



2010 CASE LAW UPDATE  
for the  
Bar Association of Metropolitan St. Louis,  
Family and Juvenile Law Section  
August 27, 2010 Procedure

### **Default Set Aside**

A default judgment should be set aside upon the filing of a timely motion stating facts constituting a meritorious defense, and stating good cause for failure to appear. Here, the movant had reason to believe that the pending action was being dismissed based upon a settlement reached in a companion case. The trial court erred in refusing to set aside the default where the motion clearly stated good cause for failure to appear, and set forth sufficient facts constituting a meritorious defense, i.e. several claimed deficiencies in the petition for ex parte order of protection. "*Although there is no universal standard which establishes the components of a meritorious defense, it has been interpreted to mean any factor likely to effect the substantive result of the case... not extensive or airtight, but must rise at least to an arguable theory of defense.*" Sastry v. Sastry, ED Mo Slip Opinion # 92824, filed January 26, 2010.

### **Child Support**

#### Appeal

Amended Rule 78.07(c) applies to claims of error pertaining to the court's failure to make required findings as to the application of Rule 88.01 and the Form 14 Guidelines. This ruling is consistent with the stated objective of Rule 78.07(c) and the case contains a good exposition of both Rule 88.01 and Rule 78.07(c). One who fails, in a Rule 78.07 Motion to

Amend the Judgment, to raise the court's failure to make the required child support calculation, or state on the record how it was determined, fails to preserve the error for review. Crow v. Crow, ED Mo Slip Opinion #92412, filed December 8, 2009

### Emancipation

"Continuous enrollment" requirement of \$452.340 is applied here in relation to a non-traditional academic schedule in a vocational institution. The court concludes that the trial court erred in emancipating the child under the circumstances, and also reversed the award to the father of \$9,700.00 in overpayments the trial judge had awarded the father obligor. The child remained eligible for support due to the "manifest circumstances" rule, applied in relation to his financial difficulty. Wilkins v. Wilkins, ED Mo Slip Opinion #92092, filed December 22, 2009.

### Gross-up of Income

Witness testified that in trying to determine income from deposits to bank accounts (because the tax returns were deemed unreliable) she "grossed up" the total amount of deposits to the parties' joint account by combined state and federal tax rates on the tax tables. She did this because the income from the deposits would be net income so she wanted to determine a gross amount. Husband did not present any evidence to refute this assertion. The gross income was necessary to calculate child support pursuant to the Form 14, and therefore, the trial court did not abuse its discretion based upon wife's evidence in determining husband's gross income to be \$179,225.05. Point denied. Andrews v. Andrews, ED Mo. Slip Op. No. 90797, filed May 12, 2009.

## No Health insurance premium- self employment and Form 14

Obligor maintains a dental practice, Rayview Dental Group, LLC., and paid for his family's health insurance premiums as business expenses of the practice. He argued that the cost was deducted from his gross income, and therefore the court erred in failing to include the monthly amount of the childrens' health insurance premiums in its Form 14 calculation. "While Father is correct that his treating the cost of the childrens' health insurance as a business expense ultimately resulted in a reduction of his gross income because the business's net profit was his gross income for Form 14 purposes, the actual deduction was from the business's gross receipts, not his gross income...Furthermore, Father received credit on the Form 14 for having paid the cost of the childrens' health insurance because his gross monthly income on line 1 was reduced by that amount. To allow him to take another credit on line 6c for the same amount would essentially permit him to "double dip." The circuit court did not err in disallowing the cost of [the children's] health insurance on line 6c of the court's Form 14." Melson V. Melson, WDMo slip op. no. 69863, filed June 23, 2009.

## Child Custody

### Custody- Joint Legal

An Award of joint legal custody was reversed for clarification, where the judgment gave one parent the final decision. The court said this provision was inconsistent with joint legal custody and was consistent with sole legal custody. The court also remanded the case for an express finding of paternity of a child born before the marriage. Brown v. Brown, Missouri Court of Appeals ED Slip Op. No. 93084 filed May 18, 2010.

## Drug Testing

A judgment which set forth a specific and detailed list of testing conditions with which the mother (who had a substance abuse issue) must comply before being allowed unsupervised visitation, was not an unenforceable "conditional judgment." Johnson v. Debyle Missouri Court of Appeals SD Slip Op. No. 29612 filed May 28, 2010.

### Modification – Joint Physical Custody

Where the only issue, in actuality, is a simple shift in parenting time, it is no longer "appropriate" to require a showing of a substantial change of circumstances. The statute does not define sole physical custody. When the court orders significant periods where the child is in the care of each parent, the award is actually one of joint physical custody, regardless of how the court characterizes it. Potts v. Potts, WD Mo Slip Opinion #70455, filed February 23, 2010.

### Relocation

The Trial Court affirmed a relocation of wife and young child to Florida, where the wife had an affair on vacation and bore the child of her paramour prior to the dissolution of marriage, where it found "good faith" and that the move was in the child's best interest. The case defines "good faith" as whether or not there is an intent to prevent the other parent's custody. Murray v. Murray, Missouri Court of Appeals WD Slip Op. No. 71381 filed May 18, 2010.

### Division of Property

#### Corporation- Joinder

A corporation need not be joined in the divorce case in order for the court to Award the stock to the parties. Here, the court gave the corporate stock to the husband despite the lack of evidence that he had ever rightfully acquired his 55 percent. Query: Does this judgment divest others of their stock? Wisdom v. Wisdom Missouri Court of Appeals WD Slip Op, No, 70930 filed May 25, 2010.

### Prenuptial Agreement Properly Set Aside –

The trial court properly set aside a prenuptial agreement for both substantive and procedural unconscionability where the wife received the agreement on Wednesday before their Saturday wedding; after reviewing it with a friend, made changes and the revised draft was presented to her at 7pm on Friday night as the parties were headed to their rehearsal dinner; where she did not sign before a notary although her signature is inexplicitly notarized; where she never consulted an attorney; where the terms of the agreement make it possible that there could be no marital property whatsoever under any circumstance; where she would have equal responsibility for marital debt even though no interest in any potential marital property; and where here fiancé had \$627,000.00 in his estate at marriage, and she had \$20,000.00 in hers. Potts v. Potts, WD Mo Slip Opinion #70455, filed February 23, 2010.

### Revocable Trust

It was not necessary to join the trustee of a revocable trust where the trustee possesses the necessary powers as both grantor and trustee pursuant to the trust which allowed him control of the trust assets. This was sufficient for the court to enter orders with which the trustee must comply in dividing the property. Roche v. Roche, ED Mo. Slip Op. No. 91294, filed May 12, 2009.

### Separate Property- Increase in Value by Marital Contribution –

Substantial evidence supported the Trial Court's determination that \$200,000.00 of the increase in the value of husband's separate funeral home business was marital, due to the wife's contribution during the marriage. There are five factors for the court's analysis: No. 1 that there was a contribution of substantial services; No. 2 that a direct connection exists between those services and the increase in value of the asset; No. 3 evidence as to the amount of the increase in value; No. 4 that the services were performed during the marriage; and No. 5 that the value of the services

or a lack of compensation exists, or inadequate compensation exists. Hillis v. Hillis Missouri Supreme Court Slip Op. Nos. 90458 filed May 11, 2010.

### Separate-- Burden of Proof

The Trial Court erroneously relieved the husband of his burden to show the existence of separate property. Meier v. Meier Missouri Court of Appeals Eastern District Slip Op. No. 92400 filed March 23, 2010.

### Social Security – "Offset"

The trial court was affirmed in finding the appellant was not entitled to an offset in the division of property for the respondent's Social Security, i.e. the Social Security should not have been considered at its projected value. Social Security is the separate property of the respondent. Such benefits are non-marital property and are to be considered by the court, but not the degree that it would have a material impact on the marital property. Had the trial court done what the appellant sought, it would have had such a material impact, which is not allowed under Missouri law. Litz v. Litz, ED Mo. Slip Op. No. 91545, filed April 28, 2009.

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