IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Thomas V. DRESSEL versus Judith A. DRESSEL

Appellate Cause No.: ED88482

STATE OF MISSOURI)
) SS:
COUNTY OF JEFFERSON)

IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL CIRCUIT
OF MISSOURI AT HILLSBORO, JEFFERSON COUNTY, MISSOURI
DIVISION NO. 1

JUDITH A. DRESSEL S.S.N. XXX-XX-ZZZZ, Petitioner,	)	
vs.	)	CAUSE NO. CV304-2767-DR-J20
THOMAS V. DRESSEL, SR. S.S.N. XXX-XX-ZZZZ, Respondent.	)	

Appellant's Brief

Jurisdictional Statement

Whereas Appellant Thomas is not directly challenging the validity of a treaty or statute of the United States, nor a statute or provision of the Constitution of this State, nor the construction of the revenue laws of this state, nor to the title to any state office, nor any case where the punishment imposed is death, the proper jurisdiction for review on appeal, where the trial court dissolution case involves issues of child custody and support, division of marital assets and debts, and the availability of alimony, is within the Missouri Court of Appeals, in this case, further being the Eastern District thereof.

Statement of Facts

Respondent Judith and Appellant Thomas married in St. Louis in October of 1980 (Record at 8), and remained residents of Missouri thereafter. *Id*. There were three (3) children born of the marriage – T.V.D., a son who was born on 12/16/82, A.L.D., a daughter who was born on 06/30/85, and M.J.D., a son who was born on 04/10/89. *Id*. At ages seventeen and nineteen, respectively, Respondent Judith and Appellant Thomas came into their marriage with little or nothing to speak of from either of themselves individually, and with a result of all significant assets obtained only during the time of the marriage union, leaving the entire same of the total value of assets held jointly by them at the time of separation subject to an equitable distribution of approximately 50 percent (50%) each. (Record at 124).

As of the time of separation in April of 2004 (Record at 8), the parties had a single (1) piece of real property, located at 2924 Old Highway A, Festus, Missouri 63028, as their only marital residence (Record at 48-50, 63, 72), approximately $86,000.00 in personal property (Record at 72-76, 91-102), and approximately $47,000.00 in cash (Record at 157, 159-160). Just before the separation, Respondent Judith had previously received a $97,000.00 settlement in her own name, and was also expecting to receive another settlement in the near future thereafter, in the amount of $125,000.00. (Record at 22). At the time of separation, and taking advantage of Appellant Thomas being hospitalized for a length of time (Record at 80), Respondent Judith removed a considerable amount of money from the parties' joint bank account to use for herself. (Record at 27, 78, 80-81, 84, 161), even writing herself checks in amounts as large as $15,000. (Record at 85-87).

Also during this period of time, Respondent Judith had been forsaking her marital fidelity, and having an illicit affair (Record at 79, 82-83), in preparation for causing the parties' separation, and her immediate filing of a petition for dissolution (Record at 8).

With his older sister already over eighteen (18) years of age (Record at 8) and living with her boyfriend (Record at 23), and being just a few days shy of fifteen (15) years old himself, the parties' teenage son, M.J.D., remained as the only minor child at the time of separation, when Respondent Judith filed her petition for dissolution. (Record at 8-9).

Although Appellant Thomas was never either alleged or proven to be unfit to parent his minor child, M.J.D. (Record at generally), and although the submitted Parenting Plan called for Appellant Thomas to exercise fairly reasonable visitation (Record at 11-16), no visitation was ever allowed by Respondent Judith subsequent to the parties' separation.

During the entire since separation, however, Respondent Judith maintained a revealing pattern of her full "control" over M.J.D., the parties' teenage son, allowing him to totally decay into significant emotional problems concerning the loss of his father, Appellant Thomas, from his life (Record at 173-178), a marked degradation of very serious absences, truancy, and utterly failing grades at school (Record at 169-172), and even allowing – and providing – M.J.D. to indulge in drugs and alcohol (Record at 119-120).

Moreover, during the two years of the instant lower court proceedings, Respondent Judith had been involved in committing various criminal acts of dishonesty against the State of Missouri, in order to even try and defraud others from their monies and assets (Record at 162-168), even though she is and was able-bodied, gainfully self-employed, and earned a reasonable income working as a housekeeper. (Record at 9, 32, 38, 71).

On August 30, 2004, a PDL Agreement was made by the parties and their attorneys (Record at 50-52), establishing temporary child support at $640.00 per month, and that the parties were performing a quit claim deed upon the former marital residence, with Respondent Judith giving up her possession and claim to said residence in exchange for a $15,000.00 cash payment and refinancing from and by Appellant Thomas, with Respondent Judith to surrender her physical possession of the residence to him shortly thereafter, in a condition similar to when the parties initially separated. (Record at 51).

On the very next day, September 1, 2004, the trial court approved the exact same agreement, but instead actually entered an order of $744.00 per month in child support, $600.00 per month in temporary maintenance for Respondent Judith, and finding Appellant Thomas several thousand in child support "arrears" (Record at 3), even though no such item amounts were ever discussed or agreed to by the parties. (Record at 50-52).

The proper amount of child support that should have ever been ordered against either party is an exacerbated issue, due to the fact that several Form 14's with varying amounts and figures were filed by both parties (Record at 36, 71, 184, 185, 186, 187), with a few figures as low as $563.00 per month, and the fact that even a full year later, on August 11, 2005, Appellant Thomas' new counsel formally instructed him that the Agreement for Payment of Child Support that had just been entered into by the parties called for him to *still* pay just $640.00 per month (Record at 61), and the fact that Respondent Judith, herself, submitted the exact same PDL agreement, and its attendant child support amount of $640.00 per month, as an Exhibit at final hearing on March 21, 2006. (Record at 63).

However, even *that* figure of $640.00 per month in child support was based upon an erroneous child support calculation, because Appellant Thomas, during much of the lower proceedings, was unable to earn anywhere near the gross income reported and used upon said Form 14's, such as only making $33,750.00 during 2004, due to being off work for a period of time because of an employment-related injury. (Record at 179).

The portion of the parties' PDL agreement regarding transfer and possession of the former martial residence had already taken effect prior to its later written execution and approval by the trial court, and Appellant Thomas was formally directed by Respondent Judith's attorney to take possession of the home on August 21, 2004. (Record at 47-49).

However, immediately upon re-entering the former marital home, Appellant Thomas discovered that Respondent Judith had not honored the terms of their Agreement, as also approved and made an order of the trial court, as she had utterly destroyed the home into a deplorable condition of heavy damages and disrepair, and had also removed the vast majority of the parties' personal property, including items only of use to Appellant Thomas and only of use to the real property itself (Record at 55, 103-108), and had left condoms from her ongoing sexual affair laying on the side of the hot tub, and substantial amounts of alcohol in the refrigerator, apparently instead of keeping any at least appropriately-token amounts of food in there, while keeping the minor children in the former marital home. (Record at 55, 108).

It was also discovered that she had completely drained the parties' joint bank account, and removed all of Appellant Thomas' agreed-upon personal property. (Record at 55-56).

All outstanding issues were then finalized by the trial court on March 28, 2006, awarding Respondent Judith the "carte blanche", including primary custody of M.J.D., child support from Appellant Thomas in the amount of $744.00 per month, a child support arrearage in the amount of $4976.00, permanent maintenance for Respondent Judith in the amount of $600.00 per month, one-half of the pension of Appellant Thomas, and all of the parties' personal property then in her possession, while Appellant Thomas was somehow "awarded" the former marital house, the meager items of personal property then in his possession, and the remaining one-half of his pension (Record at 112-116).

Appellant Thomas timely filed his motion to correct errors (Record at 117-128) and memorandum of law in support (Record at 129-141). The trial court held a hearing on said motion and memorandum on June 21, 2006, at which Appellant Thomas submitted new evidence obtained, regarding M.J.D.'s school records, showing the minor son to be extremely absent, frequently tardy, and literally failing every single one of his classes, while Respondent Judith had been in sole physical "care" of M.J.D. since the parties' separation in March of 2004. (Record 143-148). On June 30, 2006, the trial court denied every issue concerning child custody and support of M.J.D., but reduced the monthly amount of maintenance by one hundred dollars. (Record at 150).

This appeal ensued. (Record at 151).

Points Relied On

1) The trial court erred in awarding Respondent Judith custody of M.J.D., because a trial court may take custody of a child away from a parent when unfitness is shown, and in that Appellant Thomas was never alleged or proved unfit to parent his children.

Supporting Caselaw:

Troxel v. Granville, 527 U.S. 1069 (1999)

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)

Santosky v. Kramer, 455 U.S. 745 (1982)

Stanley v. Illinois, 405 U.S. 645 (1972)

2) The trial court erred in awarding Respondent Judith custody of M.J.D., because it is plain error to award child custody to a manifestly unfit parent, and in that her unfitness was then - and still is - clearly shown to include allowing severe deterioration of the minor child's performance at school, both past and present, allowing the minor child to be involved with drugs and alcohol, even supporting the same illegal habits of her minor son, M.J.D., also never having allowed the father, Appellant Thomas, any opportunities to either visit with or parent his same minor son, even knowing that her minor son was emotionally suffering from her visitation interference, and her having further began a life of crime involving dishonest acts of fraud within the State of Missouri, and in that, conversely, Appellant Thomas was never even alleged to be unfit to parent his minor son, yet was denied all aspects of a relationship with M.J.D.

Supporting Caselaw:

Young v. Young, 59 S.W.3d 23 (Mo. App. 2001)

Scott v. Scott, 147 S.W.3d 887 (Mo. App. 2004)

Horinek v. Horinek, 41 S.W.3d 897 (Mo. App. 2001)

Flathers v. Flathers, 948 S.W.2d 463 (Mo. App. 1997)

3) The trial court erred in awarding Respondent Judith with any amount of monthly spousal maintenance, because said award was contrary to the required elements of both RSMo. 452.130 and RSMo. 452.335, in that Respondent Judith abandoned Appellant Thomas, not the other way around as required by law, and in that the trial court did not find that Respondent Judith lack sufficient means to take care of herself, did not find that she was unable to maintain employment, did not find that there was any young minor child giving reason for her not to continue working, and also gave no consideration of the several factors required to be considered by RSMo. 452.335(2).

Supporting Caselaw:

Tarneja v. Tarneja, 164 S.W.3d 555 (Mo. App. 2005)

Perryman v. Perryman, 117 S.W.3d 681 (Mo. App. 2003)

4) The trial court erred in its final division of property, assets, and debts, because it essentially awarded a roughly 95% to 5% inequitable share to overwhelmingly in favor of Respondent Judith, by improperly including a large and substantial non-marital asset within the marital property to be divided between the parties, in that the trial court wrongfully included the parties' former marital residence within the aggregate property to be divided, when the parties had already excluded that asset by contract.

Supporting Caselaw:

Wright v. Wright, 1 S.W.3d 52 (Mo. App. 1999)

Conrad v. Conrad, 76 S.W.3d 305 (Mo. App. 2002)

In re Marriage of Stamatiou, 798 S.W.2d 737 (Mo. App. 1990)

Farnsworth v. Farnsworth, 108 S.W.3d 834 (Mo. App. 2003)

5) The trial court erred in its various orders of child support and judgments of child support arrearages, because the trial court apparently and mistakenly used an incorrect Form 14 in regard to calculating the parties' any present or past true incomes, and in that the trial court failed to properly consider the overall reasonableness of such child support orders, in light of Respondent Judith receiving the overwhelming lion's share of all marital assets, property, static monies, and future monies, and in light of Appellant Thomas in receiving virtually no marital assets, but getting the marital debt.

Supporting Caselaw:

State ex rel. Div. of Family Servs. v. Summerford, 75 S.W.3d 353 (Mo. App. 2002)

Woolridge v. Woolridge, 915 S.W.2d 372 (Mo. App. 1996)

Ricklefs v. Ricklefs, 39 S.W.3d. 865 (Mo. App. 2001)

Martin v. Obiakor, 992 S.W.2d 201 (Mo. App. 1999)

Argument

1) *The trial court erred in awarding Respondent Judith custody of M.J.D., because a trial court may take custody of a child away from a parent when unfitness is shown, and in that Appellant Thomas was never alleged or proven unfit to parent his children.*

Standard of Review: (1)

The standard of review is as in other judge-tried cases. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "A trial court has broad discretion in deciding child custody but

always the best interests of the child are the ultimate concern." *R.J.A. v. G.M.A.*, 969 S.W.2d 241, 244 (Mo. App. 1998).

Argument: (1)

The legal and physical custody of M.J.D., a minor child, was completely and equally vested into both of the parent parties at, and from, the very moment of M.J.D.'s birth, and that fully shared custody cannot ever be lawfully (constitutionally) removed from either parent until, and unless, that particular parent has been first proven, and only by clear and convincing evidence, of being seriously unfit, unable, or unwilling to retain said custody.

Upholding only one parent's pre-existing legal and physical child custody, and not upholding the other parent's same legal interests and rights, violates Equal Protection of the Law, and further constitutes gender discrimination between the two parties, both as various violations of the fundamental rights protected by at least the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, as well as also being various violations against Article 1, Section 2, of the Missouri Constitution.

In *Troxel v. Granville*, 527 U.S. 1069 (1999), Justice O'Conner, speaking for the Court stated, "The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of the law.' We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.' The Clause includes a substantive component that 'provides heightened protection against governmental interference with certain fundamental rights and liberty interest" and "the liberty interest of parents in the care, custody, and control of

their children is perhaps the oldest of the fundamental liberty interest recognized by this Court." Logically, these forms of fundamental liberties are inherently a federal question.

The Supreme Court has recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'" (citation omitted)).

Trial courts must, as a matter of constitutional law, fashion orders which will maximize the time children spend with each parent unless the court determines that there are compelling justifications for not maximizing time with each parent. Throughout the last century, the Supreme Court also has held that the fundamental right to privacy protects citizens against unwarranted governmental intrusion into such intimate family matters as procreation, child-rearing, marriage, and contraceptive choice. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 926-927 (1992).

The Supreme Court has long recognized as a component of substantive due process the right to familial relations. See *Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1923); *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (there is "a fundamental liberty interest of natural parents in the care, custody, and management of their child."). "Even when blood relationships are strained, parents retain

a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982).

Parents therefore have a constitutionally protected liberty interest in the care, custody and management of their children. See *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982); *Hurlman v. Rice*, 927 F.2d 74, 79 (2d Cir. 1991); *van Emrik v. Chemung County Dep't of Soc. Servs.*, 911 F.2d 863, 867 (2d Cir. 1990); see also *Stanley v. Illinois*, 405 U.S. 645, 649-52, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) (rights to conceive and raise one's children have been deemed "essential" and "basic civil rights of man").

The egregiously different burdens and benefits placed on persons similarly situated but for the award of custody, i.e., parents with the obligation to support their child(ren) and the same means for doing so as when they were married, has been explained at length in several judicial opinions. The finding is that such disparate treatment violates the guarantees of equal protection. *Jones v. Helms*, 452 U.S. 412, 101 S.Ct. 2434 (1981), *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 119 S.Ct. 1180 (1999), and *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996).

In essence, the Supreme Court has held that a fit parent may not be denied equal legal and physical custody of a minor child without a finding by clear and convincing evidence of parental unfitness and substantial harm to the child, when it ruled in *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), that “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment.”

As a general rule, therefore, before parents may be deprived of the care, custody or management of their children without their consent, due process -- ordinarily a court proceeding resulting in an order permitting removal -- must be accorded to them. See Stanley, 405 U.S. at 649, 651. A governmental entity cannot simply presume, but must actually prove in each case, that the parent has committed conduct that renders them unfit to serve as the child's guardian. Stanley v. Illinois, 405 U.S. 645, 656-58, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).

"***Parents have a fundamental right to the custody of their children, and the deprivation of that right effects a cognizable injury***. See Santosky v. Kramer, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 1397, 71 L. Ed. 2d 599 (1982). (emphasis added)." Troxel v. Granville, 530 U.S. 57, 68-69, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000) (plurality opinion). (emphasis in original).

Both parents of the minor child, M.J.D., immediately enjoyed fully shared and vested legal and physical custody of him from the very moment of his birth. Appellant Thomas was never alleged to be unfit, nor ever allowed to have any parenting time with his minor son, yet the trial court took away and deprived Appellant Thomas of his various legal rights and interests to his minor son as detailed above, while still upholding the exact same rights and interests of Respondent Judith to their minor son, M.J.D.

The trial court was, and is, in error, for such a disparate custody placement without ever judicially finding any form of unfitness of Appellant Thomas, let alone by the required clear and convincing evidence standard. That child custody should be reversed.

2) *The trial court erred in awarding Respondent Judith custody of M.J.D., because it is plain error to award child custody to a manifestly unfit parent, and in that her unfitness was then - and still is - clearly shown to include allowing severe deterioration of the minor child's performance at school, both past and present, allowing the minor child to be involved with drugs and alcohol, even supporting the same illegal habits of her minor son, M.J.D., also never having allowed the father, Appellant Thomas, any opportunities to either visit with or parent his same minor son, even knowing that her minor son was emotionally suffering from her visitation interference, and her having further began a life of crime involving dishonest acts of fraud within the State of Missouri, and in that, conversely, Appellant Thomas was never even alleged to be unfit to parent his minor son, yet was denied all aspects of a relationship with M.J.D*.

Standard of Review: (2)

Again, the standard of review is as in other judge-tried cases. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "A trial court has broad discretion in deciding child custody but always the best interests of the child are the ultimate concern." *R.J.A. v. G.M.A.*, 969 S.W.2d 241, 244 (Mo. App. 1998).

Argument: (2)

Simply put, Respondent Judith was never, and is still not, a substantially fit parent with which to properly enjoy primary physical custody of the parties' minor son, M.J.D., even more so when considering that the proper alternative is obvious to place primary custody with Appellant Thomas, who has never been alleged or shown to be at all unfit.

Although it should be plainly and painfully clear that Respondent Judith should have not been awarded primary custody of M.J.D., it will be reminded that during the entire since separation, Respondent Judith has clearly maintained a revealing pattern of her utter failures to "control" and "care" for M.J.D., the parties' teenage son, by knowingly allowing him to totally decay into significant emotional problems concerning the loss of his father, Appellant Thomas, from his life (Record at 173-178), a marked degradation of serious absences, truancy, and consistently failing grades at school since removing Appellant Thomas from his life (Record at 169-172), and even allowing – and even providing at time for – M.J.D. to indulge in drugs and alcohol (Record at 119-120).

Moreover, during the two years of the instant lower court proceedings, Respondent Judith had been involved in committing various criminal acts of dishonesty against the State of Missouri, in order to even try and defraud others from their monies and assets (Record at 162-168), even though she is and was able-bodied, gainfully self-employed, and earned a reasonable income working as a housekeeper. (Record at 9, 32, 38, 71).

Over the past few years, Respondent Judith's behavior regarding her minor son has remained markedly similar to that of the natural parents who were *easily* declared unfit and unsuitable by this Court in Young v. Young, 59 S.W.3d 23 (Mo. App. 2001):

> There was evidence of drug usage and domestic violence in the household, including some physical violence against the wife in the presence of the child. There was evidence that Gregory Young introduced Deborah Young to drugs (although he denied it) and allowed the use of drugs when the child was present. n3 The facts also suggested that appellant is controlling, aggressive, intemperate, combative, argumentative, and vindictive in nature. There was evidence that he lacked motivation to hold steady employment. When he was unemployed while his wife was working, he placed his daughter in day care rather than take care of her himself at home. There was testimony from individuals outside the marriage, as well as from Deborah Young, that

> Young tends to use physical intimidation and threats of harm to control others. The evidence suggested he lacked significant emotional maturity. He also saw nothing improper with taking unclothed showers with his then seven-year-old daughter, or letting her see him in the nude. The parties had difficulty communicating about the child. Finally, even during the course of the trial, appellant's reluctance to answer some questions created the impression he would be unwilling to assure access to the child by other parties in this case. The trial court could have concluded from the evidence that Mr. Young's primary motive in this litigation was to obtain a competitive victory, and that his desire to care for Samantha was less significant.
>
> *Young*, at 17-18.
>
> In the instant case, the court made specific findings supported by the evidence that appellant allowed Deborah Young's use of drugs to involve the child and failed to take action to protect the child. The court also found that appellant did not see his wife's drug involvement in the home as a problem; that appellant committed domestic violence in the home; that appellant was unable to communicate effectively regarding the child; that appellant intimidated and threatened others in order to gain control; that appellant abandoned the responsibility of supporting the child until he found he could gain personal advantage by paying child support and marital bills; n5 and that appellant failed to pay child support even while asking for custody. In contrast to this evidence, there was very little positive evidence of Young's qualification to have custody of Samantha. The evidence supported a finding of unfitness and unsuitability.
>
> *Young*, at 19-20.

Moreover, the trial court's awarding of primary custody of M.J.D. to Respondent Judith, and later entering denial of Appellant Thomas' motion to correct the same, goes against reasonable inclusion of the factors required to be considered by law. "The public policy of Missouri is to 'assure children frequent and meaningful contact with both parents after the parents have separated or dissolved their marriage . . . .'" *R.J.A. v. G.M.A.*, 969 S.W.2d 241, 246 (Mo. App. 1998); see § 452.375.4. Under section 452.375.2 the trial court is to determine who shall be awarded custody of a child in accordance with the best interests of that child. In making this determination, the court is to consider "all relevant factors," including, but not limited too, the following seven:

(1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;

(2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;

(3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;

(4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;

(5) The child's adjustment to the child's home, school, and community;

(6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved. If the court finds that a pattern of domestic violence has occurred, and, if the court also finds that awarding custody to the abusive parent is in the best interest of the child, then the court shall enter written findings of fact and conclusions of law. Custody and visitation rights shall be ordered in a manner that best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm; [and,]

(7) The intention of either parent to relocate the principal residence of the child.

Considering just the above factors, it must be noted that: (a) the trial court did not even use the parties' Parenting Plan, yet made no new alternative at all; (b) Appellant Thomas has still not had even one single day of "visitation" with his minor son since the parties separated in March of 2004; and (c) that Respondent Judith – despite being in contempt of court orders to the contrary – has relocated her residence several times since the parties' separation, taking and concealing the minor son, and without providing any of her new addresses or phone numbers to either Appellant Thomas or the trial court itself.

The trial court was, and is, clearly in error for placing primary custody of the parties' minor son, M.J.D., with Respondent Judith. This situation has turned out to be a disaster

upon M.J.D. and his life, resulting in all kinds of severe problems as detailed above. That child custody decision by the trial court should be reversed in favor of Appellant Thomas.

3) *The trial court erred in awarding Respondent Judith with any amount of monthly spousal maintenance, because said award was contrary to the required elements of both RSMo. 452.130 and RSMo. 452.335, in that Respondent Judith abandoned Appellant Thomas, not the other way around as required by law, and in that the trial court did not find that Respondent Judith lack sufficient means to take care of herself, did not find that she was unable to maintain employment, did not find that there was any young minor child giving reason for her not to continue working, and also gave no consideration of the several factors required to be considered by RSMo. 452.335(2).*

Standard of Review: (3)

This court will review the judgment of the trial court under the standard of review applicable to any other court-tried case. *Eckhoff v. Eckhoff*, 71 S.W.3d 619, 622 (Mo. App. 2002). The judgment will be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

Argument: (3)

Having been involved in an illicit sexual affair, Respondent Judith took dishonest advantage of Appellant Thomas' lengthy hospitalization from a work-related injury, and initiated a permanent separation of the parties, together with filing for dissolution. (Brief, *supra*, at 2-3). As such, it is Respondent Judith who "abandoned" Appellant Thomas, and not the other way around. Indeed, Appellant Thomas initially responded to her petition

for dissolution of marriage, by denying that the marriage was irretrievably broken. (Record at 23). Appellant Thomas had never entertained any ideas of "abandoning" Respondent Judith – who was the only person having "unclean hands" in this matter.

RSMo. § 452.130 specifies that an award of maintenance may be ordered by the trial court upon abandonment of one spouse by the other. According to the plainly written law, then, the trial court could have ordered Respondent Judith to pay maintenance to the spouse that she abandoned, Appellant Thomas, but there was no legal authority for the trial court to order that Appellant Thomas – who was still trying to save his marriage – should *instead* pay maintenance to the unclean hands of Respondent Judith. As such, the order of maintenance is contrary to law, and should now be reversed by this Court.

Moreover, and even notwithstanding the above, RSMo. § 452.335.1 specifies that an award of maintenance may be ordered by the trial court ***only*** upon the combined findings that the spouse seeking maintenance: (a) lacks sufficient property to provide for her own reasonable needs; ***and***, (b) is unable to support herself through appropriate employment.

There are also several additional factors that must be considered under RSMo. § 452.335.2, before an award of maintenance can be ordered, including the following:

> (1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
>
> (2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (3) The comparative earning capacity of each spouse;
>
> (4) The standard of living established during the marriage;

(5) The obligations and assets, including the marital property apportioned to him and the separate property of each party;

(6) The duration of the marriage;

(7) The age, and the physical and emotional condition of the spouse seeking maintenance;

(8) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance;

(9) The conduct of the parties during the marriage; and

(10) Any other relevant factors.

As has been clearly demonstrated, Respondent Judith in no way meets or exceeds the requirements of this Section. She had an illicit sexual affair behind Appellant Thomas' back, she initiated a sudden separation while Appellant Thomas was incapacitated in the hospital, she cleaned out the parties' joint bank account for her own selfish pleasures, she still has the lion's share of the parties' substantial amounts of personal property, and she also had very substantial settlement monies from an independent source just prior to her filing for dissolution. Moreover, she fraudulently reneged on the parties' PDL agreement, by utterly destroying the former marital residence into shambles, and dishonestly taking Appellant Thomas' personal property, before giving him residential possession back. She was also already enjoying a substantial amount of child support monies, of which a fair share was already attributable to her own needs, and she was already gainfully employed.

Respondent Judith was never entitled to any award of maintenance, whether referring to her demonstrably "unclean hands" in the entire matter, or whether referring to the actual requirements of Missouri law for an award of maintenance to be properly ordered.

Accordingly, this Court should now reverse the award of maintenance in its entirety, and find that Respondent Judith should reimburse Appellant Thomas for those amounts.

4) *The trial court erred in its final division of property, assets, and debts, because it essentially awarded a roughly 95% to 5% inequitable share in favor of Respondent Judith, by improperly including a large and substantial non-marital asset within the marital property to be divided between the parties, in that the trial court wrongfully included the parties' former marital residence within the aggregate property to be divided, when the parties had already excluded that asset by contract*.

Standard of Review: (4)

We will affirm the decision of the trial court in a dissolution case unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Wright v. Wright*, 1 S.W.3d 52, 57 (Mo. App. 1999). We will interfere with a trial court's division of property only if the division is so heavily and unduly weighted in favor of one party such that it amounts to an abuse of discretion. *Barnes v. Barnes*, 903 S.W.2d 211, 213 (Mo. App. 1995). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances before it and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *In re Marriage of Collins*, 875 S.W.2d 643, 647 (Mo. App. 1994).

Argument: (4)

It is the duty of the trial court to consider the value of non-marital property to each spouse in its division of marital property, as well as the economic circumstances of each

spouse, the contribution of each spouse to the acquisition of property, the conduct of the parties, and custodial arrangement. *Wright v. Wright*, 1 S.W.3d 52, 59 (Mo. App. 1999).

Although the trial court has discretion in assigning valuations, evidence must exist to support such valuations. *Wright*, 1 S.W. 3d at 57. As a general rule, if a marital asset does not exist at the time of trial, the trial court cannot value and include that asset in its division of marital property. *Conrad v. Conrad*, 76 S.W.3d 305, 314 (Mo. App. 2002).

During the pendency of the dissolution proceedings, the parties mutually contracted in regards to the former marital residence property, with Respondent Judith quit claiming her interest to Appellant Thomas in consideration for a substantial payment of $15,000 under the 2004 PDL Agreement, which the trial court approved by written order and entry. (Record at 51-53). As such, that single piece of real estate was no longer part of the marital assets to be divided by the trial court at final disposition. RSMo. § 452.330 specifies that "*the court shall set apart to each spouse such spouse's nonmarital property and shall divide the marital property and marital debts*...", which required the trial court to set apart the said former marital residence property to Appellant Thomas, congruent with the legally-binding agreement that the parties and the trial court had all approved, and to then divide the remainder of the parties' assets and debts in a reasonable manner. The trial court was strictly not allowed to include the former marital residence within the aggregate property to be divided between the parties. *Conrad*, 76 S.W.3d at 314.

It was plain error for the trial court to "award" Appellant Thomas his own non-marital residence of [mailing address redacted], Festus, MO 63028 within the property division (Record at 114), and that portion of the property division must be set aside as a matter of

law. Moreover, the trial court should have faithfully considered the unclean financial acts of Respondent Judith in its final division of the remaining assets and debts, by, at the very least, finding and awarding an equal (50%) share of the monies that the parties had had at the time of separation to Appellant Thomas, or even *more* so.

"[A] spouse claiming that a marital asset has been secreted or squandered by the other spouse in anticipation of a dissolution proceeding must introduce evidence demonstrating that there existed at some point a marital asset which is being secreted or was squandered." *Farnsworth v. Farnsworth*, 108 S.W.3d 834, 841 (Mo. App. 2003) (quoting *Conrad*, 76 S.W.3d at 315). Once that evidence has been introduced, while the burden of proof remains with the spouse claiming that the other has secreted or squandered the marital asset, '"the burden of going forward with the evidence shifts to the other spouse to 'account' for the claimed secreted or squandered asset by presenting evidence as to its whereabouts or disposition.'" Id. (quoting *Conrad*, 76 S.W.3d at 315).

Appellant Thomas has properly shown that Respondent Judith did secret and squander away the entirety of the parties' bank account in anticipation of dissolution, while she had also been forsaking her marital fidelity, and having an illicit affair, in preparation for causing the parties' separation (Brief, *supra*, at 2-3). This amounted to taking no less than $47,000 in cash monies from their joint bank account, with some of that money supposed to pay the medical bills incurred by the work-related injuries suffered by Appellant Thomas in March of 2004. Moreover, Appellant Thomas has shown that Respondent Judith has, still to this day, walked away with, and kept, even a lion's share of his own awarded personal property, in addition to all that she already had. This amounted to

unlawfully taking and keeping no less than $40,000 worth of Appellant Thomas' duly awarded personal property, and he is entitled to have Respondent Judith promptly return all such personal property in its condition reasonable to the time of separation, or for her to reimburse him accordingly for the values thereof.

This Court should find and order that: (a) the former residential property was no longer a "marital" asset to be included within the trial court's division of assets and debts; so as to further find and conclude, therefore, that (b) Respondent Judith must reimburse Appellant Thomas for the ½ of the parties' joint bank account balance at the time of separation, an amount of $23,500 and, (c) that Respondent Judith must either promptly return all of Appellant Thomas' such personal property in its condition reasonable to the time of separation, or reimburse him accordingly for the values thereof.

5) *The trial court erred in its various orders of child support and judgments of child support arrearages, because the trial court apparently and mistakenly used an incorrect Form 14 in regard to calculating the parties' any present or past true incomes, and in that the trial court failed to properly consider the overall reasonableness of such child support orders, in light of Respondent Judith receiving the overwhelming lion's share of all marital assets, property, static monies, and future monies, and in light of Appellant Thomas in receiving virtually no marital assets, but getting the marital debt*.

Standard of Review: (5)

The award of child support, or the failure to award child support, will be affirmed unless "no substantial evidence exists to support it, it is against the weight of the

evidence, or it erroneously declares or applies the law." *Ricklefs v. Ricklefs*, 39 S.W.3d. 865, 869 (Mo. App. 2001).

Argument: (5)

As shown (Brief, *supra*, at 4-5), on August 30, 2004, a PDL Agreement was made by the parties and their attorneys, establishing child support at $640.00 per month, and on the very next day, September 1, 2004, the trial court approved the exact same agreement, but instead actually entered an order of $744.00 per month in child support, and finding Appellant Thomas several thousand in child support "arrears", even though no such item amounts were ever discussed or agreed to by the parties. Further, the proper amount of child support that should have been ordered is highly questionable, due to the fact that several Form 14's with varying amounts and figures were filed by both parties. When even a full year later, on August 11, 2005, Appellant Thomas' counsel instructed him that the Agreement for Payment of Child Support called for him to *still* pay just $640.00 per month, and when Respondent Judith, herself, submitted the exact same PDL agreement, and its attendant child support amount of $640.00 per month, as an Exhibit at final hearing on March 21, 2006, there was no reasonable basis for the trial court to find any other amount of child support as being the proper figure, nor to find additional, literally non-existent, arrearages against Appellant Thomas.

This is not even considering the fact that child custody should have been awarded to Appellant Thomas, instead of being awarded wrongfully to the unclean hands and utterly substandard "care" of Respondent Judith, which has caused severe detriment to M.J.D.'s schooling, drug and alcohol problems, emotional health, and the very future of his life.

"In determining an award of child support in any proceeding, the trial court is required by § 452.340.8 and Rule 88.01 to follow the procedure set forth in Woolridge v. Woolridge, 915 S.W.2d 372, 379 (Mo. App. 1996)." Ricklefs, 39 S.W.3d. at 869-70. "It is undisputed that in actions filed under the UPA the trial court is to use Rule 88.01 and Form 14 to calculate the presumptive amount of child support due retroactive to the date of filing of plaintiff's petition." Martin v. Obiakor, 992 S.W.2d 201, 203 (Mo. App. 1999). The trial court was required to determine which Form 14 to properly apply.

If this Court is still specially unable to find that custody of M.J.D. either was then, or is now, properly awarded to Appellant Thomas, then it should still now find that the proper amount of child support was and is $640.00, as the parties had always agreed to, and as the trial court *itself* had approved from near the very beginning of this matter. As such, Appellant Thomas should owe no amount of arrearage for child support, at all, but should be compensated for the additional $104.00 per month over the base $640.00 per month that he has been wrongfully forced to pay, plus the additional amounts towards the incongruent "arrearage" that he has been wrongfully forced to pay, and the both of those amounts ever since final judgment in March of this year. These compensation amounts should, of course, be directed to be reimbursed from Respondent Judith, herself.

Conclusion

Both of the parent parties already had fully vested legal rights to care, custody, and management of their minor child, M.J.D., from the very moment of his birth, and the State of Missouri, by and through the trial court, had absolutely no authority or power to "award" custody of the minor child to Respondent Judith. Appellant Thomas' various

guaranteed rights under both the Missouri and Federal Constitutions to retain his pre-existing custody have been unlawfully diminished, inflicting further injuries upon his rights to equal protection of the law, and to not be discriminated against in gender.

Moreover, the evidence conclusively demonstrates that Respondent Judith is not a fit and proper person with which to exercise primary care, custody, and management of M.J.D., as shown by her allowing, and even supporting, various manifest delinquencies by, and deterioration of, the minor child while in her "care". Further, the evidence conclusively demonstrates that Respondent Judith has begun engaging in various criminal acts against the peace and dignity of the State of Missouri, and is additionally, therefore, not a fit and proper person with which to have primary custody of the minor child.

Respondent Judith abandoned Appellant Thomas, not the other way around, so if there should be any award of spousal maintenance, the proper format of the law is to have Respondent Judith pay maintenance to Appellant Thomas, not the other way around. Further, Respondent Judith is neither physically nor mentally challenged in any way, and is not entitled to any award of maintenance, as she is perfectly capable of obtaining fully gainful employment. Moreover, Respondent Judith solely enjoyed a very substantial and lucrative amount of settlement monies from her father's wrongful death litigation – enough to carry most people in a comfortable life for several years. Respondent Judith was simply not entitled by law to *any* amount of maintenance, let alone that it should also continue unchecked into *ad infinitum*.

The parties residential property in Festus, Missouri, was no longer a marital asset by the time of the trial court's division of assets, having already been removed "off the

table" by the completion of mutual contract and valuable consideration between the parties therefore. As a result, the trial court erred, as a matter of law, by including the same residential property in its March 28th, 2006 division of assets between the parties, and Respondent Judith is now and still due and owing to Appellant Thomas for the approximately $40,000 in value of the returns of various agreeable personal property that she unlawfully retained in her possession, and she is also likewise immediately due and owing to promptly refund and return $23,500 in cash monies to Appellant Thomas.

WHEREFORE, the undersigned Appellant, Thomas V. Dressel, now and hereby moves this Honorable Court to correct the certain and various errors in this cause as discussed *supra*, to reverse the trial court's award of custody to Respondent Judith in favor of Appellant Thomas, to reverse the trial court's corresponding child support award therefore, to reverse the trial court's award of maintenance as contrary to law and public policy intentions, to correct the manifest and inequitable disparity in the trial court's division of marital assets, causing the same inequity of $40,000 in personal property and $23,500 in cash monies to be forthwith compensated by Respondent Judith in favor of and to Appellant Thomas, and moves for all further relief just and proper in the premises.

Respectfully submitted,

_____

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