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# APPELLANT’S BRIEF

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## JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Modification and Contempt dated October 29, 2001, by the Circuit Court of Stone County, Thirty-ninth Judicial Circuit of Missouri, the Honorable William Kirsch presiding, finding Appellant in contempt of certain child support and debt payment provisions in the court's original Decree of Dissolution of Marriage and modifying the terms of that decree concerning Appellant's current child support obligation. (L.F. 49-53) Appellant filed his notice of appeal of the trial court's decision on November 29, 2001. (L.F. 5, 62)

Appellate jurisdiction is vested in the Missouri Court of Appeals, Southern District pursuant to § 512.020 R.S.Mo. and § 477.060 R.S.Mo. Further, this case is not one involving any of the issues within the exclusive jurisdiction of the Missouri Supreme Court as set forth in Article V, Section 3 of the Missouri Constitution.

## REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests, that pursuant to Rule 1(b) of the special rules of the Missouri Court of Appeals, Southern District, he be granted the opportunity to orally argue this case before the Court.

## STATEMENT OF FACTS

On November 16, 1992, the trial court dissolved the marriage of Appellant, Dwight Allen Gilmore (hereinafter referred to as “Father”) and Juanita Marie Gilmore (hereinafter referred to as “Mother”). (L.F. 2-3, 7) In its decree of dissolution of marriage, the court awarded the parties joint legal custody of their three children, Brandon Douglas Gilmore, born November 14, 1980, Justin Daniel Gilmore, born December 29, 1984, and Tanner Donovan Gilmore, born September 22, 1990, with Mother having primary physical custody and Father being awarded certain rights of reasonable contact with the children, which did not include any extended time during the summer. (L.F. 1-3, 8-9) The trial court also awarded Mother \$600.00 per month in child support (L.F. 9) and ordered the division and assumption of marital debts, which included a debt to People’s Bank of \$7,745.46 to be assumed by Father. (L.F. 10, 13) In its docket entry of November 16, 1992, the trial court indicated that the obligation of the non-custodial parent to make child support payments shall abate, in whole or in part, for such periods of time in excess of thirty consecutive days that the custodial parent voluntarily relinquishes physical custody of the children to the non-custodial parent. (L.F. 2)

On August 28, 2000, Father filed a Motion to Modify the dissolution decree, requesting that the court transfer primary physical custody of the child Justin Daniel Gilmore from Mother to Father and to have the Court enter an order allowing Father to pay child support for the child Brandon Douglas

Gilmore directly to him. (L.F. 3, 18-21) On September 29, 2000, Mother filed an Answer and Counter-Motion for Contempt and Modification, requesting an increase in child support and alleging that Father had willfully and purposely failed to pay the balance of the debt to People's Bank assigned to him in the original dissolution decree and that he failed to pay all of the court ordered child support for the minor children. (L.F. 3, 27-33)

The trial was held on February 26, 2001. (Tr. 2) Father testified that the oldest child, Brandon, was now twenty, was not attending school and was working for Father's brother as a heating and air conditioning installer and was therefore emancipated. (Tr. 11-12) Mother agreed that Brandon was not attending school and agreed that for child support purposes he was emancipated. (Tr. 77-78)

Father was not granted any specific summer visitation with his children in the dissolution decree. (Tr. 80, L.F. 9) Father testified that he and Mother had an arrangement where all three children would come and reside at his home for five to six weeks during the summer and that this arrangement lasted from the summer of 1993 to summer of 2000. (Tr. 14) Father further testified that he and Mother agreed that Father would reduce one of his child support payments by \$300.00 to reflect the custodial arrangements of the children during the summer. (Tr. 14, 23-24) From 1993 to 1999, Mother saw the children on alternate weekends during these five to six week periods during the summer. (Tr.

16) Father testified that Mother did not see the children on alternate weekends during the summer of 2000. (Tr. 16)

In her testimony, Mother agreed that the children did spend five to six weeks in the summer with Father from 1993 to 2000 (L.F. 80) and that she accepted \$300.00 less in child support during each of those eight years. (Tr. 116) Mother denied that there was any agreement that Father could reduce his child support payment by \$300.00 per month and she requested the Court enter a judgment against Father for those eight years of missed payments, totaling \$2,400.00. (Tr. 116, 124) Mother admitted that she never requested Father pay her back for any of these alleged child support arrearages until she filed her counter-motion for contempt and that she did not think it was inappropriate for Father to rely on her silence in this regard. (Tr. 124-125)

Both parties agreed that in the summer of 1994, Mother sold the marital residence which she was awarded under the dissolution decree and which secured the note to People's Bank of \$7,745.46 which Father was ordered to pay. (Tr. 26-27, 112) At the time Mother sold the home, Father was current in the payments on this note and the balance on that debt was \$5,138.97. (Tr. 112, Respondent's Exhibit 6) (Note: Both parties marked their exhibits "Respondent's exhibits". Father's exhibits are marked by letters, Mother's exhibits are marked by numbers.) When Mother sold the home, she approached Father asking him to pay off the entire balance of the note, to which Father replied that he could not do so as he did not have the money. (Tr. 26-27, 112-113) Mother testified that she

spoke to an attorney at the time about trying to collect this money from Father, but that she made no attempt to do so until filing her counter-motion in September of 2000. (L.F. 3, Tr. 113-114, 126) The note to People's Bank was paid out of the proceeds of the sale of the marital home in June of 1994. (Tr. 27, 113, Respondent's Exhibit 6) Mother testified at trial that she wanted interest at the legal rate dating back to June of 1994 on the unpaid balance on the note to People's Bank. (Tr. 116)

Father testified that he makes a gross monthly income of \$880.00 per week, plus a bonus, which totaled \$2,400.00 in the year 2000. (Tr. 28, 57, Respondent's Exhibit 8) Father has a 401(k) plan through his employer to which Father contributes eight percent of his gross pay and his employer contributes three percent of Father's gross pay. (Tr. 57) Between January 1, 2000 and October 10, 2000, the employee contribution to Father's 401(k) averaged \$68.37 per week while his employer's contribution averaged \$25.64 per week. (Tr. 60-61, Respondent's Exhibit 8) In Mother's Form 14 child support guideline worksheets, admitted into evidence as Respondent's Exhibits 4a, 4b and 4c, Father's gross monthly income was listed at \$4,218.00 per month. (Tr. 105) At trial, Mother's attorney admitted Father's income figure on those forms was wrong and that Father's income should be only \$4,108.00 per month. (Tr. 105-106)

Mother is self-employed selling bank equipment parts. (Tr. 99, 102) In 1999, Mother reported income from her business of \$37,354.00. (Respondent's

Exhibit D) Mother testified that she thought this amount should be reduced by \$9,611.00 for increased inventory that she accumulated during that year. (Tr. 102) In 1998, Mother reported \$27,736.00 in income. (Respondent's Exhibit E) In the year 2000, Mother reported income of only \$8,546.00. (Tr. 100) Mother explained that this reduction in income was due to her present husband quitting his employment at O'Reilly's Automotive and joining her in the business in October of 1999. (Tr. 102, 139) Mother testified that her husband did help with the business prior to working in the family business full-time in October of 1999 (Tr. 139), that she and her present husband are equal shareholders in this business (Tr. 139), and that this reduction in her income was voluntary. (Tr. 132)

At trial, Mother testified that she wanted to be awarded her attorney's fees and she offered into evidence as Respondent's Exhibit 7, an attorney fee exhibit showing \$2,980.50 in attorney's fees incurred in this case. (Tr. 118)

On October 29, 2001, the trial court entered its judgment of modification and contempt. (L.F. 5) In its judgment, the trial court found that the eldest son of the parties, Brandon Douglas Gilmore was emancipated (L.F. 49) but denied Father's request to change custody of the child Justin Daniel Gilmore to Father, finding that there was no changed circumstance to warrant such a change in custody. (L.F. 50) The trial court adopted a Form 14 child support calculation worksheet showing Mother's average monthly income at \$800.00 per month and Father's average monthly income at \$4,218.00 per month (L.F. 59) and based upon that worksheet, found the presumed child support amount to be \$675.00

per month for the two remaining un-emancipated children of the parties and ordered Father to pay that amount in child support retroactive to October 1, 2000. (L.F. 50, 51) Father was found to owe Mother \$2,400.00 in back child support and a contempt order was issued against Father for failing to pay that child support. (L.F. 51, 52-53) The trial court further found Father in contempt of the trial court's original dissolution judgment for failing to pay the obligation to People's Bank. (L.F. 52-53) Father was ordered committed to the Sheriff of Stone County, Missouri unless he paid to Mother within sixty (60) days the principal amount of the People's Bank loan of \$5,138.97 plus accrued interest at the legal rate of 9 percent per annum in the amount of \$3,391.74 and the child support arrearage of \$2,400.00. (L.F. 52-53) The trial court further awarded Mother her attorneys fees in the amount of \$2,980.00. (L.F. 53)

Father filed his Notice of Appeal of the trial court's judgment on November 29, 2001. (L.F. 5, 62)

## POINTS RELIED ON AND AUTHORITIES CITED

### POINT ONE

THE TRIAL COURT ERRED IN FINDING FATHER IN ARREARS ON HIS CHILD SUPPORT OBLIGATION TO MOTHER IN THE AMOUNT OF \$2,400.00 AND IN AWARDING HER A JUDGMENT IN THAT AMOUNT BECAUSE SAID FINDING AND JUDGMENT MISSTATED AND MISAPPLIED THE LAW AND WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION IN THAT:

- a. THE DISSOLUTION DECREE DID NOT PROVIDE FOR ANY SPECIAL SUMMER CONTACT TIME BETWEEN FATHER AND THE MINOR CHILDREN OF THE PARTIES BEYOND EVERY OTHER WEEKEND;
- b. FOR EIGHT YEARS FOLLOWING THE ENTRY OF ORIGINAL DISSOLUTION DECREE IN NOVEMBER OF 1992, MOTHER VOLUNTARILY RELINQUISHED THE CHILDREN TO FATHER FOR GREATER THAN THIRTY DAYS DURING EACH OF THESE SUMMERS;
- c. FOR EIGHT YEARS FOLLOWING THE ENTRY OF THE ORIGINAL DISSOLUTION DECREE FATHER REDUCED ONE OF HIS \$600.00 PER MONTH CHILD SUPPORT PAYMENTS BY \$300.00 DUE TO THE EXTRA TIME FATHER HAD CUSTODY OF THE CHILDREN OVER AND ABOVE THE TIME SET FORTH IN THE DISSOLUTION DECREE WHICH CONSTITUTED ALL OF FATHER'S ALLEGED ARREARAGES OF \$2,400.00;
- d. SECTION 452.340.2 R.S.MO. (2000) PROVIDES THAT A PARENT'S CHILD SUPPORT OBLIGATION SHALL ABATE, IN WHOLE OR IN PART, WHEN THE OTHER PARENT VOLUNTARILY RELINQUISHES PHYSICAL CUSTODY OF A CHILD TO THE PARENT WHO IS OBLIGATED TO PAY CHILD SUPPORT IN EXCESS OF THIRTY (30) DAYS;
- e. AS A RESULT OF MOTHER'S VOLUNTARY RELINQUISHMENT OF THE MINOR CHILDREN FOR FIVE TO SIX WEEKS DURING EACH SUMMER BETWEEN 1993 AND 2000, FATHER'S CHILD SUPPORT ABATED FOR ONE MONTH DURING THESE PERIODS AND THE TRIAL COURT'S FINDING TO THE CONTRARY MISSTATED AND MISAPPLIED SECTION 452.340.2 R.S.MO.; AND
- f. MOTHER SHOULD BE ESTOPPED FROM COLLECTING THE BACK CHILD SUPPORT AS SHE KNEW OF HER RIGHT TO COLLECT THE ALLEGED ARREARAGE BUT CHOSE NOT TO

PURSUE COLLECTION OF THE ALLEGED ARREARAGE FOR  
EIGHT YEARS.

Sutton v. Schwartz, 808 S.W.2d 15 (Mo. App. E.D. 1991).....21, 22

Grommet v. Grommet, 714 S.W.2d 747, 749-51 (Mo. App. E.D. 1986)..... 22

Section 452.340.2 R.S.Mo. ....19, 20, 21, 23

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976) ..... 19

In Re: The Marriage of Jennings, 910 S.W.2d 760, 763 (Mo. App. S.D. 1995)..... 19

POINT TWO

THE TRIAL COURT ERRED IN INCREASING FATHER’S CURRENT CHILD SUPPORT OBLIGATION TO \$675.00 PER MONTH BECAUSE SAID RULING IS NOT BASED ON SUBSTANTIAL EVIDENCE, IS AN ABUSE OF THE TRIAL COURT’S DISCRETION, AND MISSTATES AND MISAPPLIES THE LAW IN THAT:

- a. THE TRIAL COURT’S CALCULATION OF CHILD SUPPORT INAPPROPRIATELY IMPUTES TO FATHER CONTRIBUTIONS TO HIS 401(K) RETIREMENT PLAN MADE BY HIM AND HIS EMPLOYER;
- b. THE TRIAL COURT’S CALCULATION OF CHILD SUPPORT INCLUDES AN INCOME FIGURE FOR FATHER WHICH EVEN MOTHER ADMITTED AT TRIAL WAS TOO GREAT; AND
- c. SAID CHILD SUPPORT CALCULATION FAILS TO IMPUTE TO MOTHER SUFFICIENT INCOME WHERE THE EVIDENCE WAS UNDISPUTED THAT SHE HAD MADE A NET PROFIT IN EXCESS OF \$37,000.00 IN THE YEAR PRECEDING THE FILING OF THIS CASE IN HER FAMILY OWNED BUSINESS, BUT VOLUNTARILY REDUCED HER PARTICIPATION IN THAT BUSINESS PRIOR TO THE TRIAL OF THIS MATTER.

Farr v. Cloninger, 937 S.W.2d 760, 764 (Mo. App. S.D. 1997)..... 26

Pelch v. Schupp, 991 S.W.2d 729, 736 (Mo. App. W.D. 1999)..... 28

Haden v. Riou, 37 S.W.3d 854, 861 (Mo. App. W.D. 2001) ..... 27

Jones v. Jones, 958 S.W.2d 607, 611-612 (Mo. App. W.D. 1998) ..... 27

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976) ..... 24

Rule 84.14 Missouri Supreme Court Rules ..... 28

Thill v. Thill, 26 S.W.3d 199, 206 (Mo. App. W.D. 2000) ..... 26

Woffard v. Woffard, 991 S.W.2d 194, 197 (Mo. App. W.D. 1999)..... 26

POINT THREE

THE TRIAL COURT ERRED IN FINDING FATHER IN CONTEMPT FOR FAILING TO PAY A DEBT TO PEOPLE’S BANK ALLOCATED TO HIM UNDER THE ORIGINAL DISSOLUTION DECREE, WHICH HAD BEEN PAID UPON THE SALE OF THE MARITAL RESIDENCE AWARDED TO MOTHER IN JUNE OF 1994, AND AWARDING MOTHER A JUDGMENT AGAINST FATHER FOR THE PRINCIPAL AMOUNT OF SAID MORTGAGE OF \$5,138.97 PLUS INTEREST AT THE LEGAL RATE OF NINE PERCENT PER ANNUM IN THE AMOUNT OF \$3,391.74 BECAUSE SAID FINDING AND JUDGMENT IS NOT BASED ON SUBSTANTIAL EVIDENCE, IS AN ABUSE OF THE TRIAL COURT’S DISCRETION AND MISSTATES AND MISAPPLIES THE LAW IN THAT:

- a. MOTHER WAIVED ANY RIGHT TO SEEK REIMBURSEMENT FOR SAID DEBT WHERE SHE HAD CONSULTED WITH AN ATTORNEY ABOUT HER RIGHT TO COLLECT SAID DEBT BUT MADE NO DEMANDS OR ATTEMPTS TO COLLECT ON SAID DEBT FOR OVER SIX YEARS AFTER THE SALE OF THE MARITAL RESIDENCE UNTIL THE FILING OF HER COUNTER-MOTION FOR CONTEMPT IN SEPTEMBER OF 2000;
- b. MOTHER SHOULD BE ESTOPPED FROM SEEKING REIMBURSEMENT FOR SAID DEBT WHERE SHE MADE NO DEMAND ON FATHER OR ANY OTHER ATTEMPT TO COLLECT ON SAID DEBT FOR OVER SIX YEARS AFTER THE SALE OF THE MARITAL RESIDENCE AND FATHER HAD NO NOTICE THAT MOTHER WAS INTENDING ON ASSERTING HER RIGHTS CONCERNING SAID DEBT UNTIL THE FILING OF THE INSTANT ACTION; AND
- c. THERE IS NO LEGAL AUTHORITY TO AWARD INTEREST AT THE LEGAL RATE OF NINE PERCENT PER ANNUM IN A CONTEMPT ACTION CONCERNING PAYMENT OF A DEBT TO A THIRD PARTY UNDER A DISSOLUTION DECREE AS § 408.040 R.S.MO. ONLY ALLOWS INTEREST ON JUDGMENTS FOR MONEY AND NOT FOR THE PAYMENT OF A DEBT TO A THIRD PARTY AS IN THE CASE AT BAR.

American National Insurance Company v. Noble Communications Company, Inc., 936 S.W.2d 124, 132 (Mo. App. S.D. 1996) ..... 32

§ 408.040 R.S.Mo. (2000)..... 33

Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663, 674 (Mo. App. S.D. 2000) ..... 34

Harrison v. King, 7 S.W.3d 558, 561 (Mo. App. E.D. 1999)..... 30

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976) ..... 30

Speedie Food Mart v. Taylor, 809 S.W.2d 126, 131 (Mo. App. E.D. 1991).....31

State Farm Mutual Auto Insurance Company v. Zumwalt, 825 S.W.2d 906, 909-910 (Mo. App. S.D. 1992).....31

Stenger v. Great Southern Sav. And Loan Ass'n, 677 S.W.2d 376, 383 (Mo. App. S.W.2d 1984) .....31

## POINT FOUR

THE TRIAL COURT ERRED IN AWARDING MOTHER AN ATTORNEY FEE JUDGMENT OF \$2,980.00 BECAUSE SAID JUDGMENT WAS NOT BASED ON SUBSTANTIAL EVIDENCE AND WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION IN THAT THERE WAS NO EVIDENCE THAT FATHER WAS IN ANY BETTER FINANCIAL SITUATION THAN MOTHER TO PAY FOR THE COSTS OF THIS LITIGATION AS MOTHER AND FATHER'S INCOME ARE ROUGHLY EQUAL.

<u>In Re: Marriage of McCoy</u> , 818 S.W. 2d 322, 325 (Mo. App. S.D. 1991) .....	36
<u>Murphy v. Carron</u> , 536 S.W.2d 30, 32 (Mo. banc 1976) .....	36
<u>Thill v. Thill</u> , 26 S.W.3d 199, 208 (Mo. App. W.D. 2000).....	36

## ARGUMENT

### POINT ONE

THE TRIAL COURT ERRED IN FINDING FATHER IN ARREARS ON HIS CHILD SUPPORT OBLIGATION TO MOTHER IN THE AMOUNT OF \$2,400.00 AND IN AWARDING HER A JUDGMENT IN THAT AMOUNT BECAUSE SAID FINDING AND JUDGMENT MISSTATED AND MISAPPLIED THE LAW AND WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION IN THAT:

- a. THE DISSOLUTION DECREE DID NOT PROVIDE FOR ANY SPECIAL SUMMER CONTACT TIME BETWEEN FATHER AND THE MINOR CHILDREN OF THE PARTIES BEYOND EVERY OTHER WEEKEND;
- b. FOR EIGHT YEARS FOLLOWING THE ENTRY OF ORIGINAL DISSOLUTION DECREE IN NOVEMBER OF 1992, MOTHER VOLUNTARILY RELINQUISHED THE CHILDREN TO FATHER FOR GREATER THAN THIRTY DAYS DURING EACH OF THESE SUMMERS;
- c. FOR EIGHT YEARS FOLLOWING THE ENTRY OF THE ORIGINAL DISSOLUTION DECREE FATHER REDUCED ONE OF HIS \$600.00 PER MONTH CHILD SUPPORT PAYMENTS BY \$300.00 DUE TO THE EXTRA TIME FATHER HAD CUSTODY OF THE CHILDREN OVER AND ABOVE THE TIME SET FORTH IN THE DISSOLUTION DECREE WHICH CONSTITUTED ALL OF FATHER'S ALLEGED ARREARAGES OF \$2,400.00;
- d. SECTION 452.340.2 R.S.MO. (2000) PROVIDES THAT A PARENT'S CHILD SUPPORT OBLIGATION SHALL ABATE, IN WHOLE OR IN PART, WHEN THE OTHER PARENT VOLUNTARILY RELINQUISHES PHYSICAL CUSTODY OF A CHILD TO THE PARENT WHO IS OBLIGATED TO PAY CHILD SUPPORT IN EXCESS OF THIRTY (30) DAYS;
- e. AS A RESULT OF MOTHER'S VOLUNTARY RELINQUISHMENT OF THE MINOR CHILDREN FOR FIVE TO SIX WEEKS DURING EACH SUMMER BETWEEN 1993 AND 2000, FATHER'S CHILD SUPPORT ABATED FOR ONE MONTH DURING THESE PERIODS AND THE TRIAL COURT'S FINDING TO THE CONTRARY MISSTATED AND MISAPPLIED SECTION 452.340.2 R.S.MO.; AND
- f. MOTHER SHOULD BE ESTOPPED FROM COLLECTING THE BACK CHILD SUPPORT AS SHE KNEW OF HER RIGHT TO COLLECT THE ALLEGED ARREARAGE BUT CHOSE NOT TO

PURSUE COLLECTION OF THE ALLEGED ARREARAGE FOR EIGHT YEARS.

In reviewing a judgment in a contempt action, as in any other judge tried case, the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). “Under this standard of review, considerable deference is accorded judgments based upon evidentiary and factual evaluations of the trial court.... No such deference is accorded the judgment, however, when the law has been erroneously declared or applied.” In Re: The Marriage of Jennings, 910 S.W.2d 760, 763 (Mo. App. S.D. 1995). In the case at bar, the trial court found Father in contempt of the dissolution judgment for reducing his child support payment by one \$300.00 payment each summer for the eight summers preceding the trial of this matter. (L.F. 52) Father contends that, not only was this judgment an abuse of the trial court’s discretion given the facts in the case, but that it erroneously declared and applied § 452.340.2 R.S.Mo. as Mother, by her own admission, voluntarily relinquished the children for more than thirty days during each of those eight summers and, as a result, Father’s child support abated by operation of law.

It was undisputed at trial that the \$2,400.00 that Mother alleged Father is in arrears in his child support resulted from Father reducing one of his \$600.00 per month child support payments by \$300.00 for each of the eight summers

immediately preceding the trial. (Tr. 115-116) It was also undisputed at trial that the parties' minor children came to live with Father for between five to six weeks during each of those summers with Mother's consent, (Tr. 14, 80, 115-116), even though, under the trial court's original November 16, 1992 decree, Father received no special summer visitation. (L.F. 9, Tr. 80) What was disputed at trial was whether or not this \$300.00 per month reduction in child support was done by agreement, as indicated by Father (Tr. 23, 64), or was merely acquiesced to by Mother, as Mother contended in her testimony. (Tr. 116, 124-125.

Section 452.340.2 R.S.Mo. (2000) states in part:

The obligation of the parent ordered to make support payments shall abate, in whole or in part, for such periods of time in excess of thirty consecutive days that the other parent has voluntarily relinquished physical custody of a child to the parent ordered to pay child support, not withstanding any periods of visitation or temporary physical and legal or physical and legal custody pursuant to a judgment of dissolution or legal separation or any modification thereof.

Indeed, the trial court's own docket entry made at the time of the original dissolution of marriage on November 16, 1992, states: "The obligation of the non-custodial parent to make support payments shall abate, in whole or in part, for such periods of time in excess of thirty (30) consecutive days that the custodial parent has voluntarily relinquished physical custody of the children to the non-custodial parent." (L.F. 2)

During each of eight summers preceding the trial of this case, Father received physical custody of the minor children for a period of at least five weeks, a period greater than thirty days. (Tr. 14, 80) There was no dispute at trial that

this relinquishment of custody for this period was voluntary on the part of Mother. (Tr. 80) These facts, coupled with the fact that Father was not granted any special extended custodial time with the children during the summer in the original dissolution decree (L.F. 9), leads inescapably to the conclusion that Father was entitled under § 452.340.2 R.S.Mo. to abate his child support for the five to six weeks he actually had physical custody of the children during each of the eight summers preceding the trial of this case.

Even if § 452.340.2 R.S.Mo. does not apply, the evidence was overwhelming that Mother should be equitably estopped from collecting those eight \$300.00 payments from Father as she took no steps to collect that amount during the entire eight years that this arrangement existed. In Sutton v. Schwartz, 808 S.W.2d 15 (Mo. App. E.D. 1991), the Eastern District Court of Appeals held:

“There are circumstances, however, where a court may refuse to award the obligee the full amount of support allegedly due even in the absence of a court-ordered modification or an agreement to compromise past due amounts.... This refusal may occur when it would be unjust to permit the obligee to collect the full amount due...The refusal is based upon a concept labeled “waiver by acquiescence”, which is actually an application of the doctrine of equitable estoppel.”

Sutton v. Schwartz, 808 S.W.2d at 18. See also Grommet v. Grommet, 714 S.W.2d 747, 749-51 (Mo. App. E.D. 1986). In the Sutton case, the Eastern District interpreted the Grommet case as follows:

“Thus, Grommet does not teach an out-of-court agreement to reduce child support prospectively is enforceable if supported by consideration, nor, conversely, does it teach that such an agreement is not enforceable unless supported by consideration. But, it does teach that it may be an injustice to permit an obligee to collect the full amount of child support due under a decree if the obligor changed position to his or her prejudice, in reliance on a perceived agreement with the obligee.”

Sutton v. Schwartz, 808 S.W.2d at 19.

In the case at bar, it was undisputed that Father began reducing one of his \$600.00 per month child support payments in the summer of 1993 by \$300.00 and that Mother did not raise any objections to this reduction until she filed her counter-motion for contempt in September of 2000. (L.F. 3, 32, Tr. 23-25, 80, 116, 124-125) Indeed, under cross-examination Mother admitted that it would not be inappropriate for Father to rely on this agreement to reduce his child support during his summer custodial time with the children. (Tr. 125) Mother admitted that she never objected to this arrangement (Tr. 124-125) and that she knew she could have gone back to court to collect this arrearage but decided not to to avoid affecting the children. (Tr. 116) There is no question that Mother’s acquiescence in accepting less child support for the past eight years has gone to the detriment of the Father, particularly given his testimony that he does not now have at his disposal the money to pay this alleged arrearage. (Tr. 25) Given the facts in this case it was an abuse of the trial court’s discretion, especially given the uncontroverted testimony concerning Mother’s acquiescence in Father’s

reduction of child support, for it not to absolve him of this alleged \$2,400.00 arrearage.

For the reasons stated above, Father submits that the trial court's finding that Father is in contempt for failing to pay child support in the amount of \$2,400.00 was in violation of § 452.340.2 R.S.Mo. (2000) and that the trial court's failure to find that Mother waived this child support through her failure to seek or even complain about this alleged underpayment for eight years was an abuse of the trial court's discretion. Accordingly, the trial court's finding of Father in contempt for failing to pay this child support and the resulting judgment in the favor of Mother of \$2,400.00 should be reversed.

## POINT TWO

THE TRIAL COURT ERRED IN INCREASING FATHER'S CURRENT CHILD SUPPORT OBLIGATION TO \$675.00 PER MONTH BECAUSE SAID RULING IS NOT BASED ON SUBSTANTIAL EVIDENCE, IS AN ABUSE OF THE TRIAL COURT'S DISCRETION, AND MISSTATES AND MISAPPLIES THE LAW IN THAT:

- a. THE TRIAL COURT'S CALCULATION OF CHILD SUPPORT INAPPROPRIATELY IMPUTES TO FATHER CONTRIBUTIONS TO HIS 401(K) RETIREMENT PLAN MADE BY HIM AND HIS EMPLOYER;
- b. THE TRIAL COURT'S CALCULATION OF CHILD SUPPORT INCLUDES AN INCOME FIGURE FOR FATHER WHICH EVEN MOTHER ADMITTED AT TRIAL WAS TOO GREAT; AND
- c. SAID CHILD SUPPORT CALCULATION FAILS TO IMPUTE TO MOTHER SUFFICIENT INCOME WHERE THE EVIDENCE WAS UNDISPUTED THAT SHE HAD MADE A NET PROFIT IN EXCESS OF \$37,000.00 IN THE YEAR PRECEDING THE FILING OF THIS CASE IN HER FAMILY OWNED BUSINESS, BUT VOLUNTARILY REDUCED HER PARTICIPATION IN THAT BUSINESS PRIOR TO THE TRIAL OF THIS MATTER.

In its judgment of October 29, 2001, the trial court increased Father's current child support obligation for his two remaining minor children to \$675.00 per month, effective October 1, 2000. (L.F. 51) As previously stated, in a court-tried case the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). In making this ruling, the trial court specifically found: "The parties' respective incomes are correctly set forth in Respondent's Exhibit 3, which is attached hereto and incorporated herein by reference. The presumed child support amount is \$675.00 per month, which sum is not rebutted as being either unjust or inappropriate." (L.F. 50) Exhibit 3, attached to the trial court's judgment, reflects Mother's income at being \$800.00 per month and Father's income at being \$4,218.00 per month. (L.F. 59) Father respectfully submits that there was no substantial evidence to support either one of these income figures and that the trial court's decision must be reversed.

The evidence was undisputed that Father's salary is \$880.00 per week and that he receives a yearly bonus which in 2000 was approximately \$2,400.00. (Tr. 57) Father's employer contributes three percent of Father's gross pay toward his 401(k) plan and Father contributes eight percent of his gross pay toward that plan. (Tr. 57) Between January 1, 2000 to October 10, 2000 Father contributed approximately \$2,803.20, or \$68.37 per week, toward his 401(k) plan and his

employer contributed \$1,051.20, or \$25.64 per week to that plan. (Tr. 59-61, Respondent's Exhibit 8) Father's 401(k) contribution is deducted from his gross pay while his employer's contribution is in addition to his gross pay. (Tr. 62, Respondent's Exhibit 8) It is apparent from the record that Respondent's Exhibit 3, which was Mother's Form 14 child support worksheet adopted by the court in its judgment, included in Father's income both the employer and employee's contribution to his 401(k) plan. (Tr. 105) Mother's attorney at trial admitted this was not appropriate and that, according to Mother's calculation, Father's income should be only \$4,108.00 per month. (Tr. 105-106) Despite this, and the fact that employers' contributions to a parent's 401(k) plan can not be included in calculating income for child support purposes, Woffard v. Woffard, 991 S.W.2d 194, 197 (Mo. App. W.D. 1999), the trial court adopted Respondent's Exhibit 3 and based its calculation of child support on the erroneous income figure for Father of \$4,218.00. (Tr. 59) For this reason alone, the trial court's calculation of child support can not stand and should be reversed. See also Farr v. Cloninger, 937 S.W.2d 760, 764 (Mo. App. S.D. 1997) where this Court held it was error to include an employer's contribution to a parent's 401(k) plan as there was no way that money would be of immediate assistance to the parent in paying his child support obligation.

In addition to the problems with including Father's employer's contribution to his 401(k) plan in his income, the court inappropriately included Father's own contribution to his 401(k) plan as that amount was already included

in his base salary of \$880.00 per week as shown by Father's pay records. (Tr. 62, Respondent's Exhibit 8) While it is not appropriate to reduce a parent's gross income by his or her own contribution to a 401(k) plan, Thill v. Thill, 26 S.W.3d 199, 206 (Mo. App. W.D. 2000), it is equally not appropriate to increase a parent's income by that contribution where it is already figured in his gross monthly income. As a result, Father's correct average gross monthly income is \$4,013.00 per month. ( $\$880.00 \times 52 \text{ weeks} + \$2,400.00 \text{ annual bonus}$  divided by 12).

Mother is self-employed selling bank equipment parts. (Tr. 99, 102) Mother's income the year prior to this action being filed was \$37,354.00. (Respondent's Exhibit D) In 1998, Mother reported income of \$27,736.00. (Respondent's Exhibit E) In 2000, the year this case was filed, Mother reported a drastic drop in income to \$8,546.00. (Tr. 100) To explain this drastic reduction in income, Mother testified that (1) she was incorporated in November of 2000 (Tr. 137), even though before that she and her present husband, Dwight Crow, were already equal owners of the business (Tr. 137), and (2) that her husband began working full time with the business in October of 1999 (Tr. 139), even though he had participated significantly in the operation of that business before that time. (Tr. 138) Mother admitted that this reduction in income was voluntary on her part (Tr. 132), that there was no reason why she could not still do those jobs within the course of her business that she had been doing in 1999 (Tr. 132), and that her business is growing. (Tr. 140)

A parent is not permitted to escape responsibility to her family by deliberately limiting her work to reduce her income. Haden v. Riou, 37 S.W.3d 854, 861 (Mo. App. W.D. 2001). A trial court may impute income to a parent who is not employed or is under employed. Jones v. Jones, 958 S.W.2d 607, 611-612 (Mo. App. W.D. 1998). Indeed, in Pelch v. Schupp, 991 S.W.2d 729, 736 (Mo. App. W.D. 1999), the Western District held that the trial court abused its discretion in refusing to impute at least some income to a custodial mother who voluntarily quit her \$43,000.00 per year job to return to school full time. Similarly, Father contends that the trial court abused its discretion in refusing to impute income to Mother at her current rate of approximately \$37,000.00 per year where Mother admitted that the reduction in her income to \$800.00 per month was voluntary.

This Court is authorized to give such judgment as it ought to give under the circumstances. Rule 84.14, Missouri Supreme Court Rules. Given the facts in this case, Father's presumed child support amount should be no more than \$435.00 per month, as per Father's child support calculation worksheet, attached hereto marked Exhibit "A" and incorporated by reference herein. Therefore, for the reasons set forth above Father prays that this Court reverse the trial court's award of \$675.00 per month in child support and order him to pay only \$435.00 per month in child support retroactive to October 1, 2000.

### POINT THREE

THE TRIAL COURT ERRED IN FINDING FATHER IN CONTEMPT FOR FAILING TO PAY A DEBT TO PEOPLE'S BANK ALLOCATED TO HIM UNDER THE ORIGINAL DISSOLUTION DECREE, WHICH HAD BEEN PAID UPON THE SALE OF THE MARITAL RESIDENCE AWARDED TO MOTHER IN JUNE OF 1994, AND AWARDING MOTHER A JUDGMENT AGAINST FATHER FOR THE PRINCIPAL AMOUNT OF SAID MORTGAGE OF \$5,138.97 PLUS INTEREST AT THE LEGAL RATE OF NINE PERCENT PER ANNUM IN THE AMOUNT OF \$3,391.74 BECAUSE SAID FINDING AND JUDGMENT IS NOT BASED ON SUBSTANTIAL EVIDENCE, IS AN ABUSE OF THE TRIAL COURT'S DISCRETION AND MISSTATES AND MISAPPLIES THE LAW IN THAT:

- a. MOTHER WAIVED ANY RIGHT TO SEEK REIMBURSEMENT FOR SAID DEBT WHERE SHE HAD CONSULTED WITH AN ATTORNEY ABOUT HER RIGHT TO COLLECT SAID DEBT BUT MADE NO DEMANDS OR ATTEMPTS TO COLLECT ON SAID DEBT FOR OVER SIX YEARS AFTER THE SALE OF THE MARITAL RESIDENCE UNTIL THE FILING OF HER COUNTER-MOTION FOR CONTEMPT IN SEPTEMBER OF 2000;
- b. MOTHER SHOULD BE ESTOPPED FROM SEEKING REIMBURSEMENT FOR SAID DEBT WHERE SHE MADE NO DEMAND ON FATHER OR ANY OTHER ATTEMPT TO COLLECT ON SAID DEBT FOR OVER SIX YEARS AFTER THE SALE OF THE MARITAL RESIDENCE AND FATHER HAD NO NOTICE THAT MOTHER WAS INTENDING ON ASSERTING HER RIGHTS CONCERNING SAID DEBT UNTIL THE FILING OF THE INSTANT ACTION; AND
- c. THERE IS NO LEGAL AUTHORITY TO AWARD INTEREST AT THE LEGAL RATE OF NINE PERCENT PER ANNUM IN A CONTEMPT ACTION CONCERNING PAYMENT OF A DEBT TO A THIRD PARTY UNDER A DISSOLUTION DECREE AS § 408.040 R.S.MO. ONLY ALLOWS INTEREST ON JUDGMENTS FOR MONEY AND NOT FOR THE PAYMENT OF A DEBT TO A THIRD PARTY AS IN THE CASE AT BAR.

In its judgment, the trial court found Father in contempt of the November 16, 1992 dissolution judgment for failing to pay the obligation to People's Bank and ordered Father to pay the principal amount of that note of \$5,138.97 plus accrued interest at the legal rate of 9 percent totaling \$3,391.74. (L.F. 52) As

stated previously, in judge tried cases, the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). “Construction of a statute is a question of law and no deference is given the trial court’s determination of the law.” Harrison v. King, 7 S.W.3d 558, 561 (Mo. App. E.D. 1999). Father submits that, not only is the trial court’s judgment not based on substantial evidence, but that its rulings concerning the payment of interest on the judgment violates § 408.040 R.S.Mo. and therefore misstates and misapplies the law.

The facts concerning the payment of this debt are largely uncontroverted. Father was ordered to pay a second mortgage on the marital home to People’s Bank, which, at the time of the dissolution had a balance of approximately \$7,745.46. (L.F. 13) In June of 1994, Father had been current in the payments on that note. (Tr. 112) In June of 1994, Mother sold the marital home which secured that note and asked Father to pay off the remaining balance of the note of approximately \$5,138.97. (Tr. 26-27, 112-113) Father indicated to Mother at the time that he could not pay off the entire balance of the note because he did not have the money and the loan was paid out of the proceeds of the sale. (Tr. 26-27, 113) Mother spoke to an attorney about trying to collect this money from Father but made no attempts to collect it until she filed her counter-motion in the instant action in September of 2000. (L.F. 3, Tr. 113-114, 126) Father submits

that these facts show that Mother should be barred by both the doctrine of equitable estoppel and waiver.

Waiver is founded upon the intentional relinquishment of a known right and if waiver is implied from conduct, the conduct must clearly and unequivocally show the purpose to relinquish that right. State Farm Mutual Auto Insurance Company v. Zumwalt, 825 S.W.2d 906, 909-910 (Mo. App. S.D. 1992). Equitable estoppel, however, arises from the unfairness of permitting a party to assert rights belatedly if he or she knows of those rights but took no steps to enforce them until the other party has, in good faith, become disadvantaged by the changed condition. Speedie Food Mart v. Taylor, 809 S.W.2d 126, 131 (Mo. App. E.D. 1991). A court considering estoppel should give regard to the equities and conduct of all parties. Stenger v. Great Southern Sav. And Loan Ass'n, 677 S.W.2d 376, 383 (Mo. App. S.W.2d 1984). The doctrine of equitable estoppel requires: (1) an admission, statement or act inconsistent with the claim afterward asserted and sued upon; (2) an action by the other party on reliance on such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. American National Insurance Company v. Noble Communications Company, Inc., 936 S.W.2d 124, 132 (Mo. App. S.D. 1996).

There is no question that Mother knew of her rights to collect on the November 1992 judgment with regard to the People's Bank debt. By her own admission at trial, she consulted with an attorney at the time who told her of her

rights in this regard. (Tr. 113) The fact that she waited more than six years after the sale of the marital residence to begin proceedings to collect on this debt, and only then in response to Father's motion to modify custody, indicates that this was an intentional relinquishment of a known right and that, absent this instant case, she had no intention of ever asserting that right. (Tr. 114) As a result, it was an abuse of the trial court's discretion to find that there was no waiver of this right by Mother.

Similarly, Mother's inaction concerning this debt has placed Father at a considerable disadvantage, especially if Mother is entitled to receive interest on this debt of approximately \$3,400.00. Had Mother indicated to Father her intentions and desire that he reimburse her for this debt, after the sale of the marital home, Father might have been able to do so considerably quicker, and thus saved the interest that the trial court awarded Mother on this debt. As a result, all of the elements of equitable estoppel apply as Mother's delay in asserting her rights in this regard for over six years is certainly inconsistent with her present claim that the debt should be repaid by Father. As a result, Father respectfully submits the doctrine of equitable estoppel applies and that the trial court's judgment was an abuse of the trial court's discretion and was not based on substantial evidence.

Even if the trial court was correct in finding Father in contempt in not paying the debt to People's Bank, it did not have statutory authority to order interest on that judgment. The trial court awarded a judgment to Mother of the

remaining principal amount of that obligation of \$5,138.97, plus an additional \$3,391.74 in interest accrued at the legal rate of nine percent per annum. (L.F. 52)

Section 408.040.1 R.S.Mo. (2000) states as follows:

Interest shall be allowed on all money due upon any judgment or order of any court from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than nine percent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear nine percent per annum until satisfaction made as aforesaid.”

The original dissolution of marriage judgment of November 16, 1992 provided as follows: “That the court orders division and assumption of marital debts as set forth on Schedule C, attached hereto and made a part hereof.” (L.F. 10) Schedule C of that judgment listed under “Debts to be assumed by Respondent”, “People’s Bank, \$7,745.46 (No. 55398)”. (L.F. 13) Nothing in that portion of the court’s dissolution judgment required Father to pay any money at all to Mother. Indeed, the intent of that debt division portion of the trial court’s dissolution judgment was to require the payment of a debt to a third party, namely People’s Bank. In other words, the purpose of that portion of the judgment was to provide for the payment of marital debts, not to compensate Mother. As a result, Father respectfully submits that, as the dissolution judgment only provided for the performance of an act and not the payment of money to a judgment creditor (Mother), this type of an order is not a “judgment and order for money” on which § 408.040.1 R.S.Mo. allows interest.

This Court has recently stated that the rationale behind the interest statute is to provide a penalty for delayed payment of a judgment. Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663, 674 (Mo. App. S.D. 2000). In the case at bar, payment of the money due to the creditor intended to be benefited, namely People's Bank, was paid timely and any delay in Mother benefiting from this order was caused, not by Father, but by Mother failing to inform Father of her intentions to be repaid this money for six years. As a result, the facts in the instant case do not fall within the scope of § 408.040.1 and, at the very least, the trial court's award of interest on the People's Bank note of \$3,391.74 should be reversed.

For the reasons stated above, the trial court's finding that Father was in contempt of paying the People's Bank note should be reversed or, at the very least, its award of interest of \$3,391.74 should be reversed.

## POINT FOUR

THE TRIAL COURT ERRED IN AWARDING MOTHER AN ATTORNEY FEE JUDGMENT OF \$2,980.00 BECAUSE SAID JUDGMENT WAS NOT BASED ON SUBSTANTIAL EVIDENCE AND WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION IN THAT THERE WAS NO EVIDENCE THAT FATHER WAS IN ANY BETTER FINANCIAL SITUATION THAN MOTHER TO PAY FOR THE COSTS OF THIS LITIGATION AS MOTHER AND FATHER'S INCOME ARE ROUGHLY EQUAL.

As previously stated, the judgment of a trial court in a judge tried case will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it constitutes an abuse of the trial court's discretion or unless it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). The trial court has broad discretion in awarding attorney's fees in dissolution cases and only on a showing of abuse of that discretion will an appellate court interfere with an attorney fee award. In Re: Marriage of McCoy, 818 S.W. 2d 322, 325 (Mo. App. S.D. 1991) Generally, parties in a dissolution action are to pay their own respective attorney fees. Thill v. Thill, 26 S.W.3d 199, 208 (Mo. App. W.D. 2000). Two factors should be considered in awarding attorney's fees: (1) the actions of the parties during the pendency of the action, and (2) the respective financial situations of the parties. Id

In the case at bar, the evidence showed that Father makes an annual salary of approximately \$48,000.00 (Tr. 29), while Mother made \$37,354.00 in 1999, before her mysterious drop in income in 2000. (Tr. 101) Father's motivation in bringing this action was because his 16 year old son Justin indicated that he wanted to live with Father (Tr. 12, 41), something that Justin confirmed in his

testimony to the court. (Tr. 164) Based upon this evidence, it appears that both parties have sufficient resources with which to finance their own attorneys and neither party can be said to have done anything to drive up the costs of this litigation. Given the facts of this case, and especially the financial situation of both parties, the trial court abused its discretion in taxing the entire cost of this litigation, including Mother's attorneys fees, to Father and as a result, the trial court's award of attorneys fees of \$2,980.00 to Mother (L.F. 53) was an abuse of discretion and should be reversed.

## CONCLUSION

For the reasons stated above, Father respectfully requests this Court to reverse the trial court's award of \$2,400.00 in back child support to Mother; reverse its award of current child support against Father from \$675.00 per month to \$435.00 per month retroactive to October 1, 2001; reverse the trial court's finding of contempt against Father concerning the People's Bank debt and its award to Mother of the principal amount of \$5,138.97 and interest in an additional amount of \$3,391.74; and reverse the trial court's award of attorneys fees of Mother of \$2,980.00, and for such other and further relief as this Court deems appropriate under the circumstances.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, James R. Sharp, attorney for Respondent, hereby certify that two copies of the foregoing Appellant's Brief, was served by United States Mail, postage prepaid to Randy Reichard, attorney for Respondent, at his mailing address of 901 St. Louis Street, 20<sup>th</sup> Floor, Springfield, MO 65806 on this \_\_\_\_\_ day of April, 2002.

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