgment, Husband filed a motion to modify maintenance denominated as non-modifiable in the settlement agreement. The Circuit Court properly dismissed the motion to modify for lack of jurisdiction. *McBride v. McBride*, 2009 WL 1060047 (Apr. 21, 2009)

### ***Maintenance- rehabilitative—vague award-***

Order that H pays all of W's cost to obtain bachelor's and masters' degrees from Missouri State University could have qualified to be rehabilitative maintenance, but was too vague to be enforceable or qualify as rehabilitative maintenance because there was no evidence or order as to the necessary time period, requirement of satisfactory progress, etc. .

**Circuit Court must designate rehabilitative maintenance as either modifiable or non-modifiable and must set time period for it.** *Isakson v. Isakson*, 277 S.W.3d 784 (Mo. Ct. App. 2009)

### ***No Maintenance In Gross Via Property Division***

Statute bases maintenance on need, and so bars lump sum award. Judgment showed that Circuit Court used property division as maintenance, which Court of Appeals cannot cure because Circuit Court must consider statutory factors relevant to property division. *Fisher v. Fisher*, 278 S.W.3d 732 (Mo. Ct. App. 2009)

### ***"Unable to support oneself" test-***

Section 452.335 RSMO allows maintenance to a recipient who is unable to support himself or herself through appropriate employment and has insufficient income from property to do so. Here, the recipient of \$1,700 per month maintenance had a salary of \$50,000 per year. Payor

complained, saying the recipient can clearly support herself on \$50,000 per year. The court of appeals noted the trial court found her reasonable living expenses to be in the \$7,000 per month range, leaving her with a significant shortfall, so the maintenance award was affirmed. *Schild v Schild*, 272 S.W.3d 329 (Mo. Ct. App. 2008)

## DIVISION OF PROPERTY

### ***Contribution to separate residence –***

Wife's marital contribution of funds to the value of husband's separate residence did not transmute the residence to marital, absent evidence of husband's intention to do so. He owned the home before the marriage and declined, after the marriage, to place wife's name on the title. Nevertheless, wife contributed \$39,000.00 of her money to improve the residence. According to the court of appeals, the trial court should first have set aside the value of husband's separate investment, and then prorated the increase in value based upon the parties' relative contributions thereafter. *Goodwin v. Goodwin*, 263 S.W.3d 703mca 2008)

### ***Conveyance to LLC-***

The conveyance of separate property to an LLC established during the marriage equals marital. *Hernandez v. Hernandez*, 249 S.W.3d 885 (Mo. Ct. App. 2008

QUERY: how to reconcile with the Dolence case, below?.

### ***Corporation formed during marriage- title***

Acquisition of realty in the name of a corporation formed during the marriage did not transmute its character to marital property, where there was no intent to make a gift to the marital estate shown. The facts supported the conclusion that husband acquired his ownership interest in the corporate farm in exchange for his prior interest in an Ohio farm which had been his separate property. "The act of titling the Missouri in the corporation's name is entirely dissimilar to placing property in the joint names of a married couple." Appears to have been decided on exchange rather than on intent. *In re marriage of Dolence*, 231 S.W.3d 331 (Mo. Ct. App. 2007)

### ***Debt division***

Judgment is not final for appellate purposes if the trial court fails to divide all debt. *Rife v Rife*: 207 S.W.3d 199 (Mo. Ct. App. 2007) See also *Gilstrap v. Gilstrap*, 238 S.W.3d 196 (Mo. Ct. App. 2007)

### ***Equitable suit- statute of limitations-***

Equitable suit has five year statute of limitations. Property was listed on Husband's property statement at trial. Held this shows that she knew of the existence and the five years started to run. *Sharpe v. Sharpe*, 243 S.W.3d 414 (Mo. Ct. App. 2007) See also *Doss v. Doss* 822 SW 2d 427 (Mo. banc 1992).

### ***Equitable suit- pleading-***

Property omitted from the dissolution judgment may be divided only in a separate action in equity once the dissolution judgment becomes final and more than one year has passed (citing *Chrun*, 1988). When a party seeks equitable relief, however, it is not sufficient merely to aver that the dissolution judgment failed to divide all the marital property; a party must

show some basis for exercise of the court's equitable powers, such as by pleading fraud or mistake. *Naunheim v Naunheim*, 268 S.W.3d 462 (Mo. Ct. App. 2008)

***Military Pension-disability election-***

After divorce, Husband's unilateral waiver of part of his military retirement pay in favor of a non-taxable disability benefit is permitted, even though it served to diminish Wife's interest in his disposable retirement pay. The judgment contained no prohibition on such an election. *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App. 2008)

***Personal injury amounts***

As to periodic post-divorce annuity payments from a spouse's personal injury settlement, including amounts paid after Husband's death, Husband overcame the presumption of marital property. *Blydenburg-Dixon v. Dixon*, 277 S.W.3d 815 (Mo. Ct. App. 2009).

***Property- personal injury award- separate when-***

Using *Mistler* analysis, the trial court correctly found that the remaining and unconsumed part of H's personal injury settlement was his separate property because it was for loss of future wages, future medical expenses, and pain and suffering. Other aspects of the evidence supported this conclusion:

1. More than 2 million dollars of the 3 million dollar settlement was already consumed during the marriage, ostensibly for marital purposes in part;
2. as part of the settlement, he waived his claims for future medical expenses in exchange for the annuity payments provided in the settlement;
3. his workers' compensation attorney testified as to the purpose(s) of the annuity;
4. there was significant marital misconduct by wife.

Essentially, the court of appeals found the trial court was within its discretion in making the finding it made. *Blydenburg-Dixon v. Dixon*, 277 S.W.3d 815 (Mo. Ct. App. 2009)

***Residence- order to sell -***

273 S.W.3d 90 (Mo. Ct. App. 2008)

***Separate property-burden of proof-***

Husband's acquisition, during the marriage, of 9600 shares of his father's company stock was correctly found to be marital despite husband's claim that it was a gift; both husband and his father testified the conveyance was a gift. However, the trial court's discretion was validly exercised where, as here: (1) the stock powers referenced "for value received"; (2) there was no evidence that gift tax returns were ever filed, or why they weren't necessary; (3) the court found that husband's testimony was not credible.



"Before we can consider whether the court misapplied the law in classifying the stock assignment as marital property, we must first consider whether husband carried his burden of persuading the trial court as the finder of fact that the stock assignment was a gift." *In re Marriage of Fisher*, 258 S.W.3d 852 (Mo. Ct. App. 2008).

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Proof of inheritance of \$15,000 in 1994 was not sufficiently clear and convincing, on its own, to demonstrate that the money in H's IRA account at the time of divorce was his separate property because there the evidence of what happened to the funds from 1994 to 2007 was "sparse." *Neal v. Neal*, 2009 WL 679395 (Mar. 17, 2009)

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The trial court erred when it found H never intended to create a marital interest in three succeeding residences which were all jointly titled with W. The sole evidence was his self-serving testimony as to intent, and that he used money from a separate trust to acquire the original residence some two homes prior. Reversed for lack of clear and convincing evidence. *Groenings v. Groenings*, 277 S.W.3d 270 (Mo. Ct. App. 2008)

### ***Social security benefits***

Circuit Court properly treated projected social security benefits as separate property that cannot materially impact property division. Federal law under 42 U.S.C. Sec. 407(a) prohibits the Court from considering Social Security benefits in even an equitable fashion. *Litz v. Litz*, 2009 WL 1118787 (Apr. 28, 2009)

### ***QDRO- amendment***

It was error for the trial court to amend a QDRO to provide that the alternate beneficiary would receive a 50% interest in any cost of living adjustments, and in any early retirement subsidy, where the divorce judgment simply awarded her 50% of the value of the pension as of the decree date of 12/7/99. The court's jurisdiction to amend a QDRO is limited by the terms of 452.330.5 RSMO, in that the amendment after the final judgment may only occur where a.) necessary to establish or maintain the order's status as "qualified," or b.) to conform its terms to effectuate the intent of the court's judgment regarding the distribution of property. Any other changes are outside the jurisdiction of the court. Here, a broader drafting of the rights being divided in the divorce judgment would have allowed a broader QDRO. *In re marriage of Lueken*, 267 S.W.3d 800 (Mo. Ct. App. 2008).

### ***QDRO - amendment***

In facts similar to *Lueken*, the COA affirmed a judgment granting wife a one-half share of husband's final benefits. The court found the marital settlement agreement to not be ambiguous. At the time of the divorce, husband was eligible to retire with a subsidized benefit. He had the option of delaying his retirement and receiving a subsidized benefit after 30 years of service. The QDRO granted wife a percentage interest in husband's pension "at such time as husband retires and becomes entitled to receive benefits under the pension" plan. Wife began receiving her payments in 1999. Husband elected the 30 and out benefit and began receiving enhanced benefits but wife did not receive an enhanced benefit. When wife realized she did not receive any enhanced benefit she filed a motion to enforce the settlement agreement. The trial court amended the QDRO to give Wife a share in the enhanced payments. The COA held that wife was entitled to an enhanced benefit. *Samuel Royalty v. Opal Royalty*, 264 S.W.3d 679 (Mo. Ct. App. 2008)

### ***QDRO -- beneficiary designations--***

A recent U.S. Supreme Court case clarifies the obligations of a plan participant after divorce in relation to previously-named beneficiaries. In short, the existence of a divorce decree and subsequent QDRO *are not enough* to eliminate the prior spouse from being a beneficiary of the participant's interest in the event of death. The participant must affirmatively name a new beneficiary and remove the previous beneficiary, in compliance with plan provisions, to effect this change. Otherwise, upon death the divorced participant's interest may be paid to the benefit of the former spouse, despite the decedent's other estate planning. *Kennedy v. DuPont Savings and Investment Plan*, 129 S. Ct. 865 (U.S. 2009).

### ***Undivided Property-***

*Chrun* admits of no exception to the rule that property omitted from the judgment may be divided only in a separate action in equity, even where, as here, the separation agreement included a provision that property omitted shall be divided. The parties were still required to file a suit in equity, rather than a motion in the divorce court. *Naunheim v Naunheim*, 268 S.W.3d 462 (Mo. Ct. App. 2008).

## ADULT ABUSE

An argument at the door over a custody exchange between mother and paternal grandfather did not constitute "stalking" or "harassment" under the Adult Abuse Act; judgment for full order of protection reversed. *C.B. v. Buchhiet*, 254 S.W.3d 207 (Mo. Ct. App. 2008)

A group of representative cases on the topic:

1. *Vinson v Adams*: 188 S.W.3d 461 (Mo. Ct. App. 2006) **Stalking in Adult Abuse** is a "course of conduct" defined as a pattern of conduct composed of repeated acts over a period of time however short that serves no legitimate purpose. Proof is by a preponderance of the evidence. Vinson and Wife going thru a divorce and working in same business. Adams had been hired by Wife to be bodyguard. The Court entered the order of protection and said the guy was not to be within 10 feet of Vincent. Vincent appealed saying it was inconsistent. Upheld.
2. *Vinson v Adams*: 192 S.W.3d 492 (Mo. Ct. App. 2006) **Renewal of Adult Abuse** does not require new acts since the last order. Only that there be a finding that expiration of the full order "will place the petitioner in an immediate and present danger of abuse." *Capps*, 715 SW2nd 552.
3. *Pratt v Lasley*: 213 S.W.3d 159 (Mo. Ct. App. 2007) **Order of protection** the plain and ordinary meaning of the phrase "related by marriage" includes a one's brother-in-law, as being related by marriage for the purpose of sections 455.010(5) and is, therefore, a family member within the meaning of the of section 455.020.1.
4. *Clark v. Wuebbeling*, 217 S.W.3d 352 (Mo. Ct. App. 2007) **Substantial evidence required- Stalking** The court of appeals reversed the trial court's full order of protection holding there was no substantial evidence of stalking. There were no allegations, or threats, of bodily harm, physical altercations or other events. Litigation is not the type of behavior the act seeks to prevent. See also *Schwalm v. Schwalm*, 217 S.W.3d 335 (Mo. Ct. App. 2007), *reversed on same issue and grounds by the same panel of the court of appeals*. Court holds for stalking the person must reasonably be in fear of danger of physical harm. Alarm is defined as causing "fear of danger of physical harm.
5. *George v. McLuckie*, 227 S.W.3d 503 (Mo. Ct. App. 2007) **Text message**. Reversed because no evidence that the text message caused the recipient fear of danger of physical harm. Must demonstrate alarm. Section 455.010(10) defines stalking:

(10) "**Stalking**" is when an adult purposely and repeatedly engages in an unwanted course of conduct that causes alarm to another person when it is

reasonable in that person's situation to have been alarmed by the conduct. As used in this subdivision:

- (a) “**Course of conduct**” means a pattern of conduct composed of repeated acts over a period of time, however short, that serves no legitimate purpose. Such conduct may include, but is not limited to, following the other person or unwanted communication or unwanted contact;
- (b) “**Repeated**” means two or more incidents evidencing a continuity of purpose; and
- (c) “**Alarm**” means to cause fear of danger of physical harm.

6. *Cuda v. Keller*, 236 S.W.3d 87 (Mo. Ct. App. 2007) Brother-in-law files and says he is not in fear. Because they are family all that needs to be alleged is stalking, harassment, caused or attempted to cause physical harm. Only must prove “abuse” and that the statute does not require fear of physical harm but only that an attempt was made to do so.

## PATERNITY

### ***Change of name-***

Father has standing to seek name change for the child even if he is not named the next friend and it is not a divorce action (Section 527.270 RSMo). However, the scope of Section 210.841 allows the court to enter judgment "... on any matter in the best interests of the child." The court has the jurisdiction to so. *In re the Matter of Jenkins et al. v. Austin*, 255 S.W.3d 24 (Mo. Ct. App. 2008)

Child was born out of wedlock and given Mother's surname. The trial court ordered child's name changed to that of Father's. Mother appealed. The Western District affirmed and held that Father had the burden of proving that the change is in the child's best interests. Neither parent's name is presumed preferable to the other. The Court set forth the following factors:

- a) the child's age
- b) potential embarrassment or discomfort of the child in a change
- c) how the name change will affect the child's relations with his parents

*Wright v. Buttercase ex rel. Buttercase*, 244 S.W.3d 174 (Mo. Ct. App. 2008)

## ATTORNEYS' FEES

### ***Attorneys' Fees-judgment-***

Judgment that Husband should pay Wife's "reasonable" attorneys' fees which are "left" in the divorce action is void due to vagueness, and unenforceable. *In re Marriage of Bredvick*, 248 S.W.3d 692 (Mo. Ct. App. 2008)

### ***Attorneys' lien under Section 484.130 -***

The attorney may enforce the attorney's lien by independent suit or by filing a motion in the original case; this case follows the Missouri Supreme Court case of *Roberds v. Switzer*, 733 S.W.2d 444 (Mo. 1987) and declines to follow *Paige v. Goeke*, 943 S.W.2d 749 (Mo. App. 1997) to the extent it is contrary to *Roberds*. *State ex rel. Kinder v. Dandurand*, 261 S.W.3d 667 (Mo. Ct. App. 2008)

### ***Dismissal bars fee request-when-***

Ex-Husband dismissed his motion to modify prior to the court's ever having ruled upon Ex-Wife's cross-motion for attorneys' fees. HELD: The court loses jurisdiction as of the dismissal date; this is so despite the fact that the opposing party had motions pending at the time the dismissal was filed. In non-jury cases, a plaintiff may voluntarily dismiss his or her suit without a court order at any time prior to the introduction of evidence at trial. Rule 67.02(a)(2). Once a plaintiff does so, it is as if the suit were

never brought. The circuit court may take no further steps as to the dismissed action, and any step attempted is viewed a nullity. *State of Missouri ex rel. Rosen v. Smith*, 241 S.W.3d 431 (Mo. Ct. App. 2007)

### ***Fees against the State***

The State appealed an award of attorney's fees to alleged father in an independent action in equity to set aside a paternity judgment for extrinsic fraud. The state eventually filed a criminal non-support case against an administratively adjudicated father but his request for a blood test in the criminal case was denied. In a later field criminal non-support case, his motion for a blood test was granted. The test showed he was not the child's father. Therefore, alleged father began the process of setting aside the paternity judgment. This motion was dismissed for failing to state a claim. Later, the alleged father brought an independent action in equity claiming that mom had defrauded him into the original default and the judgment of paternity was set aside and the child support arrearages was deemed satisfied. The court awarded alleged father attorney's fees against the state under Sec. 536.087. The COA held that Section 536.087.2 provides for an award of fees "in any action for judicial review of an agency proceeding" while Sec. 536.087.4 provides for an award of fees in a civil action on appeal from an agency proceeding." The court held that the limiting language precluded an award of fees in an independent suit to avoid an earlier-entered child support judgment in that the equity suit was not a civil action derived from an agency proceeding. *Stigger v. Mann, et al*, 263 S.W.3d 721 (Mo. Ct. App. 2008)