

Family Law Section

NEWSLETTER

Summer 2004

Don't forget!

**Third
Annual
Family Law
Conference
August 5-7,
Country
Club Hotel,
Lake Ozark**

2004 Family Law Section Council Members

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VIEWES FROM THE CHAIR

By Ann E. Bauer, St. Louis

Dear Members,

I am pleased to be chair of the Family Law Section, one of the largest and most active sections of The Missouri Bar. Almost a year ago, I attended the August seminar at Lake of the Ozarks shortly after learning from Missouri Bar President Bill Corrigan that he had selected me for this position. Bill and I had not known each other previously, and I was pleased to know I was his choice. While I was at the conference, I tried to talk to as many people as possible about my upcoming term. Former chairs of the Section, Missouri Bar staff members and those attending the conference were more than happy to give me input into how they viewed my role, as well as the work of the Section. Many months later, I am still trying to have a "plan" and articulate goals for the remainder of my term. I thank all of you who have e-mailed me, called me, or stopped me in the hall to talk at courthouses and conferences for your input. Many of you have shared your ideas and have offered to help. I will call on you and I hope that we will have a very successful 2003-04 year, with accomplishments we



can build on in the years to come.

I hope to see many of you August 5-7 for the fourth annual Family Law Conference. We are quite excited about the 2004 format. There will be a pre-conference day on Thursday, August 5. One of the pre-conference offerings is the advanced guardian ad litem training. There is also a pre-conference session on collaborative law. Keep in mind that there is no additional fee for these pre-conference sessions on

EDITOR'S NOTE

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VIEW FROM THE CHAIR

(continued)

Thursday. If you can fit the extra time in your schedule, you can take advantage of these sessions and it will give you an extra evening to visit with colleagues—and perhaps even meet some new ones.

We will announce the Family Law Practitioner of the Year at the conference. Many have been nominated and the selection will be difficult. The honoree will be presented the award at The Missouri Bar/Missouri Judicial Conference dinner on Friday, October 1 in St. Louis. I hope many of you will be there. For those of you not at the conference when the selection is announced, look for the announcement in your e-mail.

As I write this, I am getting ready to go on vacation with an extended family group—my 82-year-old parents will be there along with their three great-grandchildren, two of them less than six months old. I am excited about this opportunity for family time, but I know you will recognize my feeling of concern about the practice and clients I am leaving behind. If I am not mistaken (and I am confident I am not), most of you feel some version of this: too many things to do, too little time to do them, and too little time left to relax and enjoy family and friends. I'll give you the advice that I am giving myself: Take the time for family and friends. Take care of your clients but be careful about taking on so much that you can't serve your clients well or go through the day without panic. There, now that I've given the advice, maybe I'll take it, breathe deeply and go off to Montana with a free spirit.

Finally, as I realize all the “to do's” for being chair of the Family Law Section, and wonder

why I agreed to take it on, I reflect on what a friend recently shared with me. He is running for public office and has three young children in a two-career household. He is raising money, and has no assurance that the end result will be a victory. I asked him why he would do this and wasn't it just all too stressful? “No,” he said. Then he paused and said, “Do you know what I have really enjoyed the most about this process?” Going on, he said that the best part, and what makes it worth it, is all the people he is meeting on the campaign and how rewarding that is. We were on the phone, and as he talked to me, and I looked around my cluttered office, I realized that that is exactly what I am enjoying about this chairmanship. It has been great to meet new people and get to know others better than before. I find it reassuring to know how many intelligent, caring people practice family law, and that there is a strong core of practitioners across the state who want to improve the practice of family law and to improve the court system for children and families. This knowledge challenges me to work to be a better family law attorney. I hope that members of the Family Law Section will feel this connection and use their involvement in the Section to improve their own practice and to contribute to the improvement of the system for families. I truly look forward to the rest of my term, including meeting even more of you.

Enjoy the rest of the summer and please be in touch.

Ann Bauer

THE EVOLUTION ON ADMISSIBILITY OF EXPERT TESTIMONY

By Michael C. McIntosh

Missouri generally followed *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923), as the test for admissibility of expert testimony through the mid-1990s and beyond. *Frye* held that for expert or scientific testimony to be admissible, the thing or process from which the expert's opinion comes must be sufficiently established to have gained general acceptance in the relevant scientific community.

The picture became clouded in 1993 with *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), a toxic tort action. In *Daubert*, the Court held unanimously the *Frye* test (or general acceptance) had been superseded by the Federal Rules of Evidence (Rule 702). The majority opinion declared the trial court has the power and obligation as "gatekeeper" to screen offered evidence of experts to ensure it is reliable and relevant.

As to reliability, *Daubert* has the judge determine if the evidence is grounded in the methods and procedures of science (Id. at 590), and set forth four factors to consider on whether a theory is based upon the scientific method (Id. at 593-594):

1. Whether the theory or technique can be and has been tested;
2. Whether the theory or technique has been subjected to peer review and publication;
3. The known or potential rate of error; and
4. General acceptance.

The "gate keeping" function of the trial judge has expanded from the expert who relies on methods and procedures of science (*Daubert*) to include the expert relying upon "skill, experience, technical or specialized knowledge," *Kumho Tire Co. v. Carmichael*, 118 S. Ct. 2339 (1998), and rev'd, 199 S. Ct. 1167 (1999).

In *Kumho*, the plaintiff's suit was for injury due to a tire blowout. Plaintiff sought to offer testimony on an expert in tire failure. The trial court applied *Daubert's* four factor test, finding it applicable to not only scientific knowledge but "technical analysis" (*Kumho*, Id.).

The evidence was excluded after the Court concluded none of the *Daubert* factors were satisfied.

The district court's *Kumho* decision was reversed by the 11th Circuit, deciding "de novo review" applied and holding *Daubert*

applicable only in the field of science.

The United States Supreme Court reversed the 11th Circuit and held the "gatekeeper" role of the trial judge extended to all experts, both scientific and those experts whose opinion is based upon specialized skill, techniques or experience (Id. at 1176).

In Missouri, expert testimony and its admissibility is determined by § 490.065 RSMo. Any confusion as to whether *Frye* or *Daubert* applies to the admissibility of expert testimony was resolved in the negative by *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003).

The Court held § 490.065, RSMo, is the standard for admissibility of expert testimony and ruled *Frye* or any other standard no longer applicable (Id. at 5). The opinion noted § 490.065, RSMo, was very similar to Federal Rule 702, which was the basis for *Daubert*. However, the Court declared the statute requires more than *Daubert* in that "facts and data on which an expert relies must be those reasonably relied on by experts in the...field in forming opinions or inferences upon the subject" and that these facts and data "must be otherwise reasonably reliable." The trial court must independently assess their reliability (Id. at 6).

In summary, § 490.065, RSMo, requires what *Daubert* doesn't: Expert opinion must be based on facts or data relied upon by the scientific community or technically specialized field and must otherwise be reasonably reliable.

McDonagh may be applied to family law in the area of expert and business valuation testimony, medical/mental health issues, or custody evaluations. The *McDonagh* opinion will require any expert to show underlying facts and data used to form the expert's opinion are of a type reasonably relied upon by experts in the field and that these facts and data are otherwise reasonably reliable or run the risk of being precluded from testimony on the relevant subject.

The expert will need preparation by counsel to articulate specifically what the source of experts in the field use in the way of such data and facts and the basis for an opinion offered as to the reliability of this information.

CUSTODY AND SUPPORT IN DISSOLUTION OF MARRIAGE FOR CHILDREN BORN PRIOR TO THE MARRIAGE

By Allan Stewart, St. Louis

A situation not uncommon to the family law practitioner in a proceeding for dissolution of marriage is when a child of the parties was born prior to their marriage. Is the child born prior to the marriage “a child of the marriage” for the purposes of child support and child custody incident to a dissolution of marriage action under Chapter 452? Does the court in an action for dissolution of marriage have jurisdiction to determine parentage of a child born prior to the marriage of the parents?

Missouri law has long recognized that the marriage of the parents of a child born prior to their marriage legitimates the child. Section 474.070, RSMo, specifically provides that “if a man, having by a woman a child or children, afterwards intermarries with her and recognizes the child or children to be his, they are thereby legitimated.” Missouri law specifically provides a mechanism for establishing the parentage of children born prior to a marriage. Section 451.160, RSMo, provides that “the reputed father and mother of children who were born before the ceremony of marriage is performed ... may at the time of solemnization of said marriage give to the officer the names of their children then living ... and it shall be the duty of such officer to record such names with his certificate of marriage.”

Courts in Missouri faced with the question of jurisdiction as to parentage have concluded that a court hearing an action for dissolution of marriage can determine the issue of the parentage of a child born prior to the marriage. *C.B.F. v. H.F.*, 592 S.W. 2d 279 (Mo. App. E.D. 1979). In *C.B.F.*, the court noted that the statutory language change in 1974 relating to child support, from “children” to “children of the marriage,” does not affect the trial court’s jurisdiction to determine the issue of legitimacy. See also *State Ex Rel. Lackey v. Hoester*, 599 S.W. 2d 272 (Mo. App. E.D. 1980).

This well-established body of law came into question with the enactment of the Uniform Parentage Act in Missouri (§§ 210.817 through 210.852, RSMo). The Uniform Parentage

Act (UPA) establishes a specific legal action for the determination of parentage. The statute itself does not provide that it is the exclusive mechanism for establishing paternity. However, several appellate courts have held that the Uniform Parentage Act is the exclusive mechanism for establishing paternity. *Snead by Snead v. Cordes by Golding*, 811 S. W. 2d 391 (Mo. App. W.D. 1991); *Poole Truck Lines, Inc. v. Coates*, 833 S.W. 2d 876 (Mo. App. E.D. 1992); and *Richie v. Laususe*, 950 S.W. 2d 511 (Mo. App. E.D. 1997). These decisions raise the question of whether a court in a dissolution of marriage continues to have the authority to determine parentage as part of the dissolution of marriage or if a separate petition pursuant to the Uniform Parentage Act must be filed and joined in the dissolution of marriage action for children born prior to the marriage. It may be argued that if the Uniform Parentage Act is the exclusive mechanism for establishing parentage, then the earlier case law vesting that authority in a dissolution of marriage action is overturned. However, the Supreme Court of Missouri has twice ruled that the Uniform Parentage Act is not the exclusive mechanism for determination of parentage. *LeSage v. Dirt Cheap Cigarettes and Beer, Inc.*, 102 S. W. 3d 1 (Mo. banc 2003) and *In Re Nocita*, 914 S.W. 2d 358 (Mo. banc 1996).

Whether or not the Uniform Parentage Act is the exclusive mechanism for determination of parentage in all actions other than probate proceedings and wrongful death actions does not mean a court in a dissolution of marriage action has no authority to determine custody and child support for children born prior to the marriage independently of an action filed pursuant to the Uniform Parentage Act. As noted earlier, the legitimacy of children born to parents prior to their marriage is established by statutory provision at § 474.070, RSMo. Further, the legitimization of children born prior to the marriage may be established pursuant to § 451.160. In addition, children born prior to the marriage are presumed to be the children of the father if “after the child’s

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birth, he and the child's natural mother have married ... and (a) he has acknowledged his paternity of the child in writing filed with the Bureau; or (b) with his consent, he is named as the child's father on the child's birth certificate; or (c) he is obligated to support the child pursuant to a written voluntary promise or by Court order" (§ 210.822.3, RSMo 2000). Because the parentage is established by these statutory provisions and by the parents' action in marrying, the court in an action for dissolution of marriage has jurisdiction to determine child custody and support.

Chapter 452 in and of itself establishes a court's authority to provide for the support and custody of children born prior to or subsequent to the date of marriage. Section 452.150, RSMo 2000, provides that the father and mother living apart are entitled to an adjudication by the circuit court as to their powers, rights and duties with respect to the custody and control of the unmarried minor children (§ 452.150, RSMo 2000). Section 452.160, RSMo 2000, further provides that the provisions of § 452.150 "shall apply to children born out of wedlock and to children born in wedlock". . . , and the terms "father and mother", "parent", "child" shall apply without reference whether the child was born in lawful wedlock." The Missouri statute relating to the criteria for determining child custody, § 452.375, RSMo, simply provides that the court shall determine the custody of the children. The statute makes no reference as to whether the children are born prior to or

after the marriage. Section 452.340, RSMo, is the statutory provision providing authority for the order of child support. This statute refers to "children of the marriage." However, the language "children of the marriage" continues to encompass children born to the parents before their marriage. In the case of *C.B.F. v. H.F.*, 592 S.W. 2d 279 (Mo. App. E.D. 1979), the court specifically found that the change in the language from the pre-1974 provision for support of "children" to the post-1974 language "children of the marriage" had no effect on the continuing authority to provide for the custody and support of the children of the parents incident to their action for the dissolution of their marriage.

Conclusion:

The Uniform Parentage Act does not specifically provide that it is the exclusive mechanism for determining parentage. The Supreme Court of Missouri has twice held that the Uniform Parentage Act is not the exclusive mechanism. For the purposes of providing for the support and custody on dissolution of marriage, the law makes no distinction between children born before the marriage and children born during the marriage. The existing statutory law provides that children of parents born prior to their marriage continue to be their children for the purposes of support and custody upon dissolution of their marriage.

CASE SUMMARIES

Child Custody – Preference of Child

The trial court declined to interview the parties' 13-year-old daughter regarding the custody arrangements for her. There was no evidence from any other source as to the child's wishes. Mother appealed the transfer of custody for failure to interview the child, and the Court of Appeals reversed. "Father is generally correct that an in-chambers interview is discretionary under Section 452.385 because the statute assumes the court also has other available means to discern the child's wishes, including witness testimony and/or the appointment of a guardian ad litem. But if no relevant evidence is presented at trial, the court cannot properly exercise its discretion by refusing to interview a child who is of sufficient age and intelligence to express his or her custodial preference." *Sanders v. Busch*, No. 62143 (Mo. App. W.D., December 23, 2003), Hardwick, J.

Child Support

The father was awarded \$313 per month for two children. Both parties were granted substantial overnight parenting time. However, the trial court did not make an adjustment for it. Instead, the trial court completed a Form 14 assuming each parent was the recipient of child support, and awarded the father the difference between the two amounts. Reversed on appeal. The trial court erroneously relied upon the manner of calculating child support where there is "split custody," i.e. where each parent has primary physical custody of one or more but not all of the children. The Form 14 guidelines and worksheet provide a method for adjusting a parent's child support obligation for the time that parent has custody. That is the manner in which the trial court should determine the proper child support amount. *Stuckmeyer v. Stuckmeyer*, No. 81923 (Mo. App. E.D., September 23, 2003), Hoff, J.

Child Support - Credit for Child in Parents' Custody

The mother's child support obligation to the

father was modified. Father was given credit for his 20-year-old daughter who was in his custody, but not the subject of the proceedings. Mother appealed. The child was a full-time college student at time of trial, but had not enrolled in college by October 1 of the year in which she graduated from high school. The mother contends it was error to give him credit for an emancipated child. The trial court decision was affirmed. It was held that the mother had the burden of proving the child was emancipated by law. She did not do so. Therefore, it was not error to give the credit under the circumstances. *Jarrett v. Cornwell*, No. 62511 (Mo. App. W.D., April 6, 2004), Smart, J.

Child Support - Criminal Non-Support

In 1995, Mr. Watkins was ordered to pay \$928 per month as child support in a judgment for dissolution of marriage. Instead, he paid an average of \$536 per month over the next several years, thereby amassing an arrearage of more than \$34,000. He was convicted of criminal non-support after a trial in which the state's evidence proved only that Mr. Watkins had failed to pay the amount ordered in the dissolution judgment. Mr. Watkins appealed for lack of evidence. The Court of Appeals reversed, stating, "The Supreme Court has instructed that the General Assembly did not intend for Section 568.040 to be used as a means of enforcing child support obligations in a dissolution decree. *State v. Morovitz*, 867 S.W.2d 506, 508 (Mo. banc 1993). That a parent is not paying what the circuit court ordered him to pay in a dissolution decree, while relevant, does not establish conclusively a criminal violation under Section 568.040." *State v. Watkins*, No. 62508 (Mo. App. W.D., January 13, 2004), Spinden, J.

DCSE and Modification of Administrative Order

Father herein was adjudged to be in contempt of court for failing to pay \$1,048. The Division of Child Support Enforcement contended the arrearage was \$18,598 and

CASE SUMMARIES

(Continued)

appealed. The arrearage is based on the collection of child support on a Utah judgment. In 1994, an administrative order determined the Utah arrearage to be \$4,001, of which the father had paid all but \$1,048. In 2001, the DCSE obtained an amended administrative order that it now contends was done to correct the erroneous 1994 determination. The DCSE contends that the father failed to dispute the 2001 order and, therefore, cannot challenge it now. The trial court disagreed. The Court of Appeals affirmed the trial court, stating that § 454.500.5, RSMo, prohibits modification of the 1994 administrative order. Therefore, the 2001 administrative order was void ab initio. *State ex rel Ryan v. Ryan*, No. 25678 (Mo. App. S.D., January 26, 2004), Shrum, J.

Family Support Division

The trial court summarily dismissed the Family Support Division's action for declaration of paternity and child support on the grounds that the division lacked standing to pursue the claim because statutory authority for such action was placed with the Division of Child Support Enforcement. In early 2003, Missouri's governor issued an executive order and reorganized the state's method for establishing paternity and child support orders by creating the Family Support Division. Reversed on appeal. "[T]he Division of Child Support Enforcement's authority, under Section 210.826.1, to 'bring an action at any time for the purpose of declaring the existence or nonexistence of the father and child relationship presumed under subsection 1 of Section 210.822' now lawfully rests with the Family Support Division." The same is true for cases in which there is no presumed father. *State ex rel. Dept. of Social Services v. K.L.D.*, et al., No. 63303 (Mo. App. W.D., October 28, 2003), Ellis, C.J.

Foreign Jurisdiction in Child Custody

This was a paternity action in which child custody was awarded to the father. The

mother was a citizen of the Philippines. The father is an American citizen, thus bestowing dual citizenship on the child. The child was born on November 9, 2001. Less than six months after his birth, the mother took the child to the Philippines and left him with her parents. Thereafter, less than six months after the child's departure from the U.S., the father filed this action for paternity and custody. The trial court exercised jurisdiction without considering whether the court of another jurisdiction would be a better venue. The father was awarded custody, and the mother appealed. The decision was reversed. The Court of Appeals stated that the court should have deferred to the jurisdiction of a court in the Philippines. Although both parents reside in Missouri, (1) the child had lived in the Philippines longer than he had lived here, and (2) the grandparents had previously obtained a judgment awarding them legal guardianship of the child in a proceeding in which the father participated in opposition to the guardianship, thereby indicating that another court had exercised its jurisdiction in determining the best interests of the child. Therefore, there is an available foreign forum which has a more significant connection with the child and evidence pertaining to his best interests. *Bounds v. O'Brien*, No. 82849 (Mo. App E.D., March 16, 2004), Crahan, J.

Grandparent Visitation

The paternal grandmother brought an independent action for visitation against the child's mother only. The mother and the child's father had been divorced in 1999. The mother had been awarded sole custody. The mother sought the summary dismissal of the grandmother's action because any such claim needed to be filed as an action to modify the original divorce judgment and because the father had not been named as a party. The trial court denied the motion to dismiss and ultimately awarded limited visitation. The mother appealed. The Court of Appeals reversed. When there is an

CASE SUMMARIES

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existing judgment regarding custody and visitation in a dissolution of marriage action, the only action permissible is for modification of that judgment. To find otherwise would likely result in contradictory directions for custody and visitation between the competing judgments. "The only way to avoid such inconsistencies is to require grandparents to seek modification of a pre-existing dissolution judgment." *Tompkins v. Ford*, No. 62956 (Mo. App. W.D., April 27, 2004), Holliger, P.J.

Guardian of Incapacitated Parent Awarded Visitation

Approximately one and a half months after the wife filed a petition for dissolution of marriage, the husband became incapacitated when he was severely injured in an automobile accident. Upon the wife's motion, the husband's mother was appointed as his guardian and, as such, substituted as respondent in the case. Among other things, the trial court placed the children in the wife's custody subject to reasonable, specific visitation to the husband. The judgment provides that his guardian "shall be his representative to have children during all visitation described herein for any time that [H.] is incapacitated, so that she can make arrangements for the children to have visitation and a relationship with their father." The wife appealed. She claimed that this was an award of visitation to a third party who was not a named party. Reversed on appeal. The wife was entitled to advanced notice of a possible award of custody or visitation rights to a third party. Moreover, before visitation rights can be awarded to a third party, that person must be made a party. The case was remanded to give the husband's mother an opportunity to seek joinder as herself rather than as husband's guardian. *Walters v. Walters*, No. 25128 (Mo. App. S.D., June 23, 2003), Barney, J.

Intent to Relocate Not Disclosed

This is an appeal from an action to prevent

the mother from moving the parties' two children to Oklahoma. The parties were divorced in the circuit court of Jackson County on October 19, 2001. It is apparent from the trial court's findings that at the time of the divorce trial the mother was awarded primary physical custody in reliance in part on her testimony that she had no "present" intention to marry her paramour or to move to Oklahoma.

Less than three months after gaining custody, she provided the requisite notice of her intention to relocate to Oklahoma to be with her new husband, her former paramour. The trial court denied the relocation, citing the mother's failure to show the request to relocate was in good faith. The mother appealed, and the Court of Appeals reversed. Section 452.377 governs relocation of children. It was the mother's burden to show that (1) her request is made in good faith, and (2) is in the best interests of the children. In concurring with the mother's argument, "even if she did intentionally mislead the court concerning her then intent to relocate, which she denies, such misrepresentations were insufficient to support the court's finding that the (mother's) proposed relocation was not being made in good faith."

The father argued that the equitable doctrine of "unclean hands" should prevent the mother from obtaining relief here. "The unclean hands doctrine is not available as a defense to proceedings at law, even though based on equitable principles." *Karpierz v. Easley*, 68 S.W.3d 565, 571-72 (Mo. App. 2002)."

The decision was also reversed because the trial court did not pass on whether the relocation would be in the best interests of the children.

There is no mention here of whether the father sought a modification of child custody, only that he sought a judgment preventing the relocation. *Swisher v. Swisher*, No. 61874 (Mo. App. W.D., November 25, 2003), Smith, J.

CASE SUMMARIES

(Continued)

Maintenance

The parties' marriage was dissolved in 1994, at which time the wife was awarded periodic maintenance. The husband sought the termination of the maintenance seven years later. At the time of the divorce, the wife was unemployed. At the time of the modification trial, she had worked a part-time job (20 hours per week) for 6 ½ years. She also had income from two rental properties awarded to her in the divorce. The trial court denied the husband's motion, and he appealed. The Court of Appeals affirmed the trial court's decision, stating that contrary to husband's assertion, the failure to seek full-time employment, by itself, is not overwhelming evidence that wife failed to make a good faith effort to seek employment and achieve financial independence. *Shanks v. Shanks*, No. 82310 (Mo. App. E.D., September 23, 2003), Norton, P.J.

Maintenance

The 1996 judgment of dissolution of marriage provided for the wife to receive non-modifiable maintenance of \$300 per month for 60 months. The judgment also incorporated within it the parties' property settlement agreement that provided for the wife to receive the sum of \$300 per month for 60 months. In exchange for the aforesaid payment, the wife forfeited her interest in the husband's pension benefits.

Thereafter, in 2002, the wife brought an action for enforcement of the judgment to obtain the \$300 per month in exchange for the waiver of interest in husband's pension benefits. The husband countered that these two references were one and the same. Thus, having already paid the maintenance, he no longer owed the wife any additional payments. The trial court agreed, and denied the wife's claim. She appealed and the trial court was reversed. Despite the identical amounts referenced in the dissolution judgment, these were two separate obligations. "Maintenance should not be used as a mechanism to distribute marital property."

Heilman v. Heilman, 700 S.W.2d 843, 845 (Mo. banc 1985). Wife's interest in husband's pension plan is marital property. *Lynch v. Lynch*, 665 S.W.2d 20, 23 (Mo. App. E.D. 1983). To accept husband's argument and affirm the motion court is to countenance the use of maintenance as an appropriate method to compensate a spouse for an interest in marital property." *Booher v. Booher*, No. 82896 (Mo. App. E.D., January 13, 2004), Cohen, J.

Maintenance and Remarriage

The parties to a dissolution of marriage action agreed that the wife would receive "contractual, non-modifiable, non-dischargeable maintenance." The entire agreement, including the maintenance provisions, was incorporated in the decree. There was no mention made of any occurrence that would trigger the termination of the maintenance before the final installment. The wife remarried within a year and several months before the monthly maintenance was to expire. When the husband stopped paying maintenance, the wife sought an income assignment. The husband filed a request to quash the income assignment, but the court denied his motion. He appealed, and the trial court decision was reversed. The wife argued that the inclusion of the word "non-dischargeable" rendered the termination of the maintenance because of her remarriage improper. The husband countered that § 452.370.3 compels the termination of maintenance. "Non-dischargeable" in this context merely means that the husband could not discharge the obligation in bankruptcy. "... [S]ection 452.370.3 requires that the parties must state such intent in writing or the court's decree must expressly provide the maintenance obligation extends beyond remarriage or death." *Tucker v. Tucker*, No. 62455 (Mo. App. W.D., January 13, 2004), Howard, P.J.

CASE SUMMARIES

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Paternity

The wife filed a petition for dissolution of marriage, which alleged that a child had been born of the marriage. The husband's answer denied that allegation. A guardian ad litem was appointed. There was no definitive evidence offered to prove that the husband was not the child's father. The husband requested paternity tests, which the trial court ordered. However, no testing was done in a timely manner, and the trial court ultimately entered a judgment that found H.M.F. to be a child born of the marriage. The husband appealed, asserting that the procedures for determining paternity under Missouri's Uniform Parentage Act (UPA) were required to be followed. The appellate court reversed, noting that "[n]otwithstanding the volume of cases holding the UPA is the exclusive means of determining paternity, it is well to note that there are now at least two statutory provisions in Missouri specifically providing for adjudication of paternity" – the Uniform Reciprocal Enforcement of Support Law ("URESAs") and the Uniform Interstate Family Support Act ("UIFSA").

Nevertheless, in a setting such as a dissolution of marriage action in which neither URESAs nor UIFSA are applicable, this opinion concludes that "courts do well to mandate that the procedural requirements of the UPA be applied in cases where parentage is contested and where no provision for adjudicating that issue outside the UPA appears applicable."

"[S]ince no action was filed pursuant to Sec. 210.826, there obviously was no compliance with Sec. 210.830, which requires that the child whose paternity is at issue, the natural mother, the presumed father and any putative father be made parties to the Sec. 210.826 action." A next friend should also be appointed for the child. *Fry v. Fry*, No. 25254 (Mo. App. S.D., June 23, 2003), Garrison, J.

Relocation - Notice

The parties had joint custody based on a previous judgment. In July 2001, the mother moved from Kansas City to South Carolina with the parties' child. She had given verbal notice that she was considering a move to South Carolina in mid-June. Thereafter, a few days before leaving for South Carolina in July, the mother gave the father a note with her new phone number and address. Proceedings against her began within 30 days after her relocation and were successful in transferring custody of the child to the father. She appealed and part of her argument was that her verbal notice was sufficient under the statute. Affirmed on appeal. The verbal notice was held to be inadequate actual notice because it was conditional notice, i.e., "I may be moving to South Carolina." Moreover, neither notice here included the information to be given as detailed in § 452.377, which is essential. *In re: Matter of Wright*, No. 62155 (Mo. App. W.D., March 30, 2004), Howard, J.

Relocation of Child

The parties were divorced in 1993. On January 7, 2002, the father sought modification of child custody that would still leave the child in the primary physical custody of the mother. During the pendency of the case (May 22, 2002), the mother sent the father notice of intention to relocate the child's residence. On June 4, 2002, father sought leave to amend his motion to modify. Leave was granted on June 17. He filed his amended motion objecting to the relocation on June 28, i.e. five days too late to object to the move. The trial court modified custody on the father's amended motion, and the mother appealed. The Court of Appeals reversed, noting that having failed to file the objection within the 30 days, the father lost his right to object. There is some discussion of whether the motion to amend, in itself, was sufficient as the requisite pleading objecting to the relocation. The court rejected that argument, saying that there was nothing in

CASE SUMMARIES

(Continued)

the motion to amend that could be interpreted as a request for the entry of an order to prevent the relocation. The opinion notes that § 452.377.7, RSMo., requires an affidavit setting forth the factual basis supporting a prohibition of the relocation. The motion to amend was signed by the father's attorney and did not contain an affidavit.

The opinion states that the father did not have to seek leave to amend in order to file another action, albeit related to the pending motion, objecting to the move. Furthermore, since the relocation was now to be considered permissible, it could not form the basis for a modification of custody. Likewise, any other complaints attendant to the relocation, such as the child having no friends there and now being 5 ½ hours away, are off limits. *Heslop v. Sanderson*, No. 62139 (Mo. App. W.D., October 21, 2003), Smith, J.

Trust Income

This was an action for dissolution of marriage. The husband was the beneficiary of a trust funded by his parents. The trust provided that the trust could be terminated after the husband reached age 25. In addition, once he reached age 35, he had the option to terminate the trust and receive the assets held in trust. No action was taken when he reached age 25. He became 35 during the marriage, but as of trial he had not exercised his option.

During the marriage, the trust received a gift of 308 acres of farmland from the husband's parents. In addition, the trust purchased 837 acres of farmland from the husband's parents with the purchase to take place over a 10-year period. The trust had paid nine of the 10 annual payments at the time of trial with funds generated by income earned on trust property.

The trial court found that the trust was a separate entity, and until husband actually receives the trust assets, they are the separate property of the trust. It further found that any "residual interest" of the husband is the husband's non-marital property. The wife

appealed. Appellate court reversed and remanded. This opinion holds that by virtue of his option to terminate the trust at age 35, "[h]usband constructively received the trust assets at that time." It is well-settled that income earned on non-marital property during marriage is marital property. The trial court should have determined the income earned on the trust property from the time the husband attained age 35 and time of divorce. "[M]arital property may have contributed to any increase in the value of trust assets from 1998 to the date of dissolution of the marriage in 2001." *Moore v. Moore*, No. 24650 (Mo. App. S.D., June 30, 2003), Parrish, J.

Change of Surname of Child

Two children were born out of wedlock to these parties. The father brought an action for a declaration of paternity, child custody and child support determination and asked that the children's surnames be changed to his name. The trial court granted that request on the testimony of the father that did nothing more than state his request that their last name be changed. Reversed on appeal. "Father's remark that he would like the children's names to be changed is not sufficient evidence to overcome his burden of proof demonstrating that it is in the children's best interests to have their surnames changed. Additionally, there is no presumption that the children's best interests are served by having their biological father's surname." *Blechle, et al. v. Poirrier*, No. 81077 (Mo. App. E.D., July 22, 2003), Draper, J.

UCCJAct/Parental Kidnapping Prevention Act

The parties were divorced in the district court of Johnson County, Kansas, in 1994. The mother and children now live in Camden County, Missouri, and she filed a motion to modify the Kansas judgment as to custody, visitation and child support. Her motion alleged that the father lives in Johnson County, Kansas, and that Missouri has been the home state of the children for more than six

CASE SUMMARIES

(Continued)

months. The trial court summarily dismissed the mother's motion sua sponte. The Court of Appeals reversed, holding: "In sum, the ultimate issue under a PKPA preemption analysis is whether the trial court's custody modification decree is entitled to interstate enforcement. *Glanzer v. State*, DSS, 835 S.W.2d 386, 393 (Mo.App. 1992)." "[T]he 'continuing jurisdiction' provision of the PKPA (28 U.S.C.A. Sec. 1738A(d)) must be considered in this case. It follows, therefore, that relevant facts should be presented to or gathered by the trial court on remand concerning any possible continuing jurisdiction in the District Court of Johnson County, Kansas. After having those facts, the trial court may do a preemption analysis and decide if any modification it makes to the Kansas decree will be entitled to interstate enforcement." *Russell v. Ruth*, No. 25457 (Mo. App. S.D., September 29, 2003), Shrum, J.

Stock Options – Acquisition of

A judgment dissolving the marriage, pursuant to the terms of a separation agreement entered into by the parties, was entered on December 12, 2000, a date of great importance in this matter. Subsequent to the divorce, the wife learned that certain stock options granted to the husband between 1997 and 2000 had not been disclosed. Pursuant to the wife's motion, the trial court set aside the judgment in all respects except for the status of the marriage. According to this opinion, it was conceded that the stock options granted to the husband from 1997 to the date of divorce were marital property. However, the husband's employer granted him stock options on 5,000 additional shares of company stock on December 13, 2000, the day after the divorce. The wife contended that the December 13 options were essentially

earned during the marriage and, therefore, were marital property. The husband's evidence was, among other things, that the employer's stock agreement left the decision to grant stock options to the total discretion of a committee. Therefore, he had no ownership interest in the December 13 stock options until after the divorce.

The trial court found that the December 13 option was marital property and divided the shares equally between the parties. The husband appealed. The Court of Appeals reversed, stating, "No Missouri case has yet answered the question whether an item to which neither party has any enforceable right as of the date of dissolution but which was technically 'paid for' during the marriage is marital property. We hold that to be considered 'acquired property' under Sec. 452.330.2 and 452.330.3, at least one party to the divorce must have some enforceable right to the item in question. The stock options awarded to (husband) on December 13, 2000, then, were not marital property subject to division by the trial court."

Further clarifying, the opinion states: "Here, all of the work performance leading to the December 13th award did occur during the marriage. The principle that a trial court does not have jurisdiction to divide property that does not exist at the time the divorce decree is filed still applies with equal force though, even when all of the work leading to the acquisition of the property occurred during the marriage."

The award of 2,500 shares to the wife from the December 13 stock options was reversed. *Clance v. Clance*, No. 62273 (Mo. App. W.D., March 2, 2004), Holliger, J.



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