



2007 Family Law Update

St. Louis, Missouri

Topic areas

- Jurisdiction/Procedure
- Property division
- Antenuptial Agreements
- Maintenance
- Child custody
- Child support
- Juvenile Law

Jurisdiction

- Can't back door subject matter jurisdiction
 - When court orders custody, visitation, and support for children who hadn't been in MO for 10 years, no subject matter jurisdiction (even with consent). *In re Rhoads*
- If divorcing party dies before Judgment, case abates. *McMilian v. McMilian*
- Final judgment
 - Must divide all property and all debts for final judgment. *Singleton*
 - Must have complete legal description. *Zacharwicz*
 - Post-trial debt discovered during post-trial motion time may be considered. *Rife v. Rife*

- Amended judgments



Amended judgments must be amended on grounds in post-trial motions or the time for your Notice of Appeal may run. *Singleton*

- Pleadings



If you don't ask for specific relief in pleadings you could have serious appellate problems.

- Custody -- *Derks v. Surface* (appeal dismissed and modification declared void when no one pled custody modification)
- Maintenance – *Gould v. Gould* (must plead facts supporting entitlement to maintenance)
- Relocation – *Melton v. Padgett* (can't consider if not in pleadings)

- “Judgments”
 - PDLs must be called judgments – *Cox v. Cox*
 - Order setting aside default to be judgment – *Coonts*
 - Contempt is separately appealable. *STL Capital Mgmt.*
- Interstate issues
 - UIFSA
 - No one here anymore, Missouri can’t abate child support. *Stewart v. Stewart*
 - If one party remains, Missouri is OK. *Straight v. Straight*
 - This is subject matter jurisdiction – no consent. *State ex rel. Brantingham v. Grate*

Post-Trial Motions Rule 78.07



Property Division

- Squandered assets
 - Where husband used business accounts to pay his personal expenses and house was foreclosed upon, Court can look at value of lost assets in dividing property.
Franklin v. Franklin
- Unknown debt
 - Court can still order unaware spouse to bear that burden.
Dowell v. Dowell
- Disability Pension – hybrid asset
 - If pre-retirement disability income, then non-marital. If retirement compensation, then marital. *Coffman v. Coffman*
- Tax liability may be considered
 - Can be factored into valuing asset. *Elrod v. Elrod*

Antenuptial agreements

- Duress
 - Signing two days before marriage not enough for duress. Courts look for:
 - Full disclosure of assets
 - Independent representation
 - Competency (age, bargaining position, sophistication, education, etc.)
 - Misrepresentation
 - *In re Marriage of Thomas*

Maintenance

- Retroactivity
 - Only way to be retroactive is if there was a PDL filed as well. *Turner v. Turner*
- Non-modifiability
 - Murder for hire not enough. *Richardson v. Richardson*
 - Court can't set aside, even if done in default *Boden*
 - Conscionability is determined at the time of agreement – not later. *Richardson*
- Amount
 - Look at income of the needing party from employment and property so maintenance can't be considered until after property division. *Stanton v. Stanton*
 - Financial statements remain important. *Woodward v. Woodward*
- Waiver
 - If your client waives maintenance at a deposition make it clear why she is waiving. *Dowell v. Dowell* (Wife waived assuming she received ½ of the family business but Husband squandered 825k – making it worth a lot less. Court found no waiver on appeal)

Child Custody

- **Orders Must Be Accurate And Complete:**

- Parenting plan was not complete in that it did not provide for frequent, continuing and meaningful contact between Father and Child; custody on major holidays and birthday; transfers between the parties; child-care decision-making rights; and health insurance. [Davis v. Schmidt](#), 210 S.W.3d 494 (Mo. Ct. App. 2007) Case was remanded because Trial Court issued a parenting plan that failed to address custody on Child's birthday and school holidays. [Murphey v. Murphey](#), 207 S.W.3d 679 (Mo. Ct. App. 2006)



Findings of Facts are required by statute when the record contains evidence of domestic violence. The findings must include whether domestic violence occurred and how the custody or visitation arrangements will protect the victims of domestic violence. [Granger v. Granger](#), 207 Mo. App. Lexis 556 (Mo. Ct. App. 2007) Findings of fact on allegations of domestic violence are required only on request. Trial Court's failure to make findings of fact required by statute, **not raised in motion to amend judgment, is not preserved as error.** Decrease in parenting time is not necessarily a restriction on visitation. [Holland v. Crow](#), 203 S.W.3d 295 (Mo. Ct. App. 2006)

- **Parent's Poor Behavior Affecting Custody and Visitation**

- Evidence showing Husband's abuse and attempts to co-opt Child into abusive behaviors supported order of restricted and supervised visitation and custody to Mother. Father threatened Mother and told Child that Mother was a prostitute, supported an award of custody to Mother. [Patterson v. Patterson](#), 211 S.W.3d 661 (Mo. Ct. App. 2007)
- Child's conduct toward Mother does not support a reduction in Mother's support obligation to Child, absence evidence of interference by the Father in their relationship. [Gerlach v. Adair](#), 211 S.W.3d 663 (Mo. Ct. App. 2007)
- Mother's violation of court orders, interference with Father's access to the children and interference with Father's relationship and involvement with Children, were reasons for a change in custody favoring Father. On those facts, assessment of Guardian ad Litem's fees solely to Father was an abuse of discretion. Remanded to split Guardian ad Litem's fees between Parents. [S.I.E v. J.M.](#)
- Trial Court's findings that Mother would more likely allow interaction with family and Father were supported by Father's taking of children from a relative's house without notice to Mother and denying her contact. [Roush v. Roush](#), 195 S.W.3d 12 (Mo. Ct. App. 2007)

- **Best Interest Of Child is Definitive Standard**

Restriction against cohabitation language that was proposed for inclusion in a separation agreement is subject to "the pole-star consideration in every child custody matter-the best interests of the children." Trial Court was not allowed to refuse consideration or inclusion of such a provision in its judgments. [Vollet v. Vollet](#), 202 S.W.3d (Mo. Ct. App. 2006)

- **Dad Gets Custody Due to Ownership of Residence**

- Father received custody of child because he owned the house that Child had lived in all her life. Awarding custody to Mother would be an extreme adjustment for Child [Rader v. Anderson](#), 196 S.W.3d 677 (Mo. Ct. App. 2006)

Modification of Custody/ Visitation

What Is The Standard For Modification?

- Courts should not require a “substantial” change from the circumstances of the original judgment where the modification sought was a rearrangement of a joint physical custody schedule. In this case, the court was considering a change in the schedule consisting of only a few hours each week. This type of change in scheduling parenting time under a joint physical custody plan must be measured by the standard for modifying custody, not the standard for modifying visitation. However, the statutory standard for modifying custody does not require a "substantial" change in circumstances even though courts often read that requirement into the statute. *Russell v. Russell*, 210 S.W.3d 191 (Mo. 2007)
- Statutes do not require a continuing change for modification of custody, only for modification of child support. Even though the Circuit Court used an incorrect basis to deny motion to modify, the Court of Appeals affirms because Circuit Court found that the Child's best interests also favored denial of the motion. *Kinner v. Scott*, 2007 Mo. App. LEXIS 444 (Mo. Ct. App. 2007)

Meeting That Standard

- On motion to modify custody, the weight of uncontroverted evidence offered by the Parents showed changes in circumstances of Parents and Child including changes in Mother's domestic and professional life; Child's development of bedwetting, nightmares; Parents' inability to agree on treatment. Such changes were substantial. *Hamer v. Nicholas*, 186 S.W.3d 884, 886 (Mo. App. 2006)
- Continuation of Wife's circumstances due to her disability was not a change of circumstances and did not meet the standard for modification of Maintenance. [*Swartz v. Johnson*](#), 192 S.W.3d 752 (Mo. Ct. App. 2006)

What Is The Standard For Modification?

- Is it JOINT to JOINT?
 - Change in scheduled parenting time under a joint physical custody plan must be measured by the standard for modifying custody, not the standard for modifying visitation. However, the statutory standard for modifying custody does not require a "substantial" change in circumstances even though courts often read that requirement into the statute. *Russell v. Russell*, 210 S.W.3d 191 (Mo. 2007)
 - Does NOT need to be continuous (unlike child support). Even though the Circuit Court used an incorrect basis to deny motion to modify, the Court of Appeals affirmed because Circuit Court found that the child's best interests favored denial of the motion. *Kinner v. Scott*, 2007 Mo. App. LEXIS 444 (Mo. Ct. App. 2007)

Relocation of child denied as it was not in Child's Best Interest

- Evidence that current custody arrangement worked well, Child saw her grandparents on a regular basis, did well in school, and was involved in activities and had friends, supported Trial Court finding that relocation, for Mother's fiancé to look for a new job, was not in Child's best interest. *Vaughn v. Bowman*, 209 S.W.3d 509 (Mo. Ct. App. 2006)

Relocation Allowed but Findings of Fact on Best Interest is Required

- When Trial Court grants permission to relocate Children over Parent's objection, it must make findings of fact on relevant best interest factors and public policy. *Schlotman v. Costa*, 193 S.W.3d 430 (Mo. Ct. App. 2006)

High Road Leads To Relocation

Mother demonstrated willingness to cooperate with visitation, maintain contacts with extended family, and support Children financially. Father did not. Record does not support reasons relied on for denying motion to relocate Children: contact with Father's extended family and interference with Father's visitation. Judgment denying motion to relocate reversed with instructions to grant it. [*In re the Marriage of: Rebecca R. Williams and Jason S. Williams. Rebecca R. Williams \(Now Saiz\), Petitioner/Appellant v. Jason S. Williams, Respondent/Respondent.*](#) Missouri Court of Appeals Southern District

Party Has A Right To Change GAL In Motion To Modify

- Each party has an "absolute" right to a change of guardian ad litem in any action. Motion to modify dissolution decree is an action independent of the dissolution action, so Circuit Court erred in denying motion for change of guardian ad litem. [*Dreppard v. Dreppard*](#), 211 S.W.3d 620 (Mo. Ct. App. 2007)

OLD Evidence can be admissible

- On motion to modify, Mother offered evidence of facts occurring before earlier motion to modify. Statute did not bar such evidence because such facts were unknown before earlier motion to modify, and exclusion of evidence was prejudicial because it was relevant to visitation. *Lapee v. Snyder*, 198 S.W.3d 172 (Mo. Ct. App. 2006)

Change in circumstances must be related to the reasons why restrictions were originally placed.

- In this case the Trial Court originally restricted Mother's visitation for reasons other than allegations of abuse and neglect, therefore, statute does not require her to show treatment and rehabilitation to lift restrictions. *Wills v. Wills*, 197 S.W.3d 187 (Mo. Ct. App. 2006)

Bond Required for Motion to Modify Custody and Visitation only, not for other issues

- Trial Court did not err in dismissing Plaintiff's petition as to count seeking to modify parenting plan for failure to post bond. But remainder of petition required no such bond because it did not address custody or visitation. [Miller v. Miller](#), 210 S.W.3d 439 (Mo. Ct. App. 2007)

Child Support

- ***Orders Must Be Accurate And Complete:***

- Trial Court may use a variety of methods to calculate a parent's income for Form 14, but any such method must be accurate. Trial Court chose one year out of five, which it may do if that year is the best predictor of Parent's future income. But Parent testified that the chosen year was anomalously low, so Trial Court's choice was an abuse of discretion. [*Pearcy v. Percy*](#), 193 S.W.3d 844 (Mo. Ct. App. 2006)
- Appellate Court can modify a judgment to account for maintenance that was awarded by Trial Court but omitted from calculation of child support. *Hall v. Hall*, 198 S.W.3d 170 (Mo. Ct. App. 2006)
- Parent's voluntary retirement account contributions must be included in the calculation of gross income. Evidence of fluctuations in Mother's income support an averaging of her income. Evidence of Father's promise to pay for children's college, possession of assets earmarked for that purpose, and spending supported Trial Court's modification of award and requirement of bond to secure payment *Forde v. Forde*, 190 S.W.3d 521 (Mo. App. E.D. 2006)
- By correcting placement of figure on Form 14, Appellate Court can render judgment that Trial Court should have. Court looked to Father's Tax return for accurate information as to his actual income. *Helsel v. Helsel*, (Mo. App. W.D. 2006)
- Use of old Form 14 after effective date of amendment resulted in erroneous calculation. The Trial Court erred in awarding dependent tax exemption to Obligor without rebutting presumed child support amount. *Vaughn v. Bowman*, 209 S.W.3d 509 (Mo. Ct. App. 2006)

- **Imputing Income**
 - On motion to modify, Trial Court erred in imputing to Father the income he could make by relocating when relocating was not best for children. However, the Father's choice to remain virtually unemployed supported Trial Court's denial of retroactive relief. Record also did not show an increase in Mother's ability to earn income despite cohabitation. *Payne v. Payne*, 206 S.W.3d 379 (Mo. Ct. App. 2006)
 - Trial Court's inconsistent findings on income imputed to Father requires remand for recalculation of child support. *Nelson v. Nelson*, 195 S.W.3d 502 (Mo. Ct. App. 2006)
- **Social Security Income is a Credit towards Parent's obligation but is not Income to that Parent**
 - Child's SSI from Father's disability does not constitute income to Father nor credit for Mother. [Gerlach v. Adair](#), 211 S.W.3d 663 (Mo. Ct. App. 2007)
 - Father was due a credit in the amount of social security income that his daughter would receive based on Father's disability but for a separate social security payment. That amount reduces the amount of support due to zero, but does not terminate the obligation. *Schindler v. Schindler*, 209 S.W.3d 35 (Mo. Ct. App. 2006)
 - When Child receives Social Security Disability payments based on her Father's disability, "it would be inequitable to withhold a credit against Father's support obligation because that obligation was met through the payment of funds Father previously contributed to the Social Security system." *Smith v. Smith*, 202 S.W.3d 83 (Mo. Ct. App. 2006)
- **Foster Care Payments May be Income Depending on Classification**
 - In considering foster care payments on motion to modify maintenance and on Form 14, emergency placement payment was part of income, but foster care payments per day, per child were not. Co-habitant's contributions count on motion to modify maintenance. Child's number of college credit hours does not alone terminate support obligation. *Bryant v. Bryant*, 2007 Mo. App. LEXIS 257 (Mo. Ct. App. Feb. 13, 2007)

- ***Inclusion of Extraordinary Expenses***

- To order a Parent to pay tuition for a private or parochial school, record must have evidence of Child's educational needs or parents' agreement. *Goins v. Goins*, 2007 Mo. App. LEXIS 418 (Mo. Ct. App. March 13, 2007)
- Trial Court erred in requiring Mother to pay half of tuition for parochial school that Father failed to show met any particular educational need of Child. *Seyler v. Seyler*, 201 S.W.3d 57 (Mo. Ct. App. 2006)
- Statute conditions child support on documentation of schooling of semester before judgment issued. *McFadden v. McFadden*, 200 S.W.3d 594 (Mo. Ct. App. 2006).
- Trial Court did not err in reducing or eliminating claims for expenses not supported by consistent evidence. Father was entitled to credit for day care payments against award of retroactive child support. *Mitalovich v. Toomey*, 2007 Mo. App. LEXIS 473 (Mo. Ct. App., Mar. 20, 2007)

- ***No Findings Of Fact Required To Rebut Presumed Child Support Amount***

- Unless it receives a specific request for findings of fact, Trial Court need not explain its basis for finding that presumed correct child support amount is unjust and inappropriate. *Peine v. Peine*, 200 S.W.3d 567 (Mo. Ct. App. 2006)

- ***Abatement Without Pleading Okay***

- If evidence on motion for family access order supports the abatement of child support, Trial Court may order it whether requested or not. Such order does not rob mother of a vested right because she had notice and an opportunity for hearing before and after hearing on access. *Vigil-Keyes v. Vanderwal*, 203 S.W.3d 749 (Mo. Ct. App. 2006)

- ***Mental Incapacity Extends Child Support***

- Mother showed that Child's mental incapacity rendered him incapable of supporting himself. Child's voluntary drug use and refusal to take medication only increased his dependency and did not emancipate him. But Trial Court had no authority to award support accruing between Child's 18th birthday and motion to increase child support. *Hicks v. Quednow*, 197 S.W.3d 217 (Mo. Ct. App. 2006)

Child Support Modification

- ***Presumption In Favor Of Modification Did Not Apply***
 - On motion for modification of child support award, Parent's evidence of increased expenses was "vague, imprecise, and minimal[,]" so Trial Court was not required to believe it. And. even if movant had shown that there were increased expenses, statutory presumption of substantial change, based on 20 percent change in expenses, would not apply because original award deviated from guidelines. *Talley v. Bulen*, 193 S.W.3d 881 (Mo. Ct. App. 2006).
- ***Modification Requires Evidentiary Basis***
 - Trial Court modified decree to increase child support without any evidence of how expenses for children had changed or in what amount. "Father adduced no evidence as to how much the children's expenses had increased nor did he detail any specific expenses he faced due to the children's advancing ages." [*Selby v. Smith*](#), 193 S.W.3d 819 (Mo. Ct. App. 2006)
- ***Modifying Child Support Order Requires Calculation Of Presumed Amount***
 - On motion to modify child support, Circuit Court must determine presumed amount, and determine whether to accept or reject it, even when no party requested findings of fact. *Klingseisen v. Klingseisen*, 2007 Mo. App. LEXIS 412 (Mo. Ct. App. March 13, 2007)
- ***Miscalculation Of Change In Child Support Not Prejudicial***
 - In ordering modification of child support amount, the Circuit Court miscalculated and misapplied percentage of change, but other evidence supported the order. Such evidence included Mother's departure from business, loans that Father received from business, increases in living expenses, expenses for children's extracurricular activities, and Father's failure to pay expenses as ordered. *Keller v. Keller*, 2007 Mo. App. LEXIS 447 (Mo. Ct. App. March 19, 2007)
- ***Administrative child support***
 - Check the Supreme Court for Hansen ruling any day

Juvenile Law

Termination of Parental Rights – factors

- There needs to be current evidence of mental instability (not old and stale evidence) as well as evidence of Mother's prognosis for continued recovery in order to terminate parental rights. *In the Interest of C.W.*, 211 S.W.3d 93 (Mo. 2007)
- Poor management of mental illness and drug abuse relapse OK to terminate. *In the interest of L.M. and S.C.M. v. Greene County Juvenile Office*, 212 S.W.3d 177 (Mo. Ct. App. 2007).
- Failure to rectify, failure to comply with treatment plans, denial of mental health problems, refusal to treat illness, and failure to protect child from sexual abuse supported termination of parental rights. *In the Interest of L.R.S v. C.M.S. v. The Greene County Juvenile Office*, 213 S.W.3d 161 (Mo. Ct. App. 2007)
- When parents gave their children to a relative and did not contact the children for a year and a half and did not pay any child support (not even token support) for 2 years, the adoptive parents met their burden to prove abandonment and the Juvenile Court was correct in terminating the parent's rights. *In the interest of R.P.C., M.C. and D.C. v. Wright County Juvenile Office, et al.*, 2007 WL 806128 (March 19, 2007)
- Failure to comply with a social service plan, failure to maintain sobriety, failure to maintain a stable home for the child, family to visit the child appropriate factors for termination. *In the Interest of L.Q.B. v. Greene County Juvenile Office*, 207 S.W.3d 640 (Mo. Ct. App. 2006)
- A biological father has a duty to not abandon nor neglect his children. When a default judgment was entered against father on abandonment and neglect grounds, Father attempted to set aside the default. Father disputed the abandonment claims but introduced no evidence and filed no pleading on neglect claims. Father testified he didn't pay any support for the children because he wasn't ordered to and he had been denied visitation. The Court of Appeals found that failure to pay any support (regardless of court order) was sufficient to terminate father's rights with respect to neglect. *J.R.M. and K.A.M. v. J.E.B.*, 186 S.W.3d 767 (Mo. Ct. App. 2006).
- Disinterest in visits, intoxication during visits, disdain for children's medical needs, and endangering children are sufficient grounds to terminate Mother's parental rights. *In the Interest of K.K, K.K., A.K., and I.K.*, 2007 WL 1098510 (April 13, 2007)
- Child's severe behavior problems combined with evidence that Mother could not properly control child, did not visit or support child, nor communicate with the child over a year, supported termination of parental rights. *In the Interest of N.T.W.L., et al. v. Crawford County Juvenile Office, et al.*, 215 S.W.3d 758 (Mo. Ct. App. 2007)

- New developments
 - Failure to perform 211.455 investigation and home study fatal, *In re C.W.*
 - If you want attorney fees from the State (even as GAL) you must join the Department of Social Services. *NTWL v. Crawford County*

Pending legislation

- SB25 was passed but has not been signed by the Governor. Will change emancipation age from 22 to 21 and makes other changes to child support laws.

Conclusion

Not many unexpected changes in 2006-2007 year.

SB25 could be major as could the *Hansen* case