

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

TROY R. NEAL, Respondent,)	No. ED90390
)	
)	Appeal from the Circuit Court
vs.)	of St. Louis County
)	
)	
ALBERTA D. NEAL, Appellant.)	Filed March 17, 2009

Alberta D. Neal (Wife) appeals from the trial court's Amended Judgment of Dissolution of Marriage (Amended Judgment), *inter alia*, awarding Troy R. Neal (Husband) and Wife with joint legal custody of the parties' minor child, ordering Husband to pay monthly child support, and dividing the parties' property and debts.

AFFIRMED IN PART, REVERSED IN PART, REMANDING WITH INSTRUCTIONS.

Division One Holds: Despite evidence on the record indicating good cause for why the trial court did not order immediate income withholding, the trial court did not make the statutorily required "written determination and explanation" that implementing immediate wage withholding would not be in the child's best interest as is required by statute. Wife's first point is denied with respect to her allegations of "inconsistencies" in the judgment, but we remand this case with instructions that the trial court review the Amended Judgment, and make the appropriate entries so as to conform to the statutory requirements of Section 452.350.

Second, the Court finds sufficient evidence on the record to support the trial court's decision to impute income to Wife, and the trial court did not abuse its discretion in considering Husband's gross income for 2006 without including his bonuses or other incentive payments. Thus, the trial court's calculation of child support based on the income amounts used on the Form 14 is supported by the evidence. Wife's second point is denied.

Next, despite the trial court's broad discretion in determining whether to include funds that previously have been spent by a party in its division of marital property, here, the trial court provided no reason on the record as to why Wife's withdrawal of funds from her 401(k) should be treated any differently than Husband's withdrawal of funds from his 401(k). Neither does the evidence show Wife's withdrawal was inappropriate or unjustified. Therefore, we find the trial court's order awarding Husband \$3125 from Wife's 401(k) was an abuse of discretion and unsupported by the evidence. Wife's third point is granted.

Additionally, the trial court did not abuse its discretion in delaying child support one year following Husband's filing of his petition, in light of the facts that Husband paid most of the child's expenses during the time the case was pending, Wife at no time filed a motion for temporary support, and the parties equally divided their time with the child by alternating weeks. Moreover, where the child support award became effective approximately four months prior to the Amended Judgment, we find that Wife in fact was awarded retroactive child support. Wife's fourth point is denied.

Finally, we find substantial evidence to prove that Husband received an inheritance prior to his marriage; however, Husband did not overcome the presumption that \$15,000 of his Roth IRA with Fidelity and American Funds was marital property by meeting his burden of proving by clear and convincing evidence that the property remained separate. Husband's Roth IRA was not traceable to the inheritance, thus, we reverse the trial court's finding that Husband's Roth IRA contained separate non-marital property and instruct the court to recalculate the parties' Division of Property and Debts accordingly. Wife's fifth point is granted.

Opinion by: Kurt S. Odenwald, P.J. Glenn A. Norton, J. and Patricia L. Cohen, J., Concur.

Attorney for Appellants: Michael P. Cohan

Attorneys for Respondents: Deborah Benoit

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