

Family Law Section

NEWSLETTER

Summer 2003

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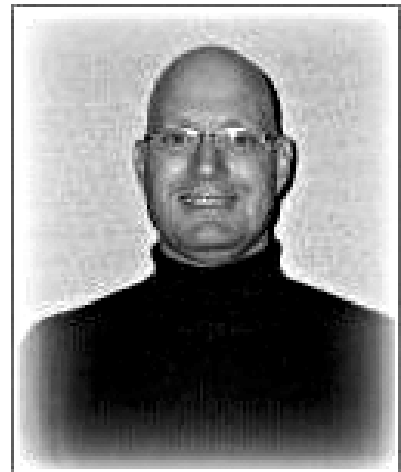
VIEWS FROM THE CHAIR

by James H. Young, Blue Springs

Many exciting things are happening with The Missouri Bar Family Law Section. The Family Law Conference is now well-established, and I think that every family law practitioner is scheduling an annual trip to the Lake of the Ozarks for a "high quality" continuing legal education experience. We also had a very good response to our CLE program at last year's Missouri Bar Annual Meeting, and plan on repeating that this year with the Annual Meeting at the Holiday Inn Executive Center in Columbia October 1-3.

As I have noted before, the first Family Law Practitioner of the Year Award will be handed out at the Annual Meeting, and we look forward to that becoming an annual event. This will give positive attention not only to the winner, but also to our Section.

Finally, my two-year term as the chair of the Section is ending. I want to thank the members of the Section and, in particular,



the members of the Executive Council and, of course, the members of the staff of The Missouri Bar who have provided assistance to our Section members. Thanks for allowing me to serve as your chair, and I look forward to seeing you at the upcoming events of our Section.

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.

AVOIDING THE PITFALLS

by Fadi Baradihi

Certified Divorce Planners are trained to examine the short-term and long-term financial ramifications of divorce, helping attorneys and their clients to avoid costly mistakes. Here's a look at some of the most common pitfalls – and how to avoid them.

Certified Divorce Planners (CDPs) help attorneys educate their clients on the short-term and long-term financial ramifications of the dissolution of marriage. The first step in the education process is to help clients understand the factors that differentiate liquid and non-liquid assets, tax-advantaged and taxable accounts, and the time value of money. The second step of the education process is to then take a proposed settlement and build the client's comprehension of their overall financial picture. CDPs use extremely powerful financial planning tools to aid the client in understanding the impact that different settlement options will have on their long-term financial health.

A CDP can help their clients avoid some of the common pitfalls during the divorce process. One of the most common mistakes divorcing clients make is neglecting to weigh emotions and immediate needs against long-term financial considerations. For example, one of the most difficult issues to tackle during a divorce is the handling of the house.

Many people are determined to stay in the marital home at all costs. That may be a big mistake in cases where it is too expensive to maintain. Also, the equity in the house is liquid and cannot be applied toward paying the bills. If it makes sense for one spouse to keep the home, that spouse should pre-qualify for a mortgage before the divorce is final. In some cases, a divorcing couple will decide that one spouse is going to keep the home and then take the other spouse's name off of the deed. Later, the spouse who wants to keep the house gets turned down for a mortgage because he/she often does not make enough money to qualify to refinance in his/her name alone. The spouse who is leaving the marital home ends up being on the hook for the debt,

has no reciprocal asset, and can't qualify for his/her own mortgage because he/she doesn't make enough money to support both mortgages.

There can be another huge pitfall associated with an emotional decision to keep the marital home. Tax law allows single taxpayers to exclude up to \$250,000 of capital gains from the sale/exchange of a personal residence and married taxpayers filing jointly to exclude up to \$500,000 of capital gains from the sale/exchange of a personal residence once every two years. If a divorcing couple has a home that has appreciated significantly, the tax ramifications of who sells the home can be significant. For example, assume a husband and wife own a home appraised at \$1,400,000, which they purchased 20 years earlier for \$600,000. Assume that the wife decides to take the home in the settlement, and then she decides to sell it for its fair market value directly following the divorce. After utilizing her capital gains exclusion of \$250,000, she could have a potential capital gains exposure of \$550,000. If you assume a federal tax rate of 20% and a state tax rate of 6% (which may be deductible from federal tax, thereby reducing federal and total liability), she could possibly face a total tax liability on the sale of the home of \$143,000. However, if the couple had sold the home *before* the divorce was final, they could have excluded up to \$500,000 in capital gains, thereby reducing their total tax liability. Thus, if the couple had considered the basis in the home and the potential tax liabilities of selling the home before the divorce was finalized, they could have allocated their assets more wisely between the two spouses instead of paying more money to Uncle Sam.

Other frequent mistakes include failing to understand the after-tax consequences of the settlement, and failing to take the tax "cost basis" into consideration. For instance, accounts with pre-tax contributions and deferred growth come with a "built-in" tax liability. It is important to understand what the after-tax equivalent value is before agreeing

AVOIDING THE PITFALLS

(Continued)

to take an asset: having \$100,000 in an IRA is not the same as having \$100,000 in a checking account. The spouse with the retirement savings plan will end up with the account value minus the tax liability and the other spouse will have the whole amount to spend.

Another pitfall lies in not knowing the basis in a stock portfolio. Suppose that a husband and wife have a stock portfolio comprised of 5,000 shares of XYZ Company trading at \$100 per share, for a total market value of \$500,000. They split the portfolio, with the husband and wife each receiving \$250,000 worth of stock. Although this settlement appears equitable at first glance, there could be underlying tax consequences that were not considered. Assume that the wife's portion of the portfolio is composed of 2,500 shares of XYZ stock purchased at \$95 dollars per share while the husband's portfolio is completely comprised of 2,500 shares of XYZ stock purchased at \$50 per share. If both spouses immediately sold their shares after the settlement, the husband could potentially have a much larger capital gains exposure and subsequent tax liability than his former spouse.

Division of retirement plans is another thorny issue. Often, clients do not take proper advantage of Internal Revenue Code § 72(t)(2)(c). Generally, distributions from qualified retirement plans to participants made before age 59½ are "early distributions" and are subject to a 10% penalty tax. Code § 72(t)(2)(c) states that money distributed from a qualified plan pursuant to a QDRO is *not* subject to the 10% penalty. The recipient may spend any or all funds without a penalty, but he/she will be required to pay regular income tax on the distribution. However, once the money from a 401(k) plan is transferred into an IRA, the early withdrawal rule still applies and the special exception for the 10% distribution rule is forfeited.

Fadi Baradihi is the president and CEO of the Institute for Certified Divorce Planners (ICDP). For more information about how a CDP can help you with the financial aspects of your divorce, call (800) 875-1760, or visit their website at www.InstituteCDP.com.

WHAT TO EXPECT IN THE APPRAISAL PROCESS

*by Arlene C. Carlson
Carlson Appraisals, Inc.
St. Louis*

Whether a lawyer concentrates in divorce matters, or only occasionally encounters some property division issue, there are times when the services of an appraisal are useful.

Appraisers specialize, including real estate, either residential, rural/farm, or commercial; personal property; fine arts; businesses; automobile; heavy equipment; and business fixtures. While the particular possession being appraised may differ, the process is the same.

First, the lawyer will want to engage a knowledgeable professional who has a track record for accuracy and fairness in his estimates of value and, in most cases, is an experienced expert witness.

The engagement process will include identification of the problem to be solved (address of property to be appraised and any points of disagreement about the property

between the parties in disagreement); the extent of the work to be completed as well as the kind of report required; and time requirements.

In property settlement matters, I like to know ahead of time whose "side" I am on, who occupies the house, and who will meet me at the property. Further, if the person I am not working for will meet me, I like to know if he/she is likely to be hostile and if I will meet resistance in getting access to the property. Admittedly, who meets me at the property has nothing to do with the valuation process. However, if I expect some animosity, I can be prepared to take some extra time to allay that person's discomfort with having a stranger look through his/her personal space.

Back to the process – before I leave the office I research public records to learn as

WHAT TO EXPECT IN THE APPRAISAL PROCESS

(Continued)

much about the subject property as I can, including legal description, zoning, lot size, building description, and sales history. All of this information helps me identify, in broad terms, defining features of the property.

Significantly positive features might be location in a sought-after neighborhood; a popular floor plan; acreage with fencing and outbuildings for horses; or proximity to airport, centers of employment or downtown. Features that tend to limit a property's market appeal include externalities such as abutting a major highway, facing a well-traveled through street, backing to a tall steel derrick that carries high voltage electrical transmission lines, abutting commercial property, or add-on design that results in an unusual floor plan and/or a much larger house than is typical of the neighborhood.

The next step is researching the market to find recently-closed sales that might appeal to the same prospective buyers to which that subject appeals. To be sure, subject probably is not going to be sold soon, but a well-studied buyer profile defines subject's market.

If a house is unusual – the original 80-year-old and updated farmhouse in the middle of a 10-year-old subdivision – I look for at least one recent sale of such a dwelling and use other houses that are more typical of the neighborhood as the remaining comparable sales.

After gathering all of the foregoing information, it's time to make a physical inspection of the subject property. I look for both the items that make subject like the other houses in its neighborhood and those traits that make it different. I look, too, at the level of

ongoing care and maintenance; whether the decorating is current and/or personalized; whether the property fits into the neighborhood; what amenities it has, such as finished basement or an in-ground pool; whether the house is finished with good quality materials and workmanship; or if it has been repaired in an amateurish manner.

After I have looked at the subject property, then I drive past 4-8 houses that have sold recently and appear, from their description, to be comparable to subject. If I have appraised any such houses recently, they will be the best comparable I can use because I have good information about them as well as having seen them inside.

Now it's time to analyze the data, reach a value conclusion, and write a report.

In a strong market there is generally adequate sales information to arrive at an easily defensible value conclusion. In a slow market the data is often less consistent and the appraiser may be required to reach a value conclusion that he/she considers less reliable.

Finally, before delivering the appraisal report, the appraiser must be sure that all information used is reliable, accurate and presented in enough detail to make a compelling case in support of the value conclusion.

The appraiser completes his assignment knowing that, in property settlement matters, the best he can hope for is that all parties will think that, while they did not win, at least they did not lose.

NOMINATIONS
NOW BEING
ACCEPTED
FOR
"FAMILY LAW
PRACTITIONER
OF THE YEAR"

Dear Family Law Section Member:

The Family Law Section and The Missouri Bar have approved an annual award to be presented to the Family Law Practitioner of the Year. The award is designed to recognize a member of the bar who has demonstrated an exceptional degree of excellence, skill, integrity, commitment, and dedication toward the improvement and advancement of the practice of family law and the children and families involved in family law matters.

We are asking all Family Law Section members to consider nominating a colleague for the first of what will be an annual award. A nomination form is included with this letter. **Nominations must be received by August 1** to be considered for this year's award.

All nominations will be reviewed by the Family Law Nominations Committee, which will narrow the field to three candidates. The Family Law Section Executive Council will make the final selection in mid-August.

The President of The Missouri Bar will present the award at The Missouri Bar/Missouri Judicial Conference Annual Meeting Awards Banquet, which will be held on October 3 in Columbia.

Please take a few moments to consider whether you know someone who should be nominated for this honor.

James Young
Chair, Missouri Bar Family Law Section

**2003 Family Law Practitioner of the Year
Nominating Form**

The Family Law Section and The Missouri Bar this year approved an annual award to honor a family law lawyer who has demonstrated an exceptional degree of competence, skill, integrity, commitment, and dedication toward the improvement and advancement of the practice of family law and the children and families involved in family law matters.

Nomination criteria should include:

- *Demonstrated excellence in negotiation and trial practice*
- *Participation and leadership in local and statewide family law-related efforts*
- *Demonstrated commitment to those involved and affected by family law matters*

Name of Nominee: _____

Address: _____

City: _____ State: _____ Zip Code _____

Name of Nominator: _____

(Please attach a statement that describes the nominee's accomplishments and provides information to support consideration for the award as described in the purpose and criteria statement above.)

This form and your nominating statement must be returned no later than August 1, 2003 to:

James H. Young • 1400 S. Outer Road, Suite C • Blue Springs, Missouri 64015
jhyoung@comcast.net

CASE
SUMMARIES**Attorney's Lien – Child Support**

The attorney who represented mother in paternity action in which retroactive child support was awarded filed a "Notice of Attorney's Lien" against the child support award. The lien was quashed, and she appealed. The court affirmed, stating that the purpose of child support is to provide for the needs of the child. It would run counter to that purpose to allow an attorney's lien against it. *Covington, et al. v. Allamby*, No. 81676 (Mo. App. E.D., May 6, 2003), Gaertner, J.

Ruling on All Child Support Components

The father appealed a modification judgment that increased his child support obligation, among other issues raised on appeal. The judgment was silent on the arrangements for payment of the children's educational and extraordinary expenses. The court reversed on that issue and stated in its opinion that § 452.310.7, RSMo., requires the trial court to set forth the arrangements as to how the expenses of the child, including educational and extraordinary expenses, if any, will be paid. The mother conceded the point and added that the nature of the increase reflects that the trial court concluded these type of expenses would fall to the mother. Therefore, the court's opinion modifies the judgment to so state. *Clark v. Clark*, No. 81058 (Mo. App. E.D., March 25, 2003), Sullivan, J.

Child Order of Protection: Stalking

A full order of protection was granted to protect an 8-year-old child from the stalking behavior of his biological grandfather. The child was adopted by consent by his stepfather and natural mother. They had not told the child he was adopted. The paternal grandfather, Mr. Syler, took various opportunities at the child's school events to take his picture, talk to him, walk up close-by and stand near him. The child had no idea who this man was or why he was doing these things. The adoptive father

testified to how the various incidents had frightened the child into thinking Mr. Syler was going to steal him away. Mr. Syler appealed the trial court's decision to grant a full order of protection. It was noted in the opinion that Mr. Syler had every right to be at the school because he has a daughter in the same grade as the child, and they are both in a choir that has a sing-along every week. The court reversed, stating that "the evidence must support a finding that the perpetrator has emotionally abused the child by purposely ('by design, intentionally, with predetermination') and repeatedly harassing him ('engaging in a course of conduct directed at a specific child that serves no legitimate purpose, and that would cause a reasonable adult to believe the child would suffer emotional distress'), or following with the intent of harassing him. *In re: R.T.T.*, 26 S.W.3d 830, 838 (Mo. App. 2000)."

The court reversed by finding that: "Here, the contact between (the child) and Syler was far from consensual, but it was not shown to have been clear to Syler prior to the Thanksgiving program, and prior to (the child's) response of appearing uncomfortable about the picture-taking, that Syler's conduct may have been causing emotional distress. This one occasion of taking pictures could hardly be called a 'course of conduct.'" Thus, it appears that unless it becomes "clear" to the perpetrator that his stalking has caused the child substantial emotional distress, he can continue.

This man was a stranger to the child. Still the court found: "*Nor can it be said that a reasonable person would necessarily believe that greeting the child (in a friendly manner), calling him by name, attempting to talk to him, and taking his picture in the presence of his parents and school authorities, would cause the child substantial emotional distress.*" (Emphasis added.) *Brockert v. Syler*, No. 61071 (Mo. App. W.D., January 28, 2003), Smart, J.

CASE SUMMARIES

(Continued)

Child Support Modification

This was an action for modification of child support for a college-bound child. The movant's evidence on the actual cost of tuition, room and board was \$1,270.12 per month at Southern Illinois University. However, the parties had agreed in the original judgment for dissolution of marriage that the obligor would pay up to a maximum of one-half of the child's college expenses of what they would be at the University of Missouri-Columbia. The movant's evidence on that amount was sketchy at best.

The obligor was self-employed, but the evidence only determined what his gross income was. No evidence of his business expenses was provided. Also, the trial court adopted the movant's Form 14 that attributed gross income to the obligor that was in excess of the evidence.

The obligor appealed the increase in child support on a number of grounds, including the failure of the court to factor in the separate obligation to pay one-half of college expenses and the adoption of the movant's Form 14 as to his income. The court reversed, stating:

"[W]here, as here, a parent is obligated under an agreement to pay the costs of a child's education, the trial court should consider this obligation when determining child support award in order to avoid a redundancy for the child's living expenses during her attendance at college."

As to the obligor's income from self-employment, it was error not to consider the ordinary and necessary business expenses. Failure to make findings regarding the ordinary and necessary business expenses in arriving at a figure for gross income is error necessitating remand in order to properly determine income for purposes of Form 14. *Douglas-Hill v. Hill*, 1 S.W.3d 613, 617 (Mo. App. W.D. 1999)."

DeArriba v. DeArriba, No. 80734 (Mo. App. E.D., March 18, 2003), Hoff, J.

Emancipation (UIFSA)

The parties were divorced in Oklahoma, where child support terminates upon the child's graduation from high school or reaching age 19, whichever occurs first. Subsequent to the divorce, the mother and child relocated to Missouri. After the child's graduation from high school, the father filed a motion to emancipate the child and terminate his child support obligation. That motion was denied, and he appealed. The court reversed.

Under the factual circumstances, an Oklahoma court would not be able to extend child support. "Section 454.973(c) of UIFSA reads, in pertinent part: 'A tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state.' Hence, the trial court here, just as the Oklahoma court, was powerless to extend the (father's) child support obligation. . . ." *Kerr v. Kerr*, No. 61564 (Mo. App. W.D., April 1, 2003), Smith, J.

Final Judgment – Must Allocate Marital Debts

The trial court failed to apportion responsibility for certain debts of the parties incurred during the marriage. The husband appealed. The court of appeals, sua sponte, dismissed the appeal for lack of a final, appealable judgment. "Having concluded that the division of marital debt is a property issue under the 1998 amendment to Sec. 452.330.1, it necessarily follows that a dissolution decree can only be final and appealable if it disposes of marital debts." *Michel v. Michel*, No. 24729 (Mo. App. S.D., January 27, 2003), Shrum, J.

Grandparent Custody

Ms. Counts had a child out of wedlock, and within six months of the child's birth she turned custody over to her mother, Ms. Chipman. Several years later, Ms. Chipman filed a petition for custody of the child. The

CASE SUMMARIES

(Continued)

child's father consented to it. However, Ms. Counts disputed the case and also filed a petition for writ of habeas corpus. Ultimately, the trial court summarily denied the petition for the writ, and the case proceeded to trial on the petition for custody. This appeal followed the award of custody to the maternal grandmother. The court dismissed: "[T]he trial court lacked subject matter jurisdiction to hear the case from the outset." The only avenue for the maternal grandmother to pursue child custody in this instance would have been an action for guardianship. *Chipman v. Counts, et. al*, No. 24977 (Mo. App. S.D., May 14, 2003), Garrison, J.

Grandparent Visitation

Parents argue the constitutionality of the grandparent visitation statute. As the opinion notes, "[a]ny challenge to the facial validity of Section 452.402 is foreclosed by this Court's decision in *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. banc 2002)."

One of the other arguments made here was that the statute requires a 90-day period of unreasonable denial of visitation to precede the filing of the case. The Court affirmed. The 90-day period is not a prerequisite to filing the lawsuit. "It requires only that the 90-day period elapse before a visitation order is entered. *Blakely*, supra, p. 544; *Herndon v. Turkey*, 857 S.W.2d 203, 210 (Mo. banc 1993). To the extent *In re: G.P.C.*, 28 S.W.3d 357, 364 (Mo.App. 2000), and *Ray v. Hannan*, 14 S.W.3d 270, 274 (Mo.App. 2000), are to the contrary, they are overruled." *Barker v. Barker*, No. 84964 (Mo. banc., March 4, 2003), per curiam.

QDRO is Appealable

The parties were divorced in 1994 and the wife was awarded 50% of pension benefits of the husband from his pension plan. The judgment directed that a QDRO be prepared consistent with the award. A QDRO was presented to the trial court nearly seven years

later. It contained a provision for the wife to receive all surviving spouse benefits. The husband objected to this provision as in excess of the intended award. The trial court entered a nunc pro tunc order four months later denominating the QDRO as a judgment. The issue is whether the QDRO is appealable. "Although the QDRO is an appealable special order, to perfect the appeal it is still necessary to denominate the order as a 'judgment or decree.' This requirement, set out in Rule 74.01(a), applies to 'decree(s) and any order from which an appeal lies.' *Tyree v. Tyree*, 975 S.W.2d 846 (Mo.App. 1998), which appears to be the only case to address the application of Rule 74.01(a) to special orders under Section 512.020, holds to the contrary, and is now overruled. In this case, the nunc pro tunc amendment denominating the QDRO as a 'judgment' was not effective to satisfy the Rule 74.01(a) requirement because the nunc pro tunc mechanism is only available to correct clerical errors, not judicial errors. *Pirtle v. Cook*, 956 S.W.2d 235, 240 (Mo. banc 1997). However, because it is clear that the trial court intended to finalize the judgment for purposes of appeal on November 1, 2001, the date the nunc pro tunc order was entered, the denomination of the order as a judgment on that date satisfied Rule 74.01(a), and the characterization of the entry as nunc pro tunc is considered as mere surplusage." *Brooks v. Brooks*, No. 84748 (Mo. banc, March 4, 2003), Limbaugh, J.

QDRO'S Terms

The judgment dissolving the marriage here was not specific when it awarded each party "fifty percent of the value" of the husband's pension plan. A dispute ensued in which the husband contended that the wife was entitled to one-half of its present value. The wife submitted a QDRO that set forth a mathematical formula in the manner of *Lynch v. Lynch*, 665 S.W.2d 20 (Mo. App. E.D. 1983), in which the number of years of credited service during the marriage was the

CASE SUMMARIES

(Continued)

numerator and the total years of credited service was the denominator. The trial court sided with the wife, and this appeal followed. The court affirmed, stating: "There is nothing in the record to indicate that the language and intent of the judgment was to award wife fifty percent of the present value rather than using the wait-and-see approach. . . ."

"[B]y generally stating in the judgment that each party is awarded fifty percent of the value of the pension plan, the trial court is not precluded from later specifying a particular method of division in the QDRO." *Redlinger v. Redlinger*, No. 81222 (Mo. App. E.D., March 25, 2003), Norton, J.

Wage Withholding and Past Due Maintenance

In 1995, a judgment dissolving the marriage of Cassandra and Steven Schumaier was entered which included an award of \$3,500 in monthly periodic maintenance. Among other matters in an action for modification of the judgment in 1999, the trial court determined that the husband then owed \$119,720 of the aforesaid judgment. A new income assignment was entered to pay it as well as ongoing maintenance and child support. After

the divorce, the husband purchased certain real property with a mortgage to United Missouri Bank. Thereafter, he transferred the real property to a trust. The husband died in 2001. In April, 2002, UMB initiated foreclosure proceedings. The wife also sought to execute on the real property for the \$119,720 judgment. The trustee of the husband's trust and the bank brought an action to stop the wife from executing on the real property. The trial court found that the wife could not execute on the property. She appealed. Despite the origin of the \$119,720 as periodic maintenance, the award for arrearage here is not an award for future needs but, like other general judgments, is a remedy for a past wrong in a sum certain and is not subject to modification. Therefore, it was a general judgment that became an automatic lien on the husband's real property.

"The fact that the court suggested a wage withholding to collect upon the judgment does not affect its status as judgment for \$119,720." Therefore, the wife could have executed on the judgment in full for the lump sum. *Leighton, et al. v. Schumaier*, No. ED 81697 (Mo. App. E.D., May 13, 2003), Dowd, J.



MISSOURI FAMILY LAW



2003 Cumulative Supplement

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