

2008 Family Law Case Update¹

Property Division

Court must declare property marital or separate

The trial court erred in dividing the marital property when it failed to characterize husband and wife's retirement accounts as marital property subject to division under the source of funds rule. *Colombo v. Brunkhorst*, ED87197, 217 S.W.3d 333

Distribution of property and initial contribution

The trial court correctly distributed marital assets despite Husband's initial contribution of 23 years being a larger amount – “the significance of the greater initial contribution of the husband has dimmed with the passage of time.” *Stanton v. Stanton*, SD27394, 219 S.W.3d 267

Failure to divide debt makes judgment not final

In a case where the trial court failed to divide the mortgage debt on the marital home, the court of appeals dismissed the appeal for lack of a final, appealable judgment. *Hetherington v. Hetherington*, ED88388, 239 S.W.3d 21

Failure to divide boat debt grounds to dismiss appeal and remand for entry of final judgment. *Gilstrap v. Gilstrap*, WD67712, 238 S.W.3d 196

Joint loan does not convert separate property into marital property

The mere fact that loans for construction of assets on separate property were taken out by both parties does not transmute inherited property into marital property. The construction and payment of the loan with income generated during the marriage which established a marital interest in the property makes a portion of the property marital. *Holman v. Holman*, SD28015, 228 S.W.3d 628,

Interest on property division

Trial court erred in finding that a divorce judgment bore interest on the sale of the former marital home when the dissolution judgment contained no language granting interest to

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the husband before the sale of the home and husband did not appeal the decree of dissolution of marriage. *Randall, Boxx, and Masri v. Norman*, SD28325, 237 S.W.3d 634

Company formed in contemplation of marriage may be marital

Where evidence existed that a mortgage company was formed in contemplation of marriage, the mortgage company may be declared marital property. *Vinson v. Vinson*, ED88702, 243 S.W.3d 418

Company assets can not be divided without joining corporation as party

The trial court erred in dividing the assets of the husband's corporation because the corporations were not parties to the dissolution proceeding and the trial court had no authority to exercise control over the corporations. *Hughes v. Hughes*, WD67324, 247 S.W.3d 59

Must sever ties to property

Trial court erred in awarding Wife the ownership of the law firm building used by Husband and his law firm in that Section 452.330 contains the goal of severing all relationships between the parties – which would not be accomplished if Wife were to remain Husband's landlord. *Accurso v. Accurso*, WD66248, 234 S.W.3d 556

Family owned corporation titled property

Trial court did not err in awarding the farm property to the husband because the property was in the family-owned corporation's name when Husband was the sole shareholder and the husband stated that he did not intend to transmute the farm into marital property. *Dolence v. Dolence*, SD27609, 231 S.W.3d 331

Capital gains may be considered in property division

The trial court did not err in considering capital gains taxes in its distribution of sale proceeds of the marital property because tax consequences are a factor to consider in dividing marital assets. *Hernandez v. Hernandez*, WD67846

Division of retirement proceeds v. disability benefits

The trial court did not err in distributing marital property in that under federal law the judgment could only divide “disposable retired pay” and disability benefits do not fall under that designation, thus, the waiver of retired pay should cause a reduction in the amount the wife received. *Morgan v. Morgan*, WD68156,

Maintenance

Maintenance – Modification

The Supreme Court ruled that the trial court correctly dismissed Husband's motion to modify the maintenance judgment since Section 452.325 permits parties to a dissolution to enter into a written separation agreement which makes the terms of the agreement binding on the trial court unless the court finds the agreement is unconscionable. Even though Husband alleged his Wife attempted to have him killed that action does not establish a clear and unequivocal attempt to relinquish her contractual right to maintenance so long as the husband is living and public policy does not dictate that the maintenance agreement be modified because Wife would not profit on Husband's death and the State's criminal and tort laws already serve to discourage murder. *Richardson v. Richardson*, SC87641, 218 S.W.3d 426

Maintenance – ability to pay

Trial court properly denied Wife maintenance when evidence showed that Husband would not have the resources to pay a maintenance award. *Owens v. Owens*, SD27618, 219 S.W.3d 867

Trial court did not err in awarding maintenance to wife because wife lacked sufficient property to provide for her reasonable needs and cannot support herself through appropriate employment. *Maxwell v. Maxwell*, SD27985, 235 S.W.3d 81

Maintenance – err

It was error for the trial court to give Wife maintenance when the record does not reveal that the trial court considered the wife's reasonable expectation of income from investment of the division of marital property awarded to her. *Stanton v. Stanton*, SD27394, 219 S.W.3d 267

Maintenance order must comply with separation agreement

The trial court erred when it entered its judgment containing a maintenance provision different than that contained in the parties' marital settlement agreement because it had no authority under Section 452.325 to modify the maintenance terms of the parties' agreement. *Boden v. Boden*, ED87900, 229 S.W.3d 169

Need evidence of sufficient needs

The trial court erred in awarding wife maintenance and child support without sufficient supporting evidence of the wife's monthly expenses and reasonable needs. *Ross v. Ross*, SD28140, 229 S.W.3d 169

A maintenance payment can now be offset by a judgment due by the maintenance recipient to the payor

Wife owed Husband \$12000 as part of a property division and \$1300 in attorney's fees. The trial court offset the amount of maintenance she was to receive by this amount. The Western District reversed its prior holding in *Poland v. Poland*, 895 S.W.2d 670 (Mo. Ct. App. 1995), "Unlike situations involving child support, for which the child is the intended beneficiary though not party to the dissolution action, maintenance is intended to benefit a spouse, who is party to the action. ...we perceive no abuse of discretion on the part of the trial court in offsetting the awards. ... *Poland* should no longer be followed. *Janes v. Janes*, WD66632,

Child Support

Income for Form 14 calculations

It is permissible for the trial court to include funds the father chose to withdraw in the form of loans, together with his designated salary, as gross income in calculating presumed child support. *Keller v. Keller*, SD27260, 224 S.W.3d 73

Administrative motions to modify

A writ proceeding is not the proper vehicle for challenging the attempted application of a child support regulation and consideration of the propriety of such relief must await an appeal or an action for declaratory judgment. The Division of Child Support Enforcement's erroneous notice accompanied by an administrative motion to modify should no longer be used by the Division. *Hansen v. Department of Social Services*, SC88242, 226 S.W.3d 137

Afterborn children credit

The trial court erred in giving husband credit for an after born child when Husband was the moving parent and the court gave Husband a reduction in his income based upon a child in his physical custody that was born after the divorce from mother. *Durbin v. Durbin*, WD67403, 226 S.W.3d 876

Interest requires affidavit

Trial court did not err in denying mother interest on father's past due child support because mother failed to file an affidavit pursuant to Section 454.520 or a motion to construe and enforce the judgment. *Sutton v. Sutton*, ED87572.233 S.W.3d 786

College expenses and contempt

Trial court did not err in denying mother's motion for contempt against father for nonpayment of college tuition and related expenses for their daughter in that the requirements of Section 452.340.5 were applicable to the separation agreement as incorporated into the dissolution judgment. *Shands v. Shands*, SD28154, 237 S.W.3d 597

UIFSA – originating state

When mother and father were divorced in California in 1991 and father was ordered to pay child support and Mother and child moved to California and Father moved to Georgia and Mother later filed a motion to modify child support in Missouri, and a judgment was entered here in Missouri – without an appeal by Father – the Missouri statute of limitations on duration of support applies and not California’s. *Burke v. Hutto*, ED89526, 243 S.W.3d 431

Uncovered medical expenses

A provisions calling for the payment of uninsured medical expenses is an order for payment of child support. Responsibility for a child’s uncovered medical care expenses may be equitably apportioned between parents by the court in percentage shared based on their income under Section 454.633.3 *Gray v. Gray*, ED89228, 239 S.W.3d 639

College transcripts

The trial court erred in ruling against Custodial Parent’s motion for contempt for not paying college related child support. The Online records for the college comply with the statutory notice requirements and mother’s child support obligations did not terminate while the child attended college. *Waddington v. Cox*, ED88992, 247 S.W.3d 567

Credit hour requirements

Trial court erred in ordering father to pay retroactive support because the father’s obligation to pay child support terminated when the daughter failed to satisfy the minimum credit-hour requirements of Section 452.340. *Maggi v. Wood*, SD28458, 244 S.W.3d 274

Even if son failed to comply with Section 452.340.5, father acquiesced to paying half of the past college expenses *Blevins v. Blevins*, WD68182

Retroactive child support

The trial court did not err in denying mother’s motion for retroactive child support when there was testimony that mother told father he did not have to pay retroactive child support. *In re L.J.S.*, SD28479

Depreciation and travel expense reimbursements do not count as income

The trial court erred in modifying father's child support and including in father's income a portion of father's C corporation's depreciation and travel and expense deductions. The provisions in the directions for Form 14 that permit the court to consider depreciation and other non-cash reductions of gross receipts in determining gross income do not apply to Father's C Corporation. *Blevins v. Blevins*, WD68182

Guardianship

Foster parent application for guardianship

The trial court did not err in granting foster parents' guardianship petition because there was significant testimony from clinical professionals, as well as evidence from previous proceedings, that father was unfit and unable to assume the duties of guardianship, that emotional harm would come to the child if he were removed from foster care and that the child was thriving in his current foster home. *In re A.S.W.*, SC88375, 226 S.W.3d 151

No family preference on guardianship unless all other things equal

Competing petitions for guardianship for a young girl were filed – one of the petitions was filed by a step-sister. The Court ruled that family preference for a guardianship only exists when all petitioners are deemed equal. *Cornelius v. Roberts*, SD28306

Attorney's fees & GAL fees

Evidence on Attorney's fees

The trial court can review attorney's fees bills in camera in light of privileged information in determining whether to order a parent to contribute to attorney's fees. *Keller v. Keller*, SD27260, 224 S.W.3d 73

Difference in income

The trial court did not err in awarding attorney's fees to Mother when there was a difference in the monthly income of father and mother. *Brown v. Penyweit*, WD66003, 219 S.W.3d 829

Legal Aid Society

Once a party complied with Section 514.030 (for representation by a legal aid society) it is error for a trial court to order the legal aid recipient to pay attorney's fees and/or GAL fees and once the statute has been complied with, the Court has no discretion to deviate from its limits. *Versey v. Jirak*, ED88308, 219 S.W.2d 774

Conflicting judgments

Trial court erred in awarding father sole legal and physical custody on a motion to modify custody before terminating the guardianship proceeding. *Kelly v. Kelly*, WD67736.245 S.W.3d 308

Custody

Domestic violence – need specific findings

The trial court erred by failing to make specific findings of fact as to whether or not domestic violence occurred, therefore the judgment was reversed and remanded for the court to make the required findings of fact and conclusions of law. *Granger v. Granger*, SD27852, 217 S.W.3d 927

UCCJA stay

When a trial court enters an order staying a custody proceeding in this state until a final decree is entered in another state or the other proceeding is dismissed, there is no final appealable judgment to review here in Missouri. *Palmer v. Grajeda*, ED89357, 228 S.W.3d 61

Preservation of error

In challenging a trial court's failure to make custody findings, the challenging party is required to file a motion to amend judgment pursuant to Rule 78.07. *Bottorff v. Bottorff*, SD27587, 221 S.W.3d 482

Must have parenting plan in judgment

Judgment reversed when the judgment did not contain a detailed parenting plan and therefore the trial court erred in its calculation of child support. The case is remanded for a complete determination of the schedule and support. *Williams v. Williams*, ED87932, 223 S.W.3d 894

Split custody OK

The trial court did not err in determining that a split custody arrangement was in the best interests of the children where given the difference in age, sex, and stated interests of the

children, the trial court could have determined that their interaction, even if living together, would be minimal. *Durbin v. Durbin*, WD67403, 226 S.W.3d 876

Joint legal custody err and OK to terminate telephone visits

The trial court erred in continuing joint legal custody because the evidence demonstrated that the parties were unable to function as a unit in making parental decisions about the children's health, education and welfare. The court properly ended telephonic visits due to the relationship of the child's parents. *Sutton v. Sutton*, ED87572, 233 S.W.3d 786

Breakdown in communication sufficient grounds to modify

The trial court did not err in modifying the decree of dissolution due to a substantial change of circumstances because a breakdown in parental communication and cooperation is sufficient to constitute a change in circumstances. *Margolis v. Steinberg*, ED88896,

Supervised visitation OK for domestic abuse

The trial court did not err in awarding father supervised visitation because the record indicates a history of physical abuse to the mother. *K.L.A. v. Aldridge*, WD67909

Parental Relocation

Must be pled or tried by consent

Trial court erred in making findings and recommendations regarding relocation when relocation was neither pled nor tried by consent. *Melton v. Padgett*, WD66910, 217 S.W.3d 911

Denying relocation of 55 miles error

Trial court erred by denying mother the right to relocate with the minor child because the proposed relocation will not reduce father's visitation time but will enhance the mother's time with the child, the mother is willing to provide contact with relatives and with father, and the distance mother was seeking to relocate was only 55 miles from current location. *Williams v. Williams*, SD27836, 220 S.W.3d 858

Failure to file written objection within 30 days fatal

A parent desiring a relocation is required to give written notice to the other parent at least 60 days in advance of the proposed relocation, unless a parent filed a motion to prevent the relocation within 30 days after receipt of such notice, thus, the father's failure to file a motion resulted in the mother's absolute right to relocate the children. *Dent v. Dent*, ED89444

Orders of protection

Need fear of physical harm under stalking

The trial court erred in entered a full order of protection under a stalking theory when there was no evidence that the Respondent's conduct caused the petitioner to be in fear of danger of physical harm. Schwalm v. Schwalm, ED87829, 217 S.W.3d 335

The fear of harm must be reasonable

The trial court erred by granting Wife a full order of protection because there was no substantial evidence to support the trial court's judgment because wife's testimony at trial that her husband's conduct caused her fear of danger of physical harm was unreasonable in that the husband made no physical threats or engaged in any conduct to suggest Wife was in danger. Clark v. Wuebbeling, ED88413, 217 S.W.3d 352

Mootness is an issue

When order expired by the time opinion rendered, the mootness doctrine may prevent review. Review would be possible under the public interest exception – but that exception did not apply to this appeal. Jenkins v. Mcleod, ED88540, 231 S.W.3d 833

Termination of Parental Rights

Must try adoption count after litigation over TPR concluded

The trial court erred in proceeding with an adoption petition while the termination of parental rights was being appealed because the adoption proceeding is dependent upon the termination of parental rights being granted and those issues are separate from the adoption issues. In re. M.D.D., SD27811, 219 S.W.3d 873

Must use some evidence of current conduct

The trial court erred by relying solely on the mother's past behavior to justify the termination of parental rights since the trial court was required to consider the mother's current ability and willingness to parent the children and consider whether or not any of the mother's past acts would result in future hard to the children. In re C.K., WD67474, 221 S.W.3d 467

Involved parent – err to terminate rights

The trial court erred in terminating the mother's parental rights because there is substantial evidence to indicate that the mother consistently visited the child in foster care, was steadily employed and supported three other children and took parenting classes to rectify the situation which caused the child to be in foster care. Additionally, as to father, the trial court erred because father did constantly visit the child, maintained contact with the child, and maintained a parental relationship with the child and father was committed to his treatment plan and does have a bond with the child and is involved in the child's life. In re. C.A.L., SD28073 and SD28114, 228 S.W.3d 66 and 228 S.W.3d 77

Parent not entitled to writ of habeas corpus ad testificandum

Trial court did not abuse its discretion in declining to issue a writ of habeas corpus ad testificandum for the mother's appearance and mother's inability to assist counsel or understand the proceedings does not prevent a hearing in a termination of parental rights case. In re W.J.S.M., ED88904, 231 S.W.3d 278

Statutory meeting requirements

The trial court erred by failing to comply strictly with the statutory requirements in that it failed to meet with the juvenile officer within 30 days after the petition for termination of parental rights was filed and it failed to order an investigation and social study determining whether TPR was in the child's best interests. In re. E.C., ED89235, 329 S.W.3d 791

You can not have these meetings BEFORE the petition to terminate parenting rights is filed. In re N.A.H., SD28679,

No right to motion to vacate judgment

Trial court lacks authority to rule on a motion to vacate judgment of adoption and termination of parental rights and therefore the denial of the motion can not be ruled upon on appeal. In Re. RRR, SD28260, 236 S.W.3d 103

TPR affirmed

Trial court did not err in terminating father's rights because father abandoned the child in that he had no contact with the child for 6 years even though mother kept in touch with father's half-brother in informed father of child's location and the court did not err in terminating father's rights because he failed to repent for his abandonment in that he did not appear at the custody hearing and failed to respond to the caseworker's requests to schedule a home study. In Re. EFBD, SD28324, 245 S.W.3d 316

Abandonment reversed

The trial court erred in terminating parents' rights when there was no evidence to support the courts' finding that the parents had a mental condition and the termination based on failure to support was error because it was shown that the parents had provided the children with clothing and gifts and had asked grandparents on numerous occasions whether the children needed anything more. In Re. K.M. WD68315

Garnishment

Can not execute on LAGERS system payments

Trial court did not err in dismissing Wife's motion to garnish maintenance payments from her ex-husband's State Government Employee Retirement System in that Section

452.140 conflicts with the anti-execution provisions of Section 70.695. *Smith v. Missouri Local Government Employees Retirement*, WD67099, 235 S.W.3d 578

Defaults

Need good cause to set aside

The trial court did not err in denying Husband's rule 74.04 motion to set aside the default judgment because Husband failed to establish good cause by establishing that his conduct, in not filing a timely answer, was not intentionally or recklessly designed to impeded the judicial process. *Dozier v. Dozier*, WD66669, 222 S.W.3d 308

Consent judgment v. default

When trial court granted Wife's motion to set aside judgment with some elements similar to a default and other elements similar to a consent judgment the trial court erred in setting the judgment aside because the judgment was deemed a consent judgment and cannot be set aside for excusable neglect. *Grasse v. Grasse*, ED89264 (application for transfer pending).

Tax Deductions

Equal custody

The trial court erred in awarding Wife the tax deduction for one of their children when custody is equally shared. *Robertson v. Robertson*, WD67330, 228 S.W.3d 624

Discovery

Tax returns

Even though an ex-husband's business tax returns are discoverable by ex-wife in a motion to modify maintenance matter, and a protective order could have been issued to protect ex-husband's business interests from competitors, ex-wife needed to show that she was prejudiced by not receiving the information. Absent ex-wife's showing that the trial court's refusal to provide her access to ex-husband's income prejudiced ex-wife, the trial court's decision will be affirmed. *Mangus v. Mangus*, SD27937, 227 S.W.3d 510

Interim relief

Due process of law

Mother sought a writ of mandamus directing the trial court to set aside its order for temporary custody granting sole legal and physical custody to the father, pending the final hearing in this case. Father and Mother had previously divorced and post-dissolution mother relocated to Kansas without complying with Missouri's relocation statute. Father requested injunctive relief and Mother filed for a writ. Father's motions were not accompanied by affidavits and no hearing was given to Mother. The Southern District issued a permanent writ in mandamus whereby the trial court was ordered to vacate the interim order of custody. *State ex rel. Milner v. Carlton*, SD28192, 223 S.W.3d 896

Pleadings

Motion to amend judgment required

Whether father made allegations that the trial court failed to make statutory findings, Rule 78.07 requires that Father make those allegations in a separate motion to amend and Father's motion for rehearing to the circuit court judge after a commissioner trial did not preserve Father's 78.07 allegations. *Southard v. Southard*, ED89217, 239 S.W.3d 172

Antenuptial agreements must be plead under Rule 55.08

When Husband and Wife entered into an antenuptial agreement prior to the marriage and Wife plead that each party had real and personal property and Husband answered with a general denied, Husband failed to comply with Rule 55.08 which requires that an affirmative defense (including an antenuptial agreement) be plead or otherwise waived. *Holman v. Holman*, SD28015. 228 S.W.3d 628

Grandparent visitation

Excessive visitation to grandparent

Parent appeals granting visitation to grandparent. The trial court erred in awarding visitation rights to a grandparent because the frequency of the visits amount to more than a minimum intrusion on parental rights and the visitation is excessive. *Shemwell v. Arni*, WD67171, 223 S.W.3d 216

Grandparent visitation when children adopted

Trial court erred in giving grandparents visitation of the children when the children were adopted. Evidence was introduced that the visitation would not be in the best interests of the children. *In re. R.S.*, SD28043, 231 S.W.3d 826

Paternity

Dismissal of action

The trial court erred in dismissing a paternity action because the Uniform Parentage Act statutes do not provide for a summary proceeding in the nature of that conducted in this case. *Litvinov v. Beard*, SD28099 and SD28095 (*In re D.A.B.*), 238 S.W.3d 708

Change of name OK

The trial court did not err in ordering child's surname to be changed because the father was attempting to build a relationship with the child and it was in the best interest of the child. *Wright v. Buttercase*, WD67861, 244 S.W.3d 174

Miscellaneous

Don't withdraw the day of trial

When attorney told Husband to pay fees by day before trial or she would withdraw and when Husband did not pay and attorney participated in some proceedings in chambers and then withdrew the day of trial and the trial proceeded against Husband, without counsel, case reversed. Attorney gave insufficient notice of her intent to withdraw.

Bledsoe v. Bledsoe, ED89382

Contempt incarceration

Father filed a motion for a writ of mandamus to order Judge Kintz to vacate an order of civil contempt. Preliminary writ made absolute. Father's incarceration for civil contempt violated his due process rights in that he was not informed of his right to counsel and did not knowingly and intelligently waive that right at the contempt hearing. Father's writ treated as a writ of habeas corpus. Smith v. Kintz, ED90472, 245 S.W.3d 257

Need legal description

The trial court erred by not including in the dissolution decree a full legal description of two parcels of real estate that were subject to the decree. Tanner v. Tanner, ED883349, ED88585,