

Family Law Section

NEWSLETTER

Fall 2001

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INVESTMENTS AND MAINTENANCE: NOW WHAT DO WE DO?

by Lisha Prater Masters, Esq., Pratt & Fossard, Springfield

If shivers went up your spine after reading *Hill v. Hill* issued by the Supreme Court of Missouri on July 24, 2001, take heart – it is not as bad as it seems at first glance.

An initial review of this opinion leads one to believe that investment income from IRAs, 401Ks, etc., must be considered in all maintenance cases. A closer reading shows that *Hill* merely clears up an apparent conflict between the Western and Southern Districts of the Missouri Court of Appeals.

The Western District Court of Appeals determined that it was necessary to *exclude* IRA accounts based on the *Witt*¹ decision, and the Southern District believed it was necessary to *include* income from IRA accounts and retirement benefits based on *Shook*.²

Hill does not require a trial court to include or exclude investment income. The opinion merely requires the following question to be answered: Are there investment accounts to be apportioned in the property division?

If so, the trial court is to determine the amount of income, *if any*, to be imputed from the accounts based on the facts and circumstances of the case, including the fol-

lowing:

- 1) The cost to convert the account to ready cash;
- 2) The age of the parties;
- 3) The intent of the parties as to the investment/consumption/retirement;
- 4) The relative division of marital property and debts; and
- 5) Any equitable adjustment for reasonably certain taxes and penalties.

Therefore, when arguing a maintenance case involving deferred investment accounts in the marital estate, evidence must be presented to show what type of loss would result by cashing out that investment.

Whether to include investment income, and the amount to be included as income, is within the discretion of the trial court. *Hill* does not result in a mandate that the receiving spouse include investment income when calculating their financial need for maintenance.

¹ *Witt v. Witt*, 930 S.W.2d 500 (Mo. App. W.D. 1996).

² *Shook v. Shook*, 997 S.W.2d 103 (Mo. App. S.D. 1999).

EDITOR'S NOTE

Opinions and positions stated in signed material are those of the author and not by fact of publication necessarily those of The Missouri Bar or the Family Law Section Newsletter. Original and fully current sources of authority should be researched.

NEWLY- LEGISLATED COURT APPOINTED SPECIAL ADVOCATE (CASA) FUND

by Terri Norris

New legislation (House Bill 107) has created a fund for new and existing CASA programs in Missouri in an effort to provide every abused and neglected child whose case results in a judicial proceeding an advocate for his or her best interests.

Federal legislation, The Adoption and Safe Families Act of 1997, and Missouri legislation has heightened the need for every child to have CASA representation by requiring states to find safe and permanent homes for children as expeditiously as possible. The efforts of CASA volunteers to advocate for the child and provide the judge with recommendations in the child's best interest may significantly reduce the amount of time a child spends in the legal system, thereby reducing out-of-home placement costs.

A \$2 surcharge will be placed on dissolu-

tions, modifications, adult abuse (if costs are assessed), child protection orders (if costs are assessed), paternity (if costs are assessed), separations/annulments, URESA, contempt, administrative order hearings, Habeas Corpus, registration of foreign judgments, family access motions, and other IV-D cases. Change of name and juvenile cases will not be assessed the surcharge.

In conjunction with MoCASA, the Office of State Courts Administrator will disburse funds after July 1, 2002, to one new start-up program; the 15 existing CASA programs will be funded at a base rate as well as at a rate based on the number of children served.

If you would like additional information, please contact Terri Norris at (573) 751-4377 or at Terri_Norris@osca.state.mo.us.

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by Susan S. Jensen

Adoption-Notice

Adoptive father sought to set aside his adoption of the child. Father, married to the child's biological mother, adopted the child in 1994. At the time of the adoption father and mother were separated. They later divorced and father was ordered to pay child support.

Mother did not know who the biological father of the child was, and no notice was given to any putative father, by publication or otherwise. In July 2000, father filed a declaratory judgment action that the adoption was void because the putative father had no notice. He asked for summary judgment. The trial court's denial of the summary judgment and dismissal of father's petition with prejudice was not error. First, father had no standing to raise the issue of whether the putative father had been denied due process because he was not injured by the entry of the adoption decree, given that he requested the court grant that petition. Second, failure to serve notice to a person not entitled to notice did not deprive the court of jurisdiction to approve the adoption. The putative father had abandoned the child, and therefore his consent to the adoption or termination of his parental rights was not necessary. *J.B.M. v. S.L.M. and J.D.B.*, a minor, slip op. SD24175 (Mo. App. S.D. 2001).

Adult Abuse Order of Protection-Stalking

Mother and father were separated and in a custody battle. Father parked in an alley near mother's house on one occasion and parked in front of the house on another occasion to watch the children playing at mother's house. No allegations of past physical abuse by father were made. Father did not seek to draw mother's attention and did not direct himself to mother. Father made no threats or hateful gestures. Under these facts, the trial court's judgment of a full order of protection on the basis of stalking was reversed. The court found that courts should exercise great vigilance to prevent abuse of the stalking provisions in the Adult Abuse Act. The court did not see evidence that father's actions would have caused significant emotional distress to a reasonable person under the circumstances. *Girard v. Girard*, 54 S.W.3d 203 (Mo. App. W.D. 2001).

Child Support-Collection

Mother received public assistance for the children. She assigned her right to receive child support up to the amount of public assistance she received to the Division of Child Support Enforcement. Mother and father later executed a stipulation stating that father's obligation to pay support had been

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satisfied because they shared expenses and custody. The trial court entered an order recognizing the agreement and stating that the division must show father as owing no child support. This was error. Because mother assigned her right to receive support up to her assistance amount to the division, the amount owed was to the division, not mother. Mother could not show another creditor's debt satisfied. ***Division of Child Support Enforcement v. Shelton***, 25 S.W.3d 165 (Mo. App. W.D. 2000).

Child Support-Emancipation

Mother admitted daughter was emancipated in her responsive brief to father's motion to modify child support. After filing mother's response, mother's attorney learned that daughter was planning on taking the GED, enroll in cosmetology school, and that mother was still supporting daughter. Over objection, mother presented the evidence indicating daughter was not emancipated. After trial, mother attempted to amend her pleadings to deny the allegations of father. The trial court did not allow the amendment. It held that mother's pleadings were judicial admissions binding upon mother, and therefore refused to consider the evidence mother presented. Statements contained in briefs filed with trial courts are not binding judicial admissions, as opposed to statements contained in a formal answer. Mother's statements were evidentiary admissions instead, and the court should have considered the evidence submitted by mother. That the issue involved the welfare of a child affected the appellate court's holding in this case. ***Peace v. Peace***, 31 S.W.3d 467 (Mo. App. W.D. 2000).

Child Support-Form 14 Calculation-Unjust and Inappropriate Circumstances

The net income of each of the parties after considering the presumed Form 14 amount of child support is not, by itself, a relevant factor on which the court could find that the presumed child support is unjust and inappropriate and deviate therefrom. However, if another relevant factor justifying deviation exists, the net incomes of the parties might warrant a finding supporting deviation. ***In re***

Marriage of Ledford, 28 S.W.3d 465 (Mo. App. S.D. 2000).

Child Support-Form 14 Calculation-Unjust and Inappropriate Circumstances

It is improper to give a credit to a parent for payment of extraordinary expenses on the Form 14, then use the fact that the parent has to pay the extraordinary expenses as a justification for deviating from the Form 14 presumed amount of child support. ***In re Marriage of Ledford***, 28 S.W.3d 465 (Mo. App. S.D. 2000).

Child Support-Form 14 Calculation-Unjust and Inappropriate Circumstances

The Form 14 Directions caveat for using line 6d (that a court need not make a finding that the presumed amount of child support is unjust and inappropriate when the parent obligated to pay support also is ordered to pay a percentage of unreimbursed medical expenses) does not allow a court to give a credit on line 6d for that expense AND deviate from the presumed amount of child support because of payment of medical expenses. Rather, this caveat exists to make clear to trial courts that they need not find the amount of presumed child support is unjust and inappropriate every time they order a payor of child support to also pay a percentage of medical expenses. ***In re Marriage of Ledford***, 28 S.W.3d 465 (Mo. App. S.D. 2000).

Child Support-Form 14 Calculation-Unjust and Inappropriate Circumstances

The minor child was the beneficiary of what the court called a "true spendthrift trust" as the result of a medical malpractice action. The trust was a special needs trust meant to supplement, rather than supplant, the child's SSI benefits by meeting her special needs throughout her lifetime. The terms of the trust were such that the existence of the trust would not defeat the child's entitlement to other assistance in that it was not considered a resource when determining the child's SSI entitlement. Therefore, the trial court correctly refused to find the presumed Form 14 amount of child support was unjust and inappropriate because of the existence of the

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special needs trust.

In addition, the trial court did not err in failing to rely upon the child's SSI benefits to deviate from the presumed child support amount. The child here received SSI benefits as the result of her disability, not the disability of a parent. The SSI she received was not a replacement for support of a parent; rather, it was meant to offset additional financial burdens the child had as the result of her disability. The benefits were a supplement to the child's income, not a substitute for other income. The trial court correctly refused to deviate as the result of these benefits, especially when the additional extraordinary expenses the child had because of her disability were not included on the Form 14.

Lewis v. Department of Social Services, slip op. WD58089 (Mo. App. September 4, 2001).

Child Support-Imputed Income

It was improper for the trial court to impute income to husband when the evidence indicated that husband left his job because of a hostile work environment, and no evidence indicated husband left in order to reduce his child support obligation. *Perkins v. Perkins*, 21 S.W.3d 184 (Mo. App. S.D. 2000).

Child Support-Incapacitation

MSA stated that child support shall end when the child is 21 years old or emancipated, whichever first occurs. Child becomes completely and permanently incapacitated after divorce is granted, at age 13. Father stops paying child support when son reaches age 21. Mother files motion to modify child support when child is 27 years old, stating that child is incapacitated so that father's child support obligation should continue. Supreme Court of Missouri found in favor of mother. Father admitted child was incapacitated, unmarried and insolvent in his answers to request for admissions. Child's receipt of SSI and Medicaid does not make him insolvent. The Supreme Court specifically held that the trial court had the jurisdiction to extend child support under § 452.340.4 even though the child had already reached the age of majority at the time mother filed her motion requesting a

modification of the child support. However, because there had been no judicial determination of incapacity until this litigation, father's obligation is retroactive only to the date of service of mother's motion to modify child support. *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387 (Mo. banc 2001).

Child Support Enforcement-Constitutionality

Father attempted to challenge the constitutionality of the statutes granting Child Support Enforcement the ability to modify child support orders. The court found that father did not properly preserve the constitutional claims because he did not raise them at the earliest opportunity, nor did he sufficiently set forth his challenges. The case describes father's challenges in detail, and explains how father failed to preserve the arguments in detail. *Lewis v. Department of Social Services*, slip op. WD 58089 (Mo. App. September 4, 2001).

Custody-Admissions and Their Effect

Father filed a request for admissions, stating, in part, that it was in the best interests of the children that they be in the primary physical custody of father. Mother, appearing pro se, did not respond to the request for admissions. The trial court awarded primary physical custody to mother. Father appealed. The judgment is affirmed. Mother's failure to respond to the request for admissions resulted in an admission of the allegations in father's request. That admission is binding against mother. However, the trial court is not bound by the parties' agreement as to children's custody. Rather, the trial court must determine what custody arrangement is in the best interests of the children based on the evidence presented. Mother's admission did not free the trial court from this duty. *In re the Marriage of Zimmerman*, 29 S.W.3d 863 (Mo. App. S.D. 2000).

Custody-Child's Preferences

A court is not required to grant an in camera interview of a child to ascertain the child's custodial preferences when a party requests the court do so. Parents have another avenue for introducing evidence as to the child's

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preferences, which is to call the child as a witness. The opinion seems to say that if the child is not competent to testify, the necessity of the trial court granting an in camera interview for the purpose of ascertaining the child's wishes would be greater. **Babbitt v. Babbitt**, 15 S.W.3d 787 (Mo. App. S.D. 2000).

Custody-Subject Matter Jurisdiction

A Missouri court does not have subject matter jurisdiction to issue an "initial" custody determination when an Indiana court had previously issued a custody determination regarding the same parties. Mother lived in Indiana. Father lived in Missouri. Mother was granted custody in Indiana. Mother later allowed father to have temporary custody so long as the child was returned to her. Father refused to return the child and filed a petition for an initial determination of father-child relationship and for custody in Missouri, which was granted when mother defaulted. The Missouri court would have had jurisdiction to modify the Indiana judgment, but father did not request the court to do so. **Bates v. Jackson**, 28 S.W.3d 476 (Mo. App. E.D. 2000).

Custody-Third Party

A stepparent cannot use the third-party custody portion of the statute (§ 452.375.5(5)(a), RSMo) in a dissolution of marriage case to request that he be awarded custody of the other party's children. A person cannot be both a party and a third person in the same case. **In re Marriage of Said**, 26 S.W.3d 839 (Mo. App. S.D. 2000).

Custody-Third Party

Before awarding custody to a third party over natural parents, a court must find that such custodial arrangement is in the best interests of the child in addition to one of the following: 1) the parents are unfit, unsuitable, or unable to be the custodian; OR 2) the welfare of the child requires third-party custody. The welfare of the child prong requires a showing of special or extraordinary reasons or circumstances making third-party custody in the child's best interests. **Young v. Young**, 14 S.W.3d 261 (Mo. App. W.D. 2000).

Custody v. Visitation-Modification

A "joint physical custody" award can only be "substantially changed" if a change of circumstances is proven. However, a "visitation" award can be modified if the modification is in the best interests of the child. The parties here had joint physical custody, even though the decree did not contain those terms, because each parent had significant periods of time during which the child resides with or is under the care of each parent. Eliminating father's two two-week periods of summer visitation was a "substantial change" of the party's joint physical custody arrangement requiring a showing of change of circumstances. **Babbitt v. Babbitt**, 15 S.W.3d 787 (Mo. App. S.D. 2000).

Debt-Undistributed

Marital debt discovered after the dissolution is granted and the decree is final that is omitted from the decree may be distributed only through a separate action in equity. **Milligan v. Helmstetter**, 15 S.W.3d 15 (Mo. App. W.D. 2000).

Evidence-Religious Beliefs

The trial court did not err in allowing extensive testimony concerning the church previously attended by the parties. Wife believed the church was a cult. Experts testified as to the cult nature of the church and the negative impact of religious cults on the development of children. While it is unquestioningly improper to inquire into the religious beliefs per se of a party, inquiry into matters of child development as impinged upon by religious convictions is permissible. Allowing such evidence was not error, especially when the record as a whole in this case does not indicate the evidence played a critical role in the court's decision to award primary physical custody to wife. **Ficker v. Ficker**, slip op. ED77871 (Mo. App. E.D. October 23, 2001).

Grandparents' Right to Intervene in Adoption

The denial of grandparents' motion to intervene in the adoption of their biological grandchild was not error even though the

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denial was made without an evidentiary hearing because their intervention would not have been in the best interests of the child. The grandparents had no legal right that would have been directly diminished or enlarged if the adoption was granted so as to grant them an unconditional right to intervene. *In re Adoption of H.M.C.*, 11 S.W.3d 81 (Mo. App. W.D. 2000).

Grandparent's Right to Intervene in Termination

A grandparent has no right to intervene in a parental termination case if the judge finds such intervention would not be in the best interests of the child. See § 211.177.1. *In re C.M.D.*, 18 S.W.3d 556 (Mo. App. W.D. 2000).

Grandparent Visitation-Minimal Intrusion

An award of two hours of grandparent visitation every three months falls within the standard of "minimal visitation subject to reasonable restrictions" required for grandparent visitation to be constitutional. *In re G.P.C.*, 28 S.W.3d 357 (Mo. App. E.D. 2000).

Grandparent Visitation-Minimal Intrusion

The following visitation schedule for grandparents is not excessive:

- one weekend every other month (to be determined by grandparents) from Friday at 6 p.m. to Sunday at 6 p.m.;
- one week during a summer month, to be chosen by agreement or by parents; and
- telephone contact on the first Sunday of every month from 1:00 p.m. to 1:30 p.m.

The court found relevant the fact that the grandparents were the only constant in the first few years of this child's life. *Ray v. Hannon*, 14 S.W.3d 270 (Mo. App. W.D. 2000).

Grandparent Visitation-Minimal Intrusion

Grant of visitation to grandparent of alternate weekends from 6 p.m. on Friday until 6 p.m. on Sunday is not merely a minimal intrusion. Therefore, that award of visitation was reversed. *Hampton v. Hampton*, 17 S.W.3d 599 (Mo. App. W.D. 2000).

Grandparent Visitation-Step-Grandparent

Step-grandparents have no right to visitation. *Hampton v. Hampton*, 17 S.W.3d 599 (Mo. App. W.D. 2000).

Guardian ad Litem-Disqualification

Section 452.423.1, which allows a party to disqualify a GAL, is constitutional. Pursuant to that statute, each party has the absolute right to disqualify a GAL one time. The trial court's denial of father's motion to disqualify the GAL, therefore, was error; however, as it was harmless error, the case was not reversed. *Suffian v. Usher*, 19 S.W.3d 130 (Mo. banc 2000).

Guardian ad Litem-Testimony

The trial court invited the guardian ad litem "to be heard" and "make a recommendation" at the close of a 12-day dissolution hearing where allegations of abuse of the children and wife were made. The guardian ad litem gave a statement, without being sworn, that contained new facts contrary to the expert testimony in the case concerning who should receive physical custody. Custody was granted pursuant to the GAL's recommendation. No other evidence supported the trial court's custody order. The court reversed, holding that the GAL must be sworn when giving testimony, as with any other witness. The court noted that the GAL's opinion was based on inadmissible hearsay medical opinions. *Dickerson v. Dickerson*, slip op. WD58128 (Mo. App. W.D. September 25, 2001).

Life Insurance-Beneficiary after Dissolution of Marriage

Washington statute that beneficiary designation of former spouse is automatically revoked upon divorce is invalid because it is preempted by ERISA. *Egelhoff v. Egelhoff*, handed down by U.S. Supreme Court 3/22/01. Missouri has a similar statute, § 461.051. Opinions of attorneys interviewed for *Missouri Lawyers Weekly* article believe the same problem exists with Missouri's statute. It is recommended that attorneys tell their clients that the beneficiary designation does not change automatically upon dissolution of

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marriage.

Maintenance-interest

Interest automatically attaches to delinquent maintenance pursuant to § 454.520, RSMo. Therefore, it is reversible error to fail to award interest on a finding that delinquent maintenance is owed. ***Lueckenotte v. Lueckenotte***, 34 S.W.3d 387 (Mo. banc 2001).

Maintenance-modification

Maintenance pursuant to marital settlement agreement that was incorporated into decree was non-modifiable because of the following statement in the MSA: "A modification or waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement." The statutory provision enacted in 1988 that declares maintenance is modifiable unless otherwise stated is not applicable here because the MSA was executed prior to 1988. The law at the time the MSA was executed was that maintenance was non-modifiable unless otherwise stated. ***Lueckenotte v. Lueckenotte***, 34 S.W.3d 387 (Mo. banc 2001).

Maintenance-modification-Rule 74.06

A litigant cannot use Rule 74.06, which gives relief from judgments when it is no longer equitable to keep them in force, to modify maintenance when the decree states that maintenance is non-modifiable. ***In re Ulmanis***, 23 S.W.3d 814 (Mo. App. S.D. 2000).

Maintenance-Prospective Termination

It was not error for the trial court to terminate wife's maintenance award when she reaches age 59 ½ for the reason that she can then withdraw sums from her IRA. The IRA funds she can withdraw, along with the reasonable expectation that she would be working full time at age 59 ½, will provide enough income for her to meet her reasonable needs. Wife was currently working part-time and gave no reason why she could not work full-time. ***Milligan v. Helmstetter***, 15 S.W.3d 15 (Mo. App. W.D. 2000).

Name Change-Child

It was error for a trial court to refuse to order the child's surname be changed to father's surname when the child's current surname was not either mother's current surname or father's surname. The child had mother's maiden name. Mother then remarried and took a different surname, leaving the child with her maiden name. The court held that it is not in the best interests of the child to set him apart from other children in the community who have a parent's surname. The court did not believe the child, who was three years old at the time of trial, would suffer any prejudice with the change of name now. ***R.W.B. v. T.W. ex rel. K.A.W.***, 23 S.W.3d 266 (Mo. App. S.D. 2000).

Name Change-Child

The trial court did not err in refusing to require the name of the child to be changed from mother's maiden name to father's surname. This child was born in 1992. He had been attending school and day care where he is known by the Mother's maiden name. Mother, the primary physical custodian, testified that she did not want his name changed, and that it would be confusing to the child to change it now, and a hardship. The opinion points out that the amount of discretion a court has to change a name is different when it is a minor child whose name a party wants to change in a dissolution action. There the court must consider specific factors such as the child's age and potential embarrassment the child might suffer if his surname is different than the custodial parent. ***In re Marriage of Hayes***, 12 S.W.3d 767 (Mo. App. S.D. 2000).

Order of Protection-Child-Parties

The Child Protection Orders Act, §§ 455.500-455.538, RSMo, allows an adult to seek protection for a child against any third party for stalking of that child. The alleged stalker need not be a former or current household member. ***In re R.T.T.***, 26 S.W.3d 830 (Mo. App. S.D. 2000).

Order of Protection-Child-Stalking

Twenty-year-old man was not stalking

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16-year-old girl when the basis for the claim of stalking was: 1) the girl snuck out of her house at night to meet the man; 2) the man made beer available for the girl; 3) the man put her in circumstances allowing her to go into a tavern, although nothing untoward took place while she was there. Rather, they had a boyfriend/girlfriend relationship, and the man had no intent to emotionally abuse the girl by purposely and repeatedly harassing her. No evidence of emotional abuse existed. The relationship was consensual. *In re R.T.T.*, 26 S.W.3d 830 (Mo. App. S.D. 2000).

Prenuptial Agreement-Validity

Prenuptial agreement prevented husband from sharing in any of wife's estate after she died. Husband claimed the prenuptial agreement was invalid for four reasons: 1) he was not represented by counsel when he signed it; 2) he first saw the agreement four days before the wedding; 3) wife did not disclose all of her assets; 3) no values were given for the assets listed. The agreement was held valid. The court found that the ultimate inquiry is whether the surviving spouse had been defrauded or overreached. It found that enforcing prenuptial agreements when one spouse dies deserves a lower level of scrutiny than in a divorce situation. Here, husband had experience with signing contracts and expected to be bound to them. He did not read the prenuptial agreement before he signed it, so its actual contents could not have misled him. *Hale v. Robertson*, slip op. SD23867 (Mo. App. S.D. 2001).

Property-Life Insurance Policy Increase in Value During Marriage

Husband and wife executed a prenuptial agreement. Husband's life insurance policy was to remain his separate property. Husband paid premiums on the life insurance policy during the marriage with marital funds, thereby increasing the value of the policy by \$20,000 during the marriage. This increase in the cash value is marital property. Nothing in the prenuptial agreement requires a different result, as husband is still the owner of the policy. *B.J.D. v. L.A.D.*, 23 S.W.3d 793 (Mo. App. E.D. 2000).

Relocation

Section 452.377, RSMo now requires three determinations before allowing a relocation: 1) the move is in the best interests of the child; 2) the move is made in good faith; 3) IF the move is ordered, contact between the non-locating parent and the child must be ordered in a frequent, continuing, and meaningful manner and transportation costs must be allocated, adjusting child support if appropriate. This holding overrules a line of cases requiring a four-part test before relocation can be allowed. [See *Boling v. Dixon*, 29 S.W.3d 385 (Mo. App. W.D. 2000) for example]. *Stowe v. Spence*, 41 S.W.3d 468 (Mo. banc 2001).

Relocation

Mother's move from Missouri to Texas is allowed even though father could no longer see the children during the week or participate in their daily activities. Father's original schedule granted him Saturday and Monday overnights and Thursday mornings. He also attended sporting events during the week. His new visitation schedule was one weekend per month and most of the children's summer, Christmas, and spring breaks. The court found this to be frequent, continuing, and meaningful contact with the children. *Weaver v. Kelling*, slip op. WD 58972 (Mo. App. August 28, 2001).

Termination of Parental Rights-Abandonment

Natural mother sending two letters in six-month period prior to filing of termination petition is not enough to find she did not willfully abandon child. Mother's other attempts at contact with the child were *de minimis*. Mother's conduct prior to statutory six-month period is also relevant in determining her intent in regard to whether she willfully abandoned the child. Mother's intent to willfully abandon the child is evidenced by her voluntarily relinquishing the child to the custody of a third party. *In re Adoption of H.M.C.*, 11 S.W.3d 81 (Mo. App. W.D. 2000).

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Judgment of dissolution of marriage entered in 1998 gave father no visitation rights "at this time." Father agreed to the entry of such an order upon his attorney's advice. Mother remarried. She filed a motion to terminate father's parental rights and for her new husband to adopt the child. Father had no visitation with the child since the dissolution decree was entered. To involuntarily terminate father's rights, mother must prove father was guilty of neglect or abandonment. The appellate court stated that father's intent governs whether there was neglect or abandonment. The court found that the only testimony that father made any effort to obtain visitation was his testimony that he consulted an attorney one month before mother filed the adoption suit. The court found that father's attempts to stay in contact with the child by furnishing gifts and cards through father's mother may be disregarded as token efforts. Deferring to the trial court's determination of credibility and conflicts in the evidence, the order terminating father's right and approving the adoption was affirmed. *In re Matter of C.M.B.*, slip op. SD23810 (Mo. App. S.D. 2001).

Trial-Time Allotted

It was error for the trial court to refuse to hear expert witness testimony that would have required the court to hear evidence past 5:00 p.m. or add an additional hour and a half hearing. The court's primary responsibility is to see that evidence is fully presented. The

expert testimony was to be on essential issues. Time limitations by trial courts should be imposed only after careful consultation with attorneys, who are the best judges of how long a trial should last. *B.J.D. v. L.A.D.*, 23 S.W.3d 793 (Mo. App. 2000).

Visitation-Denial Because of Conviction of Crime Against Child

Father pled guilty to felony child abuse of his youngest son on April 6, 1993 and was placed on five years probation. He was released from probation on June 2, 1998. Father filed a motion seeking visitation on December 28, 1999. Section 452.400.1 was amended in 1998 so that visitation must be denied for any person convicted of abuse of the child whose visitation was at issue. Prior to that amendment, visitation must be denied only for those convicted of certain sex crimes against the child. Father argued that the trial court's dismissal of his motion for visitation based on § 452.400.1 was an unlawful retroactive application of the law. The court held that § 452.400.1 could not be applied retroactively; however, the court was not applying the law retroactively to father because at the time he filed his motion to modify visitation the new statute was in effect. *Hoskins v. Box*, 54 S.W.3d 736 (Mo. App. W.D. 2001).

¹This update includes cases from June 2000 through October 2001.

“OPERATION STANDBY”

Providing legal help to the defenders of our freedom

During this time of national emergency, The Missouri Bar is recruiting attorneys willing to help, on a pro bono basis, reservists and National Guard members who have been called to active duty. These men and women may have various legal issues that, under the circumstances, may require resolution prior to their departure for military service.

As of mid-November, about 85 Missouri lawyers have already volunteered. Currently the National Guard and reservists are able to handle the legal needs of service people with the JAG Corps (judge advocate generals). But if the number of reservists called up should increase, the Operation Standby attorneys will be ready to step in and assist. The ABA and national military officials have been encouraging bars throughout the nation to develop legal assistance programs, should a major call-up of reservists or National Guard members be necessary.

If you are willing to provide such assistance, please fill out the form below and return it to The Missouri Bar at the address indicated. As the need arises, you will be contacted by a member of the Judge Advocate General Corps and paired with one or more reservists or National Guard members. Even if you are currently practicing only in a particular or specialized area of the law, information will be provided to help you get up to speed on the issues likely to require your attention, including the Soldiers' and Sailors' Civil Relief Act and the Federal Reemployment Rights Act.

Upon sending the form below, you will be provided with additional information that will help you address the legal needs of these courageous men and women.

Name: _____

Address: _____

City/State/Zip: _____

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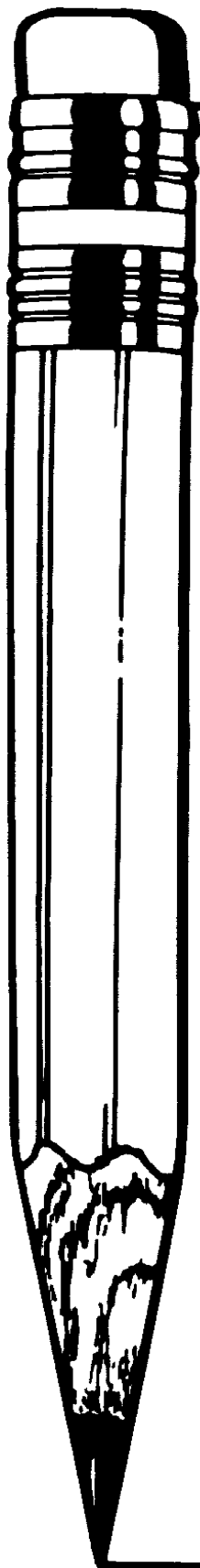
Family Law

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