

# Family Law Section

# NEWSLETTER

Fall 2007

## Family Law Newsletter

### Editorial Committee

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#### Spring Issue:

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## 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.

## VIEWS FROM THE CHAIR

*By Carla G. Holste, Jefferson City*

Dear Members,

This is my last newsletter article as chair of the Missouri Bar Family Law Section. The past two years have been eventful and enlightening. I have had many wonderful opportunities to meet family law practitioners from across the State of Missouri. Your dedication, concern and professionalism have always impressed me.

As many of you know, Senate Bill 25 went into effect on August 28 of this year. The terms of that bill reduced the age of emancipation from 22 to 21 years and included some additional provisions which might trigger an emancipation prior to that, even if the child attends college. It will be interesting to see how the courts interpret and apply the new language. I encourage each of you to read the changes to § 452.340.

During the next legislative session, we hope to have two proposed bills once again this year. Last year we presented three – the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act), the 2001 amendments to UIFSA (Uniform Interstate Family Support Act), and the Uniform Premarital Agreement Act. This year, we decided to not pursue the premarital agreement act and to concentrate on the other two bills. Given that Missouri has two large metropolitan communities that directly border with states that have adopted the UCCJEA, it is time for us to join the majority of other states. Assuming that the Board of Governors approves our bills (which they did last year, so I do not anticipate problems this year), then we need to make a strong effort to promote these two bills, especially the UCCJEA. This will be discussed in greater detail at the Fall Committee Meetings slated for November 16, 2007 in Jefferson City. If you can assist with our legislative efforts this year, please contact me at [carla.h@carsoncoil.com](mailto:carla.h@carsoncoil.com).



I would also like to take this opportunity to acknowledge the recipient of this year's Family Law Practitioner Award. As many of you know, we re-named the award the Roger P. Krumm Family Law Practitioner Award in honor of Roger Krumm, who was a family law attorney in Fulton very active in the Family Law Section and who exemplified the characteristics of a truly dedicated family law practitioner. This year the award goes to Allan Stewart from St. Louis! Allan has always been very gracious in responding to requests to give up his time to present a CLE, work on our section's newsletter or go to the legislature to present testimony on pending bills. His efforts have benefited all of us, and it is truly well-deserved. Congratulations, Allan!

As I step down from the position of chair, I want to thank those who worked with me on the executive council and those who graciously agreed to speak or moderate sessions at our annual Family Law Conference in August. Your efforts and assistance have been appreciated more than I can say. Please continue to stay active in the Section, and I look forward to another great year in 2008!

## Is There College After 21? What Do You Think?

By Allan F. Stewart

On August 28, 2007, Senate Bill 25 took effect. Among other changes, the bill amended § 452.340.3 to lower the age to which child support may continue beyond age 18, from 22 to 21.

The previous language of § 452.340.3 RSMo. had provided that "the obligation of a parent to make child support payments shall terminate when the child: ... "(5) reaches 18, unless the provisions of sub-section 4 or 5 of this section apply; or (6) reaches age 22 unless the provisions of the child support order specifically extend the parental support order past the child's 22nd birthday for reasons provided by sub-section 4" (physical or mental incapacity). By this Senate Bill 25, the age of 22 in § 452.340.3(6) and § 452.340.5 has been reduced to age 21.

One question this change raises is how this affects child support orders entered prior to the amendment which provided for support until age 22 if the provisions of § 452.340.5 are met (college or vocational school). This question has been previously addressed and rather definitively answered by the Missouri courts. Prior to 1988, child support continued until age 21. Effective August 1, 1988, the amendment to § 452.340 changed the age for termination of child support to 18 unless the child continued with his/her education, in which case the child support continued to age 22 or completion of the higher education, whichever came first. In several cases where the child had turned 18 before the law took effect, the courts consistently held the change in the law was a change in circumstances which modified any existing order from 21 to 18 and child support terminated at the new age of 18. See *Kocherov v. Kocherov*, 775 S.W.2d 539 (Mo. App. W.D. 1989); *Davis v. Helton*, 796 S.W.2d 409 at 412 (Mo. App. W.D. 1990); *Wyrick v. Coles*, 834 S.W.2d 910 at 913 (Mo. App. E.D. 1992). Based on the reasoning in these cases, it is the opinion of this writer that the change in age from 22 to 21 will effectively modify any judgment that currently provides for support to be paid until the child's 22nd birthday. This amendment changing the age at which the support obligation ends may impose a duty on the parent receiving support to notify the parent paying support of the termination of the support. § 452.370.4 RSMo., *Wyrick v. Coles*, *Id.*

A second question presented by Senate Bill 25 is how does it affect judgments (particularly judgments incorporating parenting plans or separation agreements) which provide for payment of higher education costs and tuition until the completion of the education program or age 22, whichever first occurs. Does such a provision constitute a contractual obligation that is not affected by the statutory change?

The three previously cited cases found that contract theories do not apply to child support agreements and a subsequent change in the child support law modifies the agreement. For an interesting example, see *Davis v. Helton, Id.*, wherein the child turned 21 in 1989 but the 1988 law extended the age of child support to 22; therefore, the agreement was automatically amended to continue support until age 22.

At first one might say that the principles of the previously cited cases would also apply to such an agreement to pay the costs of higher education. If the law changes the age for child support from 22 to 21, if attending college, would not that provision be modified? But note, the language of § 452.340.3 specifically applies to "the obligation to make child support payments." Nowhere does the statute require the payment for college costs or tuition. *Kocherov* notes, citing *Sheahan v. Sheahan*, 721 S.W.2d 81 at 86 (Mo. App. E.D. 1986), that parties may agree to do more for the child than the law requires.

A provision for college or higher education costs is a contract to provide for the child beyond what the law requires and is not affected by the change. While the judgment for child support for a specific amount is terminated by the change in the law, a provision to pay the costs of vocational or higher education remains unaffected as a separate contractual obligation to do more than the law requires. This argument would certainly apply where the provision for college education costs is by agreement. However, what if the court, after a trial and without agreement, orders payment of college education costs as part of the child support obligation? Is such an order beyond the court's authority? If not, is this a judgment to pay child support which would then be modified by this amendment to the statute? What do you think?

## Case Summaries

The following are summaries of some recent cases family law practitioners might find helpful:

### **Adult Abuse-Stalking**

The trial court entered a full order of protection against Husband on the basis of stalking Wife. The parties were divorced and had children. The Court reversed, finding there was no substantial evidence of stalking under the adult abuse statute. The evidence of stalking consisted of passing words at children's events, or phone or e-mail communication regarding the children. Communication regarding the children is an activity with a legitimate purpose and, by definition, cannot be stalking. *Clark v. Wuebbeling*, 217 S.W.3d 352 (Mo. App. E.D. 2007).

### **Calculating Marital and Non-Marital Interests**

This case provides several detailed examples of how to calculate the marital and non-marital interest in property that is both marital and non-marital. Increase in non-marital property is marital to the extent marital assets or labor contributed to that increase. Income during the marriage is marital. The source of funds rule requires that the spouse who contributed non-marital and the marital unit each receive a proportional share of the return on the investment. Rental income from a non-marital asset is marital income. If that income is used to pay the debt on the real estate, a marital interest in that real estate is created. Money spent jointly on remodeling Husband's premarital home resulted in a marital interest as well. *Holman v. Holman*, 228 S.W.3d 628 (Mo. App. S.D. 2007).

### **Pleading Antenuptial Agreement**

In this divorce case Husband desired to use the antenuptial agreement as a defense to Wife's claim that there was marital property to divide. He did not mention the antenuptial agreement in his answer to her petition or in his counter-petition. The Court of Appeals held that the trial court erred in admitting the antenuptial agreement for the purpose of allowing Husband to rebut there was marital property. Matters seeking avoidance of a valid contract are affirmative defenses. Affirmative defenses must be raised in the pleadings. Husband's failure to do so prevents him from offering the antenuptial agreement. *Holman v. Holman*, 228 S.W.3d 628 (Mo. App. S.D. 2007).

### **Property-Pension Benefits**

Through a marital settlement agreement, Husband was granted a \$20,000 interest in Wife's pension plan, to be awarded through a QDRO. Husband filed a motion a few months later stating that he discovered that the pension plan lacked sufficient funds to pay him, and that the retirement account would not allow Husband to receive his funds until Wife retired. Husband requested the court substitute the 401k Wife was awarded for the pension plan as the source of the \$20,000 to Husband. The trial court's order allowing this to happen was reversed on appeal. While the trial court retains jurisdiction to enter and modify a QDRO, this was not a redistribution of property contained in the decree. Qualifying a QDRO is not intended to change a party's adjudicated property rights. Husband waived any right in Wife's 401k in the MSA. *Meissner v. Schnettgoecke*, 211 S.W.3d 157 (Mo. App. E.D. 2007).

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## **Family Law Section Programming at the 2007 Missouri Bar Annual Meeting**

### **THURSDAY, SEPTEMBER 27**

*2:00 – 2:50 p.m.*

**“Missouri Prenups: Wandering in the Desert – Is An Oasis Really Out There?”**

*1.0 MCLE Hour*

*3:00 – 3:50 p.m.*

**Family Law Track Program: “Follow the Money: Uncovering and Tracking Assets in Divorce Proceedings”**

*1.0 MCLE Hour*

*4:00 – 4:50 p.m.*

**“Sex Abuse and the Use of GALs in the 21st Century”**

*1.0 MCLE Hour*

### **FRIDAY, SEPTEMBER 28**

*8:30 – 9:20 a.m.*

**“New Directions Toward a National Putative Father Registry: Making Adoptions Final After *Lentz*”**

*1.0 MCLE Hour*

*9:30 – 10:20 a.m.*

**“UCCJEA: We Don’t Have It, Almost Everyone Else Does; What You Don’t Know May Hurt You”**

*1.0 MCLE Hour*

*11:00 a.m. – 2:00 p.m.*

**Missouri Bar Family Law Section Meeting**