

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

SHERRI PICKERING,

Respondent,

v.

WILLIAM TIMOTHY PICKERING,

Appellant.

DOCKET NUMBER WD71489

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: July 6, 2010

APPEAL FROM

The Circuit Court of Cass County, Missouri
The Honorable Daniel W. Olsen, Judge

JUDGES

Division One: Mitchell, P.J., and Hardwick and Martin, JJ.

CONCURRING.

ATTORNEYS

Carmen J. Carter
Raymore, MO

Attorney for Respondent,

Michelle Illig
Overland Park, KS

Attorney for Appellant.



MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

SHERRI PICKERING,)
)
Respondent,)
v.) **OPINION FILED:**
) **July 6, 2010**
WILLIAM TIMOTHY PICKERING,)
)
Appellant.)

WD71489

Cass County

Before Division One Judges: Karen King Mitchell, Presiding Judge, Lisa White Hardwick and Cynthia L. Martin, Judges

Appellant William Timothy Pickering (“Husband”) appeals the judgment entered by the Circuit Court of Cass County. The circuit court’s judgment dissolved Husband’s marriage to Respondent Sherri Pickering (“Wife”); awarded joint custody of the parties’ children; entered a parenting plan; calculated and ordered child support for Husband to pay to Wife; divided marital assets between the parties, finding that Husband owed Wife an equalization payment; and awarded Wife her attorney’s fees. Husband raises numerous points on appeal, challenging almost every aspect of the circuit court’s judgment. We affirm in part, reverse in part, and give such judgment as the trial ought to have given. Rule 84.14.¹

AFFIRMED IN PART; REVERSED IN PART, AND JUDGMENT ENTERED PURSUANT TO RULE 84.14.

DIVISION ONE HOLDS:

I. Adoption of Wife’s Proposed Judgment

Husband argues that the trial court erred in adopting Wife’s proposed judgment. Although the verbatim—or near verbatim—adoption of a party’s proposed judgment is strongly disapproved of, to do so is not per se reversible error and does not alter this court’s standard of

¹ Rule citations are to Missouri Supreme Court Rules (2010).

review. Accordingly, the circuit court's adoption of most of Wife's proposed judgment does not constitute reversible error, and we will affirm the judgment unless it cannot satisfy the *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), standard.

Moreover, in a court-tried case, defects in the form or language of the judgment must be raised in a motion to amend the judgment in order to be preserved for appellate review. Rule 78.07(c). Here, Husband filed a motion to amend the judgment, but he failed to cite as error the circuit court's adoption of Wife's judgment. To the extent the trial court's reliance on Wife's proposed judgment can be said to constitute a defect, it is a defect in the form and/or language of the judgment. Such defects must be cited in a motion to amend the judgment; otherwise, they are abandoned. Point denied.

II. Squandered Assets

Husband argues that the trial court erred in finding that he had squandered \$20,000 in marital assets in that, although he concedes that he liquidated marital assets, he used the funds on legitimate, everyday expenses. Although liquidating marital assets in order to pay legitimate living expenses does not constitute "squandering," *Farnsworth v. Farnsworth*, 108 S.W.3d 834, 842-43 (Mo. App. W.D. 2003), *Lawrence v. Lawrence*, 938 S.W.2d 333, 338 (Mo. App. W.D. 1997), it is within the trial court's discretion to disbelieve a spouse's testimony that he or she used the proceeds of a liquidated marital asset for such purposes. *Franklin v. Franklin*, 213 S.W.3d 218, 226 (Mo. App. E.D. 2007). Here, there was substantial evidence to support the trial court's finding that Husband had failed to account for the proceeds of the marital assets that he had liquidated. Point denied.

III. Equalization Payment

Husband argues that the trial court erred in ordering him to pay an equalization payment to Wife of \$2,171.59. The trial court divided the marital property equally between the two parties and found that, after taking into account the property that each party possessed at the time of trial, Husband owed Wife the equalization payment. Husband argues that the trial court failed to take into account all marital property ("disputed assets"). However, unless a spouse proves that the other squandered a marital asset, the trial court may only consider assets that exist at the time of trial. *Farnsworth*, 108 S.W.3d at 841. At trial, Husband did not attempt to prove that Wife squandered the disputed assets. Thus, in order to have the disputed assets included within the trial court's equalization, Husband was required to show that they existed at the time of trial, *id.*, which he did not do. Point denied.

IV. Retroactive Maintenance

Husband argues that the trial court erred in awarding "retroactive maintenance" to Wife. Husband did not properly present this point to the trial court and, in any case, the trial court did not actually award retroactive maintenance. Point denied.

V. Child Support

Husband argues that the trial court erred in calculating child support. We agree in part.

a. Income of Husband

Husband argues that the trial court erred in calculating child support in that, in doing so, it overestimated his yearly salary by erroneously taking into account Husband's commissions. The argument fails because Missouri Supreme Court Rule Form 14 ("Form 14") specifically states that commissions are a part of gross income. Point denied.

b. Income of Wife

In the past, Wife has worked as a nurse, but, since 2004, she had been employed as a teacher. Husband argues that the trial court erred in not imputing the income of a nurse, rather than that of a teacher, to Wife in its calculation of child support.

In calculating child support, it is within the trial court's discretion to impute income to one of the parents if he or she is underemployed. *Lokeman v. Flattery*, 146 S.W.3d 422, 427 (Mo. App. W.D. 2004). "Under proper circumstances, the trial court may impute income to a parent based on what that parent could earn through his or her best efforts to gain employment proportionate to his or her capabilities." *Id.*

In considering whether to impute income to a parent, the trial court should consider all relevant factors, including "[t]he parent's probable earnings based on the parent's work history during the three years, or such time period as may be appropriate, immediately before the beginning of the proceeding and during any other relevant time period." Form 14, Line 1, Comment H (emphasis added). Other factors include the parent's qualifications, the parent's employment potential, the availability of employment, and whether the parent is the custodian of a child whose condition or circumstances make it appropriate that the parent not seek employment outside the home. *Id.*

Here, Wife, through a mutual decision with Husband, decided to quit nursing and become a teacher in 2004, three years before the petition for dissolution was filed and five years before trial. As noted, the comments to Form 14 instruct the trial court to consider the parent's earnings in the three years previous to the beginning of the proceedings. Following that instruction, the trial court could properly have based its projected earnings for Wife based on her earnings as a teacher, as she had held no other job during the three years previous to filing the petition and the five years previous to trial. Moreover, although both parties conceded that Wife could earn more working as a nurse than she made as a teacher, there was no evidence, beyond mere conjecture, as to how much she could make or as to whether she could in fact obtain a new nursing job. In addition, both parties testified that the younger child benefited from the hours at home that Wife's employment as a teacher afforded her. Point denied.

c. Extraordinary Expenses

Husband argues that the trial court erred in calculating the extraordinary expenses of the children. The trial court's Form 14 found that Wife paid \$246.00 per month in extraordinary expenses and that Husband paid no extraordinary expenses. First, Husband argues that none of the expenses claimed by Wife qualifies as an extraordinary expense of the children. Thus, Husband argues that the trial court erred in ordering him to pay his proportionate share of those expenses in addition to the basic child support amount that he is required to pay. Second, Husband claims that he pays the older son's car insurance and that the trial court erred in failing to treat that expense as an extraordinary expense. Thus, Husband argues that the trial court should have ordered Wife to pay her proportionate share of the older child's car insurance payment. We agree in part and disagree in part.

Line 6e of Form 14 instructs the trial court to factor "[o]ther extraordinary child rearing costs" ("extraordinary expenses") into the child support calculation. These costs include, but are not limited to, the following: "tutoring sessions, special or private elementary and secondary schooling to meet the particular educational needs of a child, camps, lessons, travel and other activities intended to enhance the athletic, social or cultural development of a child." Form 14, Line 6e, Comment A; *Bauer v. Bauer*, 28 S.W.3d 877, 884 (Mo. App. E.D. 2000). However, an award of extraordinary expenses "must not include a redundancy in the children's living expenses already, and must otherwise be just and reasonable." *Foraker v. Foraker*, 133 S.W.3d 84, 98 (Mo. App. W.D. 2004).

Here, Wife testified to a number of fees that she incurs in conjunction with the educational and athletic development of the children (e.g., athletic camps, various school-related fees, art classes, athletic equipment, etc.). These items fall within Form 14's definition of extraordinary expenses, as they could properly be characterized as "intended to enhance the athletic, social or cultural development of [the] child[ren]." Form 14, Line 6e, Comment A.

However, the trial court erred in including the children's cell phone costs as an extraordinary expense. Wife testified that the cell phones were necessary because Husband did not have a landline at his home, and she could therefore not communicate with the children if they did not have cell phones. Nevertheless, the issue is not whether the cell phones are necessary, but whether their cost meets Form 14's definition of extraordinary expense. Wife has cited no evidence that would establish that the children's use of cell phones is integral to, or even associated with, an "activit[y] intended to enhance the athletic, social or cultural development of [the] child[ren]." Form 14, Line 6e, Comment A. Accordingly, the trial court misapplied the law in including the cost of cell phones in Line 6e of Form 14.

For the same reason, we reject Husband's contention that his paying the older child's car insurance should qualify as an extraordinary expense. Husband cites no evidence that the car insurance is integral to, or even associated with, an "activit[y] intended to enhance the athletic, social or cultural development of [the] child[ren]." *Id.* Accordingly, the trial court did not err in failing to include car insurance as an extraordinary expense paid by Husband. Point granted in part, denied in part.

d. Uninsured Medical Expenses

Husband argues that the trial court erred in ordering him to pay 50% of the children's uninsured medical costs. Husband did not raise this issue at trial, and therefore he cannot raise it on appeal. Point denied.

e. "One Child" calculation

Husband argues that the trial court erred in entering a notation in its Form 14 stating "[o]ne child: \$767.00" without making a separate Form 14 calculation based on one child. Husband requests that we strike the notation from the record. Wife argues that the notation is not a part of the court's findings or a part of the court's order. As the parties both acknowledge, the notation is not a part of the judgment and has no binding effect. Thus, it would serve no purpose to strike it. Point denied.

VI. Parenting Plan

Husband argues that the trial court erred in implementing its Parenting Plan, in that the court failed to follow the statutory guidelines of section 452.375.2.²

The failure to make the findings required by section 452.375.2 must be raised in a motion to amend the judgment. Rule 78.07(c); *Bottorff v. Bottorff (In re Marriage of Bottorff)*, 221 S.W.3d 482, 485 (Mo. App. S.D. 2007). Here, Husband filed two motions to amend the judgment, but in neither motion did he raise the trial court's alleged failure to follow section 453.375.2. Point denied.

VII. Medical Insurance

Husband argues that the trial court erred in ordering Wife to provide medical insurance for the children.

"If health benefit plans [to cover the children] are available to both parents upon terms which provide comparable benefits and costs, the court or the division shall determine which health benefit plan, if any, shall be required, giving due regard to the possible advantages of each plan." § 454.603.4. In evaluating the possible advantages of competing health insurance plans, the trial court has broad discretion. *Gatton v. Gatton*, 35 S.W.3d 930, 933 (Mo. App. W.D. 2001).

There is nothing in the record to suggest that the trial court abused its broad discretion on this point. *See id.* Although the plan provided by Husband's employer is apparently less expensive, the trial court could have decided, as the parties themselves decided prior to separating, that it was in the best interest of the children for Wife to continue with a plan that (1) did not depend upon Husband's employment, which had historically been subject to frequent change; and (2) provided other benefits. Point denied.

² Statutory references are to RSMo 2000.

VIII. Attorney's Fees

Husband argues that the trial court erred in awarding Wife her attorney's fees.

Unless otherwise indicated, the court from time to time after considering all relevant factors including the financial resources of both parties, the merits of the case and the actions of the parties during the pendency of the action, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding pursuant to sections 452.300 to 452.415 and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding and after entry of a final judgment.

§ 452.355.1. "A trial court may also consider a spouse's conduct during the marriage in determining attorney's fees." *Maninger v. Maninger*, 106 S.W.3d 4, 13 (Mo. App. E.D. 2003). "The trial court is considered an expert as to the necessity, reasonableness, and value of attorneys' fees and thus, the trial court's decision is presumptively correct." *Krepps v. Krepps*, 234 S.W.3d 605, 616 (Mo. App. W.D. 2007).

Here, the relevant factors justify an award of attorney's fees to Wife. *See* § 452.355.1. Husband's income was much higher than Wife's, and thus he was in a better position to pay attorney's fees. Moreover, during the pendency of the dissolution proceedings, Husband liquidated marital assets without consulting Wife and paid his own attorneys with the proceeds. Husband committed marital misconduct. The merits of the case favored Wife, as evidenced by the court's judgment. Given these factors, the trial court was within its discretion in awarding attorney's fees to Wife. *See id.* Point denied.

Conclusion

Since the record contains all of the facts that are necessary to amend the trial court's judgment without remanding, we will give such judgment as the trial court ought to have given. Rule 84.14. When recalculating the presumed child support award in the appropriate fashion, the presumed child support amount decreases from \$956 to \$890 per month. Accordingly, the trial court's Form 14 is so amended. Further, the trial court's judgment is amended to award child support in the amount of \$890 per month, under the conditions set forth in the trial court's judgment. In all other respects, we affirm the trial court's judgment.

OPINION BY: Karen King Mitchell, Presiding Judge

July 6, 2010

THIS SUMMARY IS **UNOFFICIAL** AND SHOULD NOT BE QUOTED OR CITED.