

RESPONSE TO RESPONDENT'S MOTION TO DISMISS

In her Motion to Dismiss, Respondent (Mother) argues that Appellant's (Father's) appeal concerning the trial court's judgment finding Father in contempt should be dismissed, on the grounds that the contempt judgment is not final as it has not been enforced by actual incarceration. The applicable portion of the trial court's judgment states in part:

“ 4. Respondent Dwight Allen Gilmore, shall be committed to the custody of the Sheriff of Stone County, Missouri, until such time as he purges himself of contempt, or until he is otherwise discharged by law.

5. Execution of this judgment with regard to Respondent's incarceration shall be stayed so long as Respondent complies with the following provisions which he may purge himself of contempt:

- A. Payment to Petitioner of \$10,930.71, representing the principal unpaid amount of the People's Bank obligation, plus interest from and after June 20, 1994, the date the obligation was paid by Petitioner, plus child support arrearages in the amount of \$2,400.00, said payment to be made within sixty (60) days from the date of this judgment.
- B. Upon Respondent's failure to comply with the purge order set forth above, a warrant for his arrest and an order for his commitment to the Stone County Sheriff shall issue forthwith without further hearing.

C. The Court retains jurisdiction of this contempt action until the contempt has been purged.”

(L.F. 52-53)

On February 27, 2002, the trial court approved an appeal bond in the amount of \$20,000.00 to cover the amount of the judgment remaining unsatisfied, costs on the appeal, interest and damages for delay. (App. 1, 3) Previously, on February 11, 2002, Mother had filed a garnishment on Father’s wages on the amounts contained in the contempt judgment. (App. 1) On March 5, 2002, Father posted the \$20,000.00 bond with the Circuit Clerk of Stone County, Missouri. (App. 4) On March 12, 2002, in response to this bond, Mother released her garnishment on Father’s wages. (App. 5)

This Court has previously held that if an alleged contemnor chooses to appeal a contempt judgment, he must wait until the order is enforced by incarceration pursuant to a warrant of commitment and at that point he is entitled to be released on bond pending appeal. In Re: Marriage of Beaver, 945 S.W.2d 717, 721 (Mo. App. S.D. 1997) Father has complied with that provision in that he has filed an appeal bond which stayed the actual execution of the contempt judgment, including the actual incarceration. As a result, Father contends that the order finding him in contempt is a final appealable judgment given his posting of an appeal bond on March 5, 2002.

In addition, Father would like to point out to this Court that contempt judgments are, in many cases, enforced by means other than incarceration,

including garnishment of the wages of the alleged contemnor, as happened in this case. By limiting the appealability of contempt judgments to situations involving only actual incarceration presents a grave injustice where the petitioner in such an action chooses to pursue execution against the alleged contemnor's property rather than incarceration of his person. Therefore, Father respectfully requests this Court to reexamine its rules concerning the appealability of contempt judgment where the Petitioner has chosen to pursue enforcement of said judgments through executions on property rather than incarceration.

POINT ONE

In her response to Point One of Father's Brief, Mother argues that she had no choice but to accept Father's reduction of child support by \$300.00 during the six (6) weeks that he had the children for the summer, because: "I could definitely not go back to court and fight it, so all I could do was accept it...". (Respondent's Brief p. 12, Tr. 116) This was clearly not the case as Mother did not have to go back to court if she truly believed that she was being short-changed by Father on child support. In the original divorce decree, the court included language then mandated by § 452.350.1 R.S.Mo. concerning Father's wages being subject to withholding if he became delinquent in child support in an amount equal to one month's total support obligation. (L.F. 9) Mother, if she truly believed that Father was behind in his child support obligation, could merely have filed a wage withholding order after the end of Father's second six (6) weeks summer contact period as he would have then have been in arrears in the amount of one month's support payment. Therefore, Mother's contention that she merely acquiesced to an arrangement imposed upon her by Father is simply against the weight of the evidence in the record.

Mother also argues that her permitting the children to stay with Father for five to six weeks each summer was not a "relinquishment of custody" which would allow the abatement provisions of Section 452.340.2 R.S.Mo. to apply, especially in light of her receiving alternate weekend visitation during those six

weeks periods. (Mother's Brief p. 13) Whether Mother's argument prevails is based upon the definition of "custody" as used in § 452.340.2 R.S.Mo.

It is uncontested in this case that the children lived with Father for five to six weeks during the eight summers prior to trial, a period of between 35 and 42 days. (Mother's Brief p. 13) If Mother had every other weekend visitation, the children would have stayed with her for a maximum of six days during each of those periods. As a result, the children would have lived with Father during those periods for approximately 85 percent of the time. This would indicate he had actual control over the children during those summer periods.

Appellate courts have tended to equate "custody" of children with control of over the children. For example in State v. Burris, 32 S.W.3d 583 (Mo. App. S.D. 2000) this Court found that, for the purpose of a statutory provision requiring a juvenile to be advised prior to questioning in a criminal case that he has a right to have "custodian" present during questioning, the principal of the child's boarding school where the child resided was his "custodian" as he was the one that exercised actual control over the child. State v. Burris 32 S.W.2d at 589-590. Additionally, and perhaps more persuasively, the Western District Court of Appeals held in Gordon v. Gordon, 924 S.W.2d 529, 534 (Mo. App. W.D. 1996) "Of course, where the custodial parent voluntarily relinquishes control of a child to the non-custodial parent for a period in excess of thirty (30) days, the obligation of the non-custodial parent may abate in whole or in part for the period in question." (Emphasis added) Therefore, Father submits that he had

custody of the children during those periods and is entitled to an abatement of child support under § 452.340.2 R.S.Mo.

On page 14 of Mother's brief, she argues that § 452.340.2 R.S.Mo. only allows abatement of child support commencing after the initial thirty day custodial period has run. Father submits that the whole purpose of this statute is to give some relief to a parent obligated to pay child support from paying child support during those periods he has actually custody of the minor children beyond that intended by the initial dissolution decree. This interpretation has been followed by the Western District Court of Appeals in Gordon v. Gordon, 924 S.W. 2d 529, 534 (Mo. App. W.D. 1996), where that court indicated that "the obligation of the non-custodial parent may abate in whole or in part for the period in question." In the case at bar the "period in question" is clearly the five to six week periods during the last eight summers Father actually exercised control over the children and he should be given credit in his child support obligation for those periods.

Finally, on page 15 of Mother's brief, she argues that there was no exchange of value between the parties which would support an agreement to reduce Father's obligation by \$300.00 per year in child support for these five to six week per year periods where there was an exchange of custody. Father would respectfully submit that there was a definite exchange of value in this arrangement in that Mother was relieved of the burdens, financial and otherwise, of caring for the children for these periods in exchange for this \$300.00

reduction in one of the Father's child support payments. This was the consideration that supported this agreement and would certainly support the idea that there was a definite agreement between Mother and Father for the previous eight years concerning a reduction in Father's child support obligation. For this reason, Father submits that the trial court's finding that there was no agreement is certainly against the weight of the evidence and misstates and misapplies the law and should be reversed.

POINT TWO

On Page 19 of her brief, Mother argues that her business grew so much in 1999 that she had to have her current Husband come to work for the company which necessarily reduced her income to only \$800.00 per month, from more than \$3,000.00 per month the year before. It would stand to reason, however, that people as economically astute as the Crowes would not have given up Mr. Crowe's \$36,000.00 a year salary if they did not believe that they could make at least that much more by having him assist Mother in the operation of her business. In any event, bringing Mr. Crowe into the business was a decision made solely by Mother and Father should not have to pay for that decision. As a result, it was clearly an abuse of discretion for the trial court to use as Mother's income a figure 77 percent lower than her 1999 reported income.

Finally, on page 21 of Mother's brief, she argues that the trial court is not required in every instance to average a party's prior three years income in determining a proper income figure for its Form 14 PCSA calculation. While this is true as far as it goes, where Mother, at trial, argued that her income had taken a sudden 77 percent drop during the pendency of a child support modification action based solely on her decision to include her husband in her business, it is an abuse of discretion for the trial court not to do some sort of averaging of prior years' incomes, especially where Mother is still in the same business she has been for the past several years.

For these reasons and the reasons stated in Father's brief, the trial court's child support modification was against the weight of the evidence, not based upon substantial evidence and was an abuse of the trial court's discretion and should be reversed.

POINT THREE

Mother argues on page 25 of her brief that Father waived the affirmative defense of waiver and estoppel as to the People's Bank debt as he did not plead it in his answer to Mother's contempt petition. Rule 55.33 (b) of the Missouri Supreme Court Rules allows pleadings to be amended to conform to the evidence when issues not raised by the pleadings are tried by "express or implied consent of the parties". This Court has indicated that, in order to allow issues to be tried by "express or implied consent of the parties"; the evidence must bear only on the new issues and not be relevant to any issue already in the case. Sisk v. McIlory & Associates, 934 S.W.2d 567, 571 (Mo. App. S.D. 1996) Father testified, without objection from Mother, as to the last time he received communication from Mother concerning this debt and her lack of any action for the past several years to enforce Father's obligation on this debt. (Tr. 27-28) There was no objection as to this evidence being beyond the scope of the pleadings, even though this evidence would have no bearing on any issue concerning the People's Bank debt other than waiver and estoppel. As a result, this issue was tried with the consent of the parties and is a proper subject for this appeal.

With regard to the issue of whether the trial court had the authority to award interest of nine percent per annum on the \$5,138.97 People's Bank debt, the difference between Mother's and Father's position is whether this is a money judgment, as argued by Mother, or whether this was merely the order for the performance of specific act, which Father contends takes this matter outside of the scope of the interest statute, § 408.040.1 R.S.Mo. Father was not ordered in this situation to pay any money to Mother but merely he was ordered to pay a debt to People's Bank, which was not a party to this action, which indicates that it was an order to perform a specific act. (L.F. 13)

Further, the rationale behind the interest statute is to provide an incentive for prompt payment of money obligations. Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663, 674 (Mo. App. S.D. 2000) This is considerably different than a fine as punishment in a civil contempt case, as Mother argues this award is, in that there must be some relation between the fine and the actual damage suffered by the injured party in the contempt case. In Re Marriage of Hunt, 933 S.W.2d 437 at 448-449 (Mo. App. S.D. 1996). In the case at bar there was no evidence indicating that Mother could have earned nine percent per annum interest on this money had Father actually paid it in 1994 or what interest she could have earned on this money during that period of time. Absent that evidence, Father respectfully submits that, not only was the trial court's award of interest contrary to the law, there was no substantial evidence on

which to make such an award. Therefore, at the very least, the interest portion of judgment concerning the People's Bank debt should be reversed.

POINT FOUR

As previously argued in Father's brief, Father did not violate the trial court's decree and therefore an award of attorneys fees on that basis is not supportable. Also, contrary to Mother's argument on page 32 of her brief that she makes only \$800.00 per month, the evidence was clear that Mother makes in excess of \$37,000.00 per year and therefore the parties' financial situations are roughly the same. As a result, the trial court's award of attorneys fees was clearly erroneous and should be reversed.

CONCLUSION

For the reasons stated herein and in his brief, Father respectfully submits that the trial court's judgment modifying the child support award and finding him in contempt should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, James R. Sharp, attorney for Respondent, hereby certify that two copies of the foregoing Respondent's Reply Brief was served by United States Mail, postage prepaid to Randy Reichard, attorney for Mother, on this _____ day of July, 2002.

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To the best knowledge and belief of the undersigned attorney,
Reply Brief complies with the limitations contained in special rule 1(d) and
specifically, pursuant to the word processing system of Appellant's counsel, there
are 2,568 words contained in Reply brief. Appellant further states that the floppy
disk being provided herein, which contains Reply Brief, has been scanned for
viruses and is virus free to be best of the undersigned's knowledge.

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