

**IN THE MISSOURI SUPREME COURT**

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**No. SC84131**

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**BELINDA ULRICH WOODSON,**  
Cross-Appellant/Respondent,

v.

**DENNIS EDWARD WOODSON,**  
Respondent/Appellant.

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APPEAL FROM SIXTH JUDICIAL CIRCUIT COURT OF MISSOURI  
Hon. Gary D. Witt, Judge

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**BRIEF OF CROSS-APPELLANT  
AND BRIEF OF RESPONDENT  
DENNIS E. WOODSON**

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HUSBAND’S APPEAL

I. The trial court erred in treating Wife’s Missouri state teachers retirement account as her separate property instead of marital property divisible by the court for the reason that §169.572 RSMo 2000 which shields such account from division is unconstitutional as applied to the facts of this case, where payroll deductions for Social Security (FICA) were simultaneously withheld from Wife’s school district salary, and the failure to divide the account deprived Husband of property without due process of law and denied him the equal protection of law under the U.S. and Missouri Constitutions .....17

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II. Assuming *arguendo* the constitutionality of §169.572 RSMo 2000 as applied to the facts of this case and the non-divisibility of Wife’s Missouri state teachers retirement fund, the trial court’s judgment decree dividing the marital property and marital debts was fair and just, was consistent with the factors listed in §452.330.1 RSMo and warranted by the parties’ respective circumstances and the evidence on the record, and was not an abuse

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**JURISDICTIONAL STATEMENT**

This is an appeal and cross-appeal from a judgment in a dissolution of marriage action entered on November 6, 2001, by the Platte County Circuit Court. Husband’s appeal challenges the validity of §169.572 RSMo 2000 as depriving him of property in violation of the equal protection and due process clauses of the United States and Missouri Constitutions as applied to the facts of the case. The Supreme

Court has jurisdiction. Missouri Constitution, Art. V, §3, as amended.

### **STATEMENT OF FACTS**

Appellant Dennis Woodson is unable to adopt in its entirety the statement of facts set out in Mrs. Woodson's Brief because of certain errors, its often argumentative nature, and its brevity. He offers these additional facts:

A. Marital History: Husband and Wife originally married in March 1971 (Tr. 15). That marriage ended in a dissolution in October 1973 (Tr. 15), although the parties never separated and continued to live together until they secretly remarried sometime in 1974 in Ardmore, Oklahoma (Tr. 17, 24, 167). The latter ceremony was re-enacted in Independence, Missouri, on December 6, 1975 (Tr. 16, 17).

Wife filed the instant Petition for Dissolution of Marriage on August 21, 2000 (LF 1). For a period of some 10 months, the parties continued to live in the marital residence (LF 2; Tr. 17-8); they separated June 22, 2001 (Tr. 18).

B. The Parties: Husband was 54 years old in August 2001 (Tr. 84). He has diabetes and takes "medication" for it (Tr. 177, 182). He holds a bachelor's degree in business from Pittsburgh State University in Pittsburgh, Kansas (Tr. 38, 171). Husband has held several jobs since the 1970's with Sunshine Biscuit, Southwest Petrol, Gard Oil, PQ Oil Co., Devine Lighting, Swift, ServiceMaster and Aramark (Tr. 40, 42-8), and also performed lawn service, clean-up, and snow removal part-time on the side beginning in 1997 (Tr. 47, 158). His optimal annual income is approximately \$58,700 (Tr. 161).

Wife was 50 years old in August 2001 (Tr. 84). She has been a middle school principal for four years (Tr. 36-7) and earns between \$75,000 and \$76,000 per school year (Tr. 76). She can earn

additional money if she works during summer vacation (Tr. 77, 161). Wife has a B.S. in education from U.M.K.C., a Master's Degree from Leslie University in Cambridge, Massachusetts, and an Education Specialist certificate from U.M.K.C. (Tr. 37). She has been involved in teaching and school administration since 1972, except for a period between 1977 and 1984 when she stayed home to raise children (Tr. 39-42).

C. The Children: Three of the parties' six children had reached the age of majority or were emancipated by the time of the dissolution hearing on August 9, 2001 – Matt (DOB 9/14/76), Brent (DOB 7/22/78), and Kenneth (DOB 12/8/81) (Tr. 18-21; LF 103). Daughter Stacy (DOB 2/1/80) was attending college in Virginia on a full scholarship (Tr. 21, 51-2; LF 110) and would have attained the age of 22 within a few months of the Dissolution Decree (LF 54). Both legal and physical custody of Stacy and of the other two minor children, Thomas (DOB 5/8/88) and John (DOB 10/28/89), was granted to Husband and Wife jointly, and Wife was designated as their primary physical custodian (LF 104). Husband was ordered to pay \$765 per month as child support for Thomas and John, and \$100 per month for Stacy until her impending emancipation (LF 54, 110-1).

D. Misconduct -- "Indignities": Husband and wife physically separated on June 22, 2001 (Tr. 18). Wife testified that their marriage began to deteriorate after the birth of their sixth child when they "just began going different directions" (Tr. 24). She stated that he had "become progressively more angry, very upset with me, because of my employment" (T. 24). Marriage counseling was not successful (Tr. 35-6).

Wife described a change in Husband's behavior occurring after she filed the petition for dissolution of marriage: "[he] has become actually very abusive in the last short while" (Tr. 24-5). She noted "things

have gotten worse and worse” after she commenced the dissolution (Tr. 25). She then read a list of statements she claimed he made after the filing of the petition (Tr. 27-9), which she characterized as “intimidating language, intimidating gestures, intimidating looks, verbal put-downs, verbal abusive threats, cursing, yelling, screaming” (Tr. 25). She compiled that list after commencing the dissolution (Tr. 27). She asserted she was induced to obtain an Ex Parte Order of Protection because of some incidents of verbal abuse and a single act of physical intimidation occurring shortly before June 22, 2001 (Tr. 30-3).

Husband agreed with the approximate timing of the deterioration of the marriage, citing her hysterectomy and failure to take estrogen for her change in behavior and attitude (Tr. 152-3), and also her deeper involvement in school district employment, educational pursuits, and resulting absence from home during that time (Tr. 154). He denied ever physically harming Wife (Tr. 151). He acknowledged he had shown a bad temper since she announced her intention to obtain a divorce (Tr. 155-6, 180-1, 193-4), and asserted that just before she sought an Ex Parte Order of Protection she urged him to move out of the house and was attempting to aggravate and provoke him (Tr. 151-2).

Wife referred to “other items . . . [that] were said prior to the filing of the Petition” but did not describe any of them (Tr. 29).

Wife acknowledged that the children have a close loving and active relationship with Husband even after the alleged incidents of abusive behavior she mentioned (Tr. 34, 50-1, 62-3). Husband described the same (Tr. 143-6, 147-55, 161-2), and the trial court observed after interviewing the minor sons *in camera* that they love both parents very much (Tr. 201).

The trial court made no express or implied finding that any of the alleged indignities occurred prior to the time Wife filed her petition for dissolution or prior to the time she informed Husband she wanted to

terminate their marriage. The court made no finding that the Husband's behavior had any adverse effect on the marital relationship or on the children.

*E. Misconduct – Financial:* In addition to regular employment, in the last three years Husband performed some parking lot cleaning, lawn care and snow removal in Platte Woods (Tr. 67, 149, 158-9, ). His purpose in taking on the added work was to help pay for religious missions for his sons (Tr. 75-6, 158). He engaged his sons to help him and paid them hundreds of dollars for their work (Tr. 149-50). None of this income was reported either on the joint tax returns Wife prepared and filed, as they had agreed (Tr. 71-3, 172), or on his separate returns in 2000 (Tr. 166). His stated reason was that he had not received a Form 1099 (Tr. 171, 173). He also did not report the income initially on the income and expense statement he filed with the court because he did not know what the monthly amount was, lacked the Form 1099, and did not keep track of the sums he paid his sons for their help or to purchase a new tractor and snowblade as well as other business expenses (Tr. 170-3).

The trial court addressed this issue, finding that Husband “may have tax liability for tax years 1998 and 1999 which may arise from any undisclosed income from his lawn care and snow plowing business” (LF 109), and ordering that all such tax liability, together with any penalties and interest, would be borne solely by Husband who must hold Wife harmless for same (LF 117).

Husband also accumulated over \$15,000 in cash, mostly from his side business (Tr. 183-4), which he kept in the bedroom closet of the marital home (Tr. 67-8). He kept it secret from Wife (Tr. 183) because she “is financially irresponsible and she would have spent every dime of it” (Tr. 197). He was the marriage partner who attempted to save money over the years and to use it for the children, to improve the lawn and snow removal business, and for unexpected expenses (Tr. 184, 197-8). His original statement

of marital and non-marital property and debts failed to list this money, but he amended the statement after Wife discovered the money and gave it to her lawyer (Tr. 175-6).

The trial court awarded the entire \$15,340 to Husband (LF 115 #12). It made no express or implied finding of misconduct in the manner he accumulated or handled that money.

*F. Maintenance:* Both Husband and Wife waived any claim for maintenance and none was ordered (Tr. 23, 167; LF 55, 103, 112).

*G. Wife's Social Security and Missouri State Teachers Retirement Fund:* Wife made final amendments to her Statement of Marital and Non-Marital Property and Liabilities and filed same on August 8, 2001 (LF 64), the day before the trial (Tr. 7, 82). In the "grid" attached to that statement, she asserted that her "KCMO Public School Retirement" fund was non-marital property (LF 70, #18). Wife submitted her amended statement at trial as Petitioner's Exhibit 2 (LF 64; Tr. 82-3).

As trial commenced, but prior to the introduction of any evidence, Husband formally requested findings of fact and conclusions of law under Rule 73.01 on the issue whether Wife's retirement fund with the Kansas City School District could be treated as marital property and divided accordingly (Tr. 8). Counsel requested that the trial court declare §169.572 RSMo unconstitutional "as applied to [Husband], under the unique circumstances of this case," stating as follows (Tr. 8-10):

[it] violates the Equal Protection Clause and Due Process Clause of the 14<sup>th</sup> Amendment of the United States Constitution and the Due Process Clause of Section 10, Article 1 of the Missouri Constitution, and the Equal Protection Clause of Section 2, Article 1 of the state constitution, in that in this particular case [Wife] is in fact a participant and her employer, the Kansas City School District, does in fact participate under FICA, the

Federal Social Security System. And for that reason that the statute which shields that as nonmarital the rationale for . . . that statute is to protect that asset because it is received by a teacher in lieu of Social Security benefits, which would be nonmarital property. In this particular case, since she is already eligible to receive Social Security funds, it is our position that the statute is unconstitutional. In the alternative, we would request that This Court find that the statute, applied to this case, should be construed or interpreted as being inapplicable to a teacher who does in fact participate in the Social Security System.

In testimony, Wife claimed the account was her non-marital property (Tr. 88-9), and her counsel took the position that §169.572 RSMo and Silcox v. Silcox, 6 S.W.3d 899 (Mo.banc 1999), precluded the court from dividing the school district retirement account (Tr. 10). After citing and furnishing some legal authorities to the court and asking that it take judicial notice thereof, the parties stipulated that the value of the school district retirement fund was approximately \$194,000, that the school district also participated in the Social Security retirement system, and that FICA contributions are withheld from Wife's paychecks with the school district (Tr. 11-2).

An accounting firm's valuation of Wife's state teachers retirement account was admitted by stipulation as Exhibit G (Tr. 142). The testimony indicated, and the trial court found, its value to be \$193,693.00 (Tr. 163; LF 109).

The trial court declined to declare §169.572 RSMo unconstitutional as applied (LF 109). However, it expressly noted that the legislative rationale for the statute "does not exist in this case because the [Wife] participates in the Social Security system and is an employee covered by same and eligible to

receive retirement insurance benefits therefrom” (LF 110). On the basis of existing authority, the court found that the state teachers retirement fund was non-marital and thus not divisible, and set the entire amount over to Wife (LF 109, 112-3 #30). In so doing, it made this explicit finding:

the value of the non-marital retirement is a factor in determining the division of the remaining marital property in this case.

(LF 110).

*H. Property and Debt Division:* After setting over specific items of non-marital property to each spouse (LF 112-3), the court awarded Wife the marital home (worth \$133,500, with no outstanding mortgage debt), a 1999 Plymouth Voyager, various bank accounts and other items having a total value of \$163,274 (LF 113-5).

Husband was awarded the couple’s rental properties in Independence; two pick-up trucks; various bank accounts, IRAs and stock holdings, his own profit-sharing and retirement plans (altogether worth \$37,500); cash and other items. The total value of all this marital property is \$359,825 (LF 115-6). The duplex and four-plex in Independence have outstanding mortgages totaling \$128,892 (LF 117), resulting in a net value to Husband of \$230,933.

No issue is raised on appeal concerning the values of the marital and non-marital property assigned by the trial court.

Wife was ordered to pay four enumerated debts totaling \$11,500 – Sears, Mastercard, Discover and First Federal Credit Union (LF 117). Wife erroneously asserts Husband was ordered to pay these debts (App.Br. at 8), but the court’s letter to the parties’ counsel setting out the property and debt division and directing Wife to draft the Decree specifies that she is responsible for those (LF 55). That disposition

is consistent with her own trial testimony that she should be assigned those debts (Tr. 91).

Wife has correctly pointed out (App.Br. at 8) an error in the drafting of the final Decree which was evidently overlooked by all. Husband was awarded the duplex and four-plex properties in Independence (Tr. 79), and the Decree *should* have reflected that the primary responsibility for the mortgage debts on these two rental properties (totaling \$128,892) was assigned to Husband. Instead it incorrectly specified “Petitioner” (LF 117). The court’s letter to the parties’ attorneys indicates the court’s true intent (LF 55). Husband agrees with Wife’s position that *this* paragraph of the Decree contains a scrivener’s error.

**POINTS RELIED ON**

**HUSBAND’S APPEAL**

**I. THE TRIAL COURT ERRED IN TREATING WIFE’S MISSOURI STATE TEACHERS RETIREMENT ACCOUNT AS HER SEPARATE PROPERTY INSTEAD OF MARITAL PROPERTY DIVISIBLE BY THE COURT FOR THE REASON THAT §169.572 RSMO 2000 WHICH SHIELDS SUCH ACCOUNT FROM DIVISION IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE, WHERE PAYROLL DEDUCTIONS FOR SOCIAL SECURITY (FICA) WERE SIMULTANEOUSLY WITHHELD FROM WIFE’S SCHOOL DISTRICT SALARY, AND THE FAILURE TO DIVIDE THE ACCOUNT DEPRIVED HUSBAND OF PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED HIM THE EQUAL PROTECTION OF LAW UNDER THE U.S. AND MISSOURI CONSTITUTIONS.**

## **WIFE'S APPEAL**

**II. ASSUMING *ARGUENDO* THE CONSTITUTIONALITY OF §169.572 RSMO 2000 AS APPLIED TO THE FACTS OF THIS CASE AND THE NON-DIVISIBILITY OF WIFE'S MISSOURI STATE TEACHERS RETIREMENT FUND, THE TRIAL COURT'S JUDGMENT DECREE DIVIDING THE MARITAL PROPERTY AND MARITAL DEBTS WAS FAIR AND JUST, WAS CONSISTENT WITH THE FACTORS LISTED IN §452.330.1 RSMO AND WARRANTED BY THE PARTIES' RESPECTIVE CIRCUMSTANCES AND THE EVIDENCE ON THE RECORD, AND WAS NOT AN ABUSE OF THE COURT'S DISCRETION.**

## **ARGUMENT**

### **HUSBAND'S APPEAL**

**I. THE TRIAL COURT ERRED IN TREATING WIFE'S MISSOURI STATE TEACHERS RETIREMENT ACCOUNT AS HER SEPARATE PROPERTY INSTEAD OF MARITAL PROPERTY DIVISIBLE BY THE COURT FOR THE REASON THAT §169.572 RSMO 2000 WHICH SHIELDS SUCH ACCOUNT FROM DIVISION IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE, WHERE PAYROLL DEDUCTIONS FOR SOCIAL SECURITY (FICA) WERE SIMULTANEOUSLY WITHHELD FROM WIFE'S SCHOOL DISTRICT SALARY, AND THE FAILURE TO DIVIDE THE ACCOUNT DEPRIVED HUSBAND OF PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED HIM THE EQUAL PROTECTION OF LAW UNDER THE U.S. AND MISSOURI CONSTITUTIONS.**

**STANDARD OF REVIEW.** This appeal involves a constitutional challenge to §169.572 RSMo 2000 as applied to Husband, on the grounds that it deprives him of property without due process of law and denies him the equal protection of law. The facial validity of the statute is not at issue.

Moreover, it is substantive not procedural due process that is involved here. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution guarantees more than fair process. It includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.” Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997). This Court long ago recognized that “the right to acquire, hold, enjoy, and dispose of property, real or personal” is a “fundamental” right guaranteed by the U.S. Constitution. Stone v. City of Jefferson, 317 Mo. 1, 7, 293 S.W. 730, 782 (banc 1927).

Thus “strict scrutiny” is the standard by which the constitutionality of §169.572 RSMo must be judged here because its application infringes upon a fundamental constitutional right. Washington v. Glucksberg, supra 521 U.S. at 721 and n.17, 117 S.Ct. at 2268 and n.17 (substantive due process “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”), quoting Reno v. Flores, 507 U.S. 292, 301-2, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993) (emphasis in original). This heightened protection means that to pass constitutional muster the statute must use the *least restrictive means* consistent with its goal of furthering a *compelling* state interest. Id.

The statute, in its application to the facts of this case, does not enjoy a presumption of validity. Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503, 512 (Mo.banc 1991) (“That presumption obtains unless the statute clearly contravenes some constitutional provision. . . . Such a law is presumptively invalid because it impinges upon a substantive right or liberty conferred by the constitution”); State v. Young, 695 S.W.2d 882, 883 (Mo. banc 1985).

**DISCUSSION.** Husband does not contest the facial validity of §169.572, which survived a

constitutional challenge in Silcox v. Silcox, 6 S.W.3d 899, 903-4 (Mo.banc 1999). Husband recognizes that the statute serves a legitimate and salutary state purpose in affording the same protection to Missouri state teachers retirement accounts as is extended to Social Security benefits, *where the beneficiary of that protection -- the teacher – does not simultaneously contribute to the Social Security retirement fund*. Sec. 169.572 pertains only to teachers retirement accounts funded *in lieu of* Social Security contributions; it does not afford similar treatment to any other retirement account.

But in this situation, the statute protects not only Wife’s Social Security (to which she stipulated, Tr. 11-2), but also another retirement account to which she has voluntarily contributed, much like a private fund or an IRA. Had she made contributions to another such fund instead, the trial court would have been compelled to characterize that account as “marital” property subject to a just and equitable division. But §169.572 requires that state teachers retirement accounts must be considered nonmarital property and cannot be divided in a dissolution action. Silcox, 6 S.W.3d at 902; Gismegian v. Gismegian, 849 S.W.2d 201, 204 (Mo.App.E.D. 1993).

Husband has raised both due process and equal protection grounds in his constitutional challenge, citing the specific provisions of both the U.S. and Missouri Constitutions (Tr. 8-10). Sec. 1 of the 14th Amendment to the U.S. Constitution reads in pertinent part:

No state shall . . . deprive any person of . . . property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The counterparts in the Missouri Constitution read as follows: “no person shall be deprived of . . . property without due process of law” (Art. I, §10), and “all persons are created equal and are entitled to equal rights and opportunity under the law” (Art. I, §2).

These separate protections raise separate issues, but much of the analysis is identical.

#### A. DUE PROCESS ANALYSIS

Due process analysis begins with the question whether application of the act deprives Husband of a property right. As noted above, it does – the right to have the retirement account treated as marital property and thus divisible by the court in a dissolution proceeding, inasmuch as Wife has contributed to Social Security and *those* retirement funds are fully protected under the federal Social Security Act, 42 U.S.C. §407(a) (1994) and separately under §169.572.1 RSMo.

Thus the infringement at issue here is not a mere regulation of the use of property authorized by the state’s police power in the broader public interest. Rather, it is a complete denial to the Husband of any opportunity to acquire, enjoy and dispose of property by a legislative enactment that absolutely prevents the courts from awarding him an interest in certain property, even though the retirement account would presumptively be a marital asset subject to division under §452.330.2 RSMo 2000 (it was acquired after she began working during their first marriage, Tr. 39-41) and decisions such as Roam v. Roam, 708 S.W.2d 343 (Mo.App.S.D. 1986), and Hedgecorth v. Hedgecorth, 696 S.W.2d 862 (Mo.App.E.D. 1985). The effect of the statute is tantamount to taking his property right without just compensation.

Husband recognizes that §169.572 serves a legitimate state interest, even a compelling one – it protects teachers retirement accounts funded *in lieu of* Social Security contributions and thereby helps diminish economic hardship to divorced teachers upon retirement. Silcox recognized this very point, referring to “the state’s goal of providing retirement to teachers *not covered by social security*.” 6 S.W.3d at 903-4 (emphasis added).

But the statute is not narrowly tailored in at least one respect: it does not anticipate that a teacher

might also have contributed to Social Security. Thus its protective cloak envelops both retirement funds so that she receives a double pension protection available to no one else. Indeed, in this respect, under the “rational basis” test utilized in Silcox, the statute is not even rationally related to “the state’s goal of providing retirement to teachers not covered by social security.” Id. at 903.

Viewing this situation, the trial court correctly determined that “the rationale [of §169.572] does not exist in this case because the [Wife] participates in the Social Security system and is an employee covered by same and eligible to receive retirement insurance benefits therefrom” (LF 110).

Husband has sustained a very real injury because the state teachers retirement fund has been placed beyond the authority of the trial court to divide. Unlike the litigant in Silcox, Husband does not contend that he had any “vested” right to a portion of Wife’s retirement account. But he does enjoy the right to have the trial court treat the account as marital property such that a portion of it could have been set over to him as part of a just and equitable division of assets, or the court could have kept that account intact and awarded some other item of substantial value to him. Silcox, 6 S.W.3d at 902 and cases cited at n.3 therein.

The trial court clearly indicated that would have been its decision if the state teachers retirement fund had been characterized as “marital”: “This Court does find that the value of the non-marital retirement is a factor in determining the division of the marital property in this cause” (LF 110).

It is of no moment that Husband cannot show with reasonable certainty that he would have received either a proportion of the state teachers retirement fund or a compensating allowance from other marital property, and that he cannot assign a dollar value to his harm. Neither point establishes lack of standing or lack of harm, and neither point relieves the State of its constitutional obligation to afford due process of

law. As the U.S. Supreme Court observed nearly a century ago, “To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.”

Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 35 S.Ct. 625, 629, 59 L.Ed. 1027 (1915).

## B. EQUAL PROTECTION ANALYSIS

For equal protection purposes, the analysis begins with identification of the classification created by the statute and determination whether Husband is treated differently than other persons who are similarly situated. “Equal protection mandates that persons similarly situated in relation to a statute be treated the same.” State v. Stokely, 842 S.W.2d 77, 79 (Mo.banc 1992). The equal protection clauses permit classification of the subjects of legislation “if all within the same class are included and treated alike \* \* \* [or] if all persons in the same class are treated with equality.” Kansas City v. Webb, 484 S.W.2d 817, 824 (Mo.banc 1972).

Husband’s situation is that, like many parties in a dissolution proceeding, his wife has an established Social Security retirement account that is legislatively classified as her separate property not subject to division by the court. However, she has an additional retirement account acquired during their marriage that has also been legislatively classified as her indivisible, nonmarital property. Husband, unlike all other parties to divorce proceedings whose spouses have both Social Security and some other retirement fund or account acquired during the marriage, is unable to have a fair proportion of that other account (or another allowance to compensate for it) awarded to him in the division of marital assets. No other person in Wife’s position who is involved in a dissolution proceeding in this state receives such favorable treatment. No other

person in Husband's position who is involved in a dissolution proceeding in this state receives such unfavorable treatment.

This unequal treatment runs afoul of the basic philosophy that "property division should reflect the concept of marriage as a shared enterprise similar to a partnership." Goller v. Goller, 758 S.W.2d 505, 508 (Mo.App.W.D. 1988). Certainly Mr. and Mrs. Woodson worked and made personal and financial sacrifices jointly, as partners, so that Wife could continue her education, launch and sustain what she has described as "an exemplary career" as educator and administrator (App.Br. 6), and could contribute to *both* Social Security *and* the state teachers retirement fund. The "reward" for Husband's work and sacrifice is that Wife's Social Security retirement account is left intact, and an asset acquired during the marriage valued at nearly \$200,000 was set over entirely to her.

Wife has the same kind of retirement benefits that most people have, Social Security. The complete protection of her state teachers retirement account does not affect her Social Security in any way. Thus the statutorily-mandated treatment of the state teachers retirement fund is wholly irrelevant to achievement of the state's objective noted in Silcox, supra, whether evaluated under the "strict scrutiny/least restrictive means" test or the "rational basis" test. "A statute that creates arbitrary classifications that are irrelevant to the achievement of the statute's purpose may be struck down because the arbitrary classifications violate equal protection." Kilmer v. Mun, 17 S.W.3d 545, 552 n. 21 (Mo.banc 2000).

Discrimination is arbitrary and unconstitutional if the classification rests upon a ground wholly irrelevant to the achievement of the state's objective, \* \* \* or which is not based upon differences reasonably related to the purposes of the legislation. \* \* \* The selection must be not merely possibly, but must be clearly and actually, arbitrary and unreasonable.

\* \* \* The question is whether the principle of classification adopted rests upon some real difference, bearing a reasonable and just relation to the act with respect to which the classification is proposed. \* \* \*

Kansas City v. Webb, *supra* 484 S.W.2d at 824 (omitting citations).

In *this* case, on *these* facts, the General Assembly has drawn a conspicuously artificial line with §169.572 that adversely impacts Husband but does not advance the state's goal of "providing retirement to teachers not covered by social security." Silcox, 6 S.W.3d at 903-4.

## WIFE'S APPEAL

### II. ASSUMING *ARGUENDO* THE CONSTITUTIONALITY OF §169.572 RSMO 2000 AS APPLIED TO THE FACTS OF THIS CASE AND THE NON-DIVISIBILITY OF

**WIFE'S MISSOURI STATE TEACHERS RETIREMENT FUND, THE TRIAL COURT'S JUDGMENT DECREE DIVIDING THE MARITAL PROPERTY AND MARITAL DEBTS WAS FAIR AND JUST, WAS CONSISTENT WITH THE FACTORS LISTED IN §452.330.1 RSMO AND WARRANTED BY THE PARTIES' RESPECTIVE CIRCUMSTANCES AND THE EVIDENCE ON THE RECORD, AND WAS NOT AN ABUSE OF THE COURT'S DISCRETION.**

**STANDARD OF REVIEW.** The appellate court reviews the action of the trial court in dividing marital property and marital debts in a dissolution of marriage action for abuse of discretion. Silcox v. Silcox, 6 S.W.3d 899, 904-5 (Mo.banc 1999). “The trial court’s division of property is presumed correct, and the appellant bears the burden of overcoming this presumption. \* \* \* The division of marital property will only be disturbed if the distribution of marital property is so ‘heavily and unduly weighted in favor of one party as to amount to an abuse of discretion.’” Bauer v. Bauer, 38 S.W.3d 449, 460-1 (Mo.App. W.D. 2001) (citations omitted). “An abuse of discretion will be found only if the award is so arbitrary or unreasonable that it indicates indifference and lack of proper judicial consideration.” Silcox, supra 6 S.W.3d at 905. An abuse of discretion is an “untenable judicial act that defies reason and works an injustice.” Moore v. Board of Education of Fulton Public School No. 58, 836 S.W.2d 943, 948 (Mo.banc 1992), *cert. denied*, 507 U.S. 916 (1993).

**DISCUSSION.** The gross value of the marital property awarded to husband is \$359,825 (LF 115-6). However, when the outstanding mortgages on the two parcels of rental property in Independence (\$128,892; LF 117) are factored in, his share of marital property has a net value of \$230,933 and constitutes 58.6% of the whole. Wife’s share of the marital property is \$163,274 (LF 113-5), or 41.4%

of it, the most significant item being the marital home (worth \$133,500, with no outstanding mortgage debt). At her request (Tr. 91), Wife was ordered primarily responsible for the consumer debts totaling \$11,500.

As this Court has previously noted, §452.330.1 “requires a fair and equitable division of the marital property in light of the circumstances attending each individual case. It does not require an equal division of the property. \* \* \* A just division of the property cannot be accomplished by means of a mathematical formula or a rigid method.” Dardick v. Dardick, 670 S.W.2d 865, 869 (Mo.banc 1984). There is “no specific formula for a court to follow in determining the weight to be given to the various [statutory] factors.” Taylor v. Taylor, 25 S.W.3d 634, 640 (Mo.App.W.D. 2000). “Moreover, these factors are not exclusive.” Id.

The award to one party of a higher proportion of marital assets does not by itself constitute an abuse of discretion. Nelson v. Nelson, 25 S.W.3d 511, 517-8 (Mo.App.W.D. 2000). Missouri courts “routinely affirm highly disproportionate divisions of marital property.” Id. (citing cases that have approved awards to one spouse of 86%, 75%, 72%, 80%, 74%, 75%, and 84% of the marital assets). There is not even a presumption that an unequal division of marital property is suspect. Id.

The issue, then, is whether there is sufficient evidence supporting the unequal division of the parties’ marital property as being fair and equitable. Id. The trial court is presumed to have considered all the evidence and to have believed the testimony and evidence consistent with its judgment. Id. The judge is free to believe or disbelieve all, part or none of a witness’s evidence. T.B.G. v. C.A.G., 772 S.W.2d 653, 654 (Mo.banc 1989).

The division of property “cannot be considered deficient for its failure to announce that it was made in accordance with the statutory factors.” Taylor v. Taylor, *supra* 25 S.W.3d at 640, citing Starrett v.

Starrett, 703 S.W.2d 544, 548 (Mo.App.E.D. 1985). Here, neither party requested specific findings of fact and conclusions of law regarding the decision-making process in dividing the marital property, and the court was not required to announce them on its own. Supreme Court Rule 73.01(c); State v. Revels, 13 S.W.3d 293, 296 (Mo.banc 2000). Where no specific findings are sought, the appellate court presumes that the lower court resolved all factual issues in favor of the result reached. Rule 73.01(c); T.B.G. v. C.A.G., supra 772.S.W.2d at 654.

The Judgment Decree plainly demonstrates the court considered all relevant factors, both those listed in §452.330.1 and others. For example, Husband is older than Wife and in poorer health. He 54 years old and has diabetes for which he takes medication (Tr. 84, 177, 182). He has a minimal amount of money earmarked for his retirement – stock, IRAs, profit-sharing and savings plans worth only \$37,000 (LF 115). His work history shows several periods where he was unemployed (Tr. 42-8). Such an earning’s record adversely affects his monthly Social Security retirement benefits.

The only two items of property awarded to Husband with significant potential for producing future income were the duplex and four-plex in Independence, but the mortgages on them will not be paid off until he is 65 years old (Tr. 83-4). Although they generate some income now, it is not enough to keep up with necessary structural improvements and repairs, since the properties are in “terrible shape right now” (Tr. 155-6).

Wife’s annual earnings are significantly higher than Husband’s by some \$20,000 (Tr. 76-7, 161).

The parties were given joint legal and physical custody of the two minor sons (LF 117-8); their daughter Stacy was emancipated in February 2002. Wife was named primary residential custodian (LF 118), and Husband’s monthly support obligation for the boys was \$765, and an additional \$100 for Stacy

(LF 123).

In short, the record is devoid of any evidence or circumstance demonstrating that the trial court was indifferent or lacked proper judicial consideration (Silcox, supra 6 S.W.3d at 905), or its ruling defies reason and works an injustice (Moore v. Board of Education, supra 836 S.W.2d at 948). Nothing in the record justifies reversal.

**Wife's Contentions.** The thrust of Wife's complaints on appeal is two-fold: that the trial court (1) gave inordinate weight to Wife's KCMO School District retirement fund, and (2) gave insufficient weight to Husband's alleged misconduct. Neither argument has merit.

(A) *Consideration of the State Teachers Retirement Fund.* The Dissolution of Marriage Act expressly requires the trial court to consider the value of the nonmarital property set apart to each spouse. §452.330.1(3); Silcox v. Silcox, supra 6 S.W.3d at 905. Moreover, this duty extends to consideration of a spouse's future Social Security, as the Missouri court of appeals has held. Mallams v. Mallams, 861 S.W.2d 822, 824 (Mo.App. W.D. 1993) ("While social security is an unassignable asset, it is an economic factor which must be considered by the trial court in its division of property"); Hogan v. Hogan, 796 S.W.2d 400, 407 (Mo.App.E.D. 1990).

Because §169.572 mandates that state teachers retirement funds be treated the same as social security contributions, the trial court properly factored in the value of Wife's KCMO School District retirement account. Silcox, supra 6 S.W.3d at 905; Holt v. Holt, 976 S.W.2d 25, 29 (Mo.App.W.D. 1998).

The trial court's treatment of Wife's retirement fund is legally correct. Wife cites DeMayo v. DeMayo, 9 S.W.3d 736 (Mo.App.W.D. 2000), to support her argument that the court *may consider*

the retirement fund but *may not adjust* its division of marital property in any “material” way to account for setting over a large asset to one spouse as nonmarital property (App.Br. 14). DeMayo does indeed state that. 9 S.W.3d at 740, 741 (citing David v. David, 954 S.W.2d 611, 616 (Mo.App.W.D. 1997) (“the court is not to permit the consideration of the retirement account to ‘materially impact’ the division of property”).

Husband submits that DeMayo and David misapprehended both the express language of §452.330.1 and the prior cases involving school district retirement funds. The suggestion that the trial court may not *adjust* the allocation of marital property in any “material” way to achieve a just division plainly conflicts with the implied authority to do exactly that in performing the statutory *duty to consider* the amount of separate property set apart to each spouse. The statutory mandate to *consider* all relevant factors, including the five set out there, does not have a fluid definition as one goes down the list of factors – it does not mean one thing with respect to “the economic circumstances of each spouse” and “the conduct of the parties” but quite another with respect to “the value of nonmarital property” set over to each spouse. This artificial limitation created by David and DeMayo swallows up the statutory grant of authority and obligation, rendering the *duty to consider* the nonmarital property under §452.330.1(3) merely an empty exercise.

Furthermore, there is no textual support in previous court cases for the proposition announced in David and DeMayo. Indeed, that proposition conflicts with the prior decisions. David and DeMayo have misread the precedents by overlooking the *context* of their reference to “material effect.” The seminal case is Gismegian v. Gismegian, 849 S.W.2d 201 (Mo.App.E.D. 1993), where the wife’s school retirement funds were determined to be marital funds and awarded to her in their entirety. Citing the

“recently enacted” §169.572 RSMo, the Eastern District ruled that the characterization of the retirement funds as “marital” was error. The court then acknowledged the bedrock principle in Missouri embodied in Supreme Court Rule 84.13(b), that the trial court’s distribution of marital property should be disturbed only “if the error involved had a material effect on said distribution.” *Id.* at 204, citing Puckett v. Puckett, 632 S.W.2d 83 (Mo.App.E.D. 1982), which in turn cited Rule 84.13(b) as barring reversal of any judgment “unless error committed by the trial court materially affects the merits.” Puckett, 632 S.W.2d at 84. The Gismegian Court then analyzed the effect on the wife of the trial court’s denomination of the retirement fund as marital property and, finding that the error materially and adversely affected the allocation of property to her under the circumstances, reversed and remanded the case for reconsideration. Gismegian, 849 S.W.2d at 204.

Every other appellate decision except David and DeMayo has recognized that the phrase “material effect” refers to the standard for ordering reversal under Rule 84.13(b) and not to the nature of the trial court’s authority to consider retirement funds under §452.330.1:

- In Mallams v. Mallams, supra 861 S.W.2d 822, the trial court treated the teacher retirement accounts as marital and divided them (both husband and wife were teachers and had separate accounts in different amounts). The Western District explained that in Gismegian the erroneous inclusion of the wife’s retirement account “was *reversible* error, because its exclusion would materially impact the total value of the property received by the parties,” (861 S.W.2d at 824, adding emphasis); pointedly explained that the proper test to determine if reversal is required “is *whether the error materially impacted* the overall distribution of marital property,” (*id.*, adding emphasis); undertook just such an analysis and, after finding that the trial court’s error

“materially impact[ed] the division of property,” reversed the judgment. Id. at 824-5.

Unfortunately, it did not cite Rule 84.13(b).

- In Ludwinski v. Ludwinski, 970 S.W.2d 892 (Mo.App.E.D. 1998), the court reiterated the careful explanation of Gismegjan found in Mallams that the phrase “materially impact” pertains to the nature of trial court error with respect to *reversibility* of a judgment. 970 S.W.2d at 894.

The trial court there characterized the retirement account as marital, did not assign a value to it, and awarded the item to the wife/teacher. Id. The Ludwinski Court reversed with instructions to amend the judgment to award the account (worth \$41,000) to wife as her separate property.

Significantly, the Eastern District stated: “It remains for the [trial] court to decide whether this change materially impacts the overall distribution of marital property because of the separate award of an asset having a known and substantial value.” Id. That observation recognizes that setting over an item of separate property having a “substantial value” might require a reallocation of marital property awarded to the husband – precisely the legislative intent behind §452.330.1(3), and at loggerheads with DeMayo and David.

- In Holt v. Holt, supra 976 S.W.2d 25, the trial court declared husband’s teacher retirement account as separate property and set it apart to him, then ordered him to pay the wife \$50,000 as part of the property distribution. Husband argued this order was “an indirect attempt to divide his teachers retirement benefit.” Id. at 28. The Western District disagreed, noting that the trial court expressly disaffirmed any such intent “but did, under §452.330(3) [sic] consider the sizeable amount of non-marital property set aside to Husband.” Id. The Western District approved the lower court’s consideration of the retirement account which was expected to pay the husband over

\$1,800 per month during retirement, and affirmed the order for payment of \$50,000 to achieve a just distribution of marital property because of the husband's "more stable economic circumstances, both in salary and retirement," wife's age, her limited education and earning capacity, curtailment of her education and career development to rear children, and the minimal pension benefits she would not be able to draw for another 13 years: "Wife was in a far more fragile position at the time of the dissolution." *Id.* at 29. Once again, this decision properly applies §452.330.1(3) and is at odds with David and DeMayo.

This appeal provides an opportunity for this Court to correct the misstatement of law in DeMayo upon which Wife relies.

It cannot be fairly disputed that both §452.330.1(3) and long-standing case law direct the trial court to consider, in dividing marital assets, how much property was set over to each spouse as nonmarital, and where appropriate to adjust its property division accordingly to achieve a fair and equitable result. There is little other guidance given to the courts in this task. While no mathematical formula has been established to determine how much weight to give a substantial award of non-marital property in dividing marital property equitably, Evans v. Evans, 45 S.W.3d 523, 532 (Mo.App.W.D. 2001), a dollar-for-dollar consideration has been criticized because it would "eliminate the reason for the distinction between separate property and marital property" under the statute and permit one party to "invade [the other's] non-marital estate under the guise of procuring an equitable distribution of marital assets." Smith v. Smith, 702 S.W.2d 505, 509 (Mo.App.S.D. 1985).

The trial court here did not violate that tenet. Its award of marital property to Husband was neither equal to nor half of Wife's school district fund, which had an agreed-upon value of \$193,693.00 at the time

of trial (Tr. 163; LF 109). Husband's net award of marital property exceeds Wife's share by about \$67,660 (\$230,933 less \$163,274).

The trial court declared "the value of the non-marital retirement is a factor in determining the division of the remaining marital property in this case" (LF 110). The court did not explain that statement further. It is impossible to decipher how much weight the court gave to that "factor." The court might actually have awarded Husband a slightly larger share of the marital property because of Wife's retirement account. On the other hand, Husband may have received an even larger portion of marital property had the state teachers retirement fund been treated as marital property. Just as with the husband in Holt, Wife is unable to establish that the property division here was "an indirect attempt to divide [her] teachers retirement benefit." Holt v. Holt, *supra* 976 S.W.2d at 28.

*(B) Alleged Misconduct.* The trial court's handling of the two kinds of Husband's alleged misconduct was neither a misapplication of the law nor an abuse of discretion. As for the alleged "indignities," Husband disputed Wife's negative characterization of him (Tr. 146-7, 151-3), testified to his own good conduct as helpmate and father (Tr. 147-51), and admitted he had shown a bad temper only after she announced her intention to dissolve the marriage (Tr. 151-2, 155-6, 180-1, 193-4). Moreover, Wife described no intolerable conduct in her testimony prior to her commencement of the dissolution proceeding (Tr. 24-9). The behavior she cited as the basis for seeking an Ex Parte Order of Protection occurred in mid-June 2001, ten months after the action was filed (LF 1) and two months before the dissolution hearing (Tr. 30-3). The trial court did not explicitly declare Wife's allegations were credible, nor that Husband should be sanctioned on this issue.

On the financial issue, Husband neither squandered marital assets nor diverted them during the marriage. Any initial non-disclosure of assets to Wife and the court was corrected. The court handled any possible adverse tax consequence to Wife by ordering Husband to be responsible to the IRS for all tax liability, interest and penalties associated with under-reported income (LF 117).

Wife urges this Court to substitute its own judgment for that of the trial judge and to punish Husband more harshly for alleged misconduct. That is not this Court's function. Furthermore, misconduct is not the sole factor to be considered under §452.330.1. Sinopole v. Sinopole, 871 S.W.2d 46, 49 (Mo.App.E.D. 1993). “[T]here should not be an inordinate focus upon a particular incident or even a series of incidents, particularly in a marriage of long duration.” In re Marriage of Gustin, 861 S.W.2d 639, 644-5 (Mo.App.W.D. 1993), citing Burtscher v. Burtscher, 563 S.W.2d 526, 527-28 (Mo.App.E.D. 1978); *see also* Balven v. Balven, 734 S.W.2d 909, 913 (Mo.App.E.D. 1987). Misconduct becomes an important factor “when the conduct of one party to the marriage is such that it throws upon the other party marital burdens beyond the norms to be expected in the marital relationship.” Id. “It is only when the misconduct of one spouse changes the balance so that the other must assume a greater share of the partnership load that it is appropriate that such misconduct can affect the distribution of property. Id.

Here, Wife has not shown that she was faced with any additional marital burdens as a result of Husband's alleged misconduct in the 31 years they were together (Tr. 143). Evans v. Evans, *supra* 45 S.W.3d at 532.

### **CONCLUSION**

For the foregoing reasons, the Court should reverse the Judgment Decree because §169.572 RSMo is unconstitutional as applied to the facts of this case, and remand the cause for reconsideration of

the division of marital property.

Should the Court find the statute constitutionally sound, it should reject the contention of Mrs. Woodson that the property division is unduly weighted in favor of Husband in violation of §452.330.1 RSMo and was an abuse of the trial court's broad discretion.

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CERTIFICATE OF COMPLIANCE WITH  
RULE 84.06(C) AND OF SERVICE

Pursuant to Rule 84.06(c), I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03(a) and (b); that it contains 8612 words/868 lines and complies with the word/line limitations contained in Rule 84.06(b); that a diskette of the Brief is included herewith in WordPerfect 5.1 format; that the diskette was scanned for virus using McAfee virus scan and found to be free of virus; and that one copy of the diskette and one copy of Respondent's Brief were mailed, by U.S. Mail, postage prepaid, this \_\_\_\_ day of June, 2002, to Michael J. Svetlic, 5716 N. Broadway, Kansas City, MO 64118.

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James D. Boggs