SC91498

IN THE SUPREME COURT OF MISSOURI

In Re the Marriage of:
ROBERT J. SIMPSON,

Petitioner/Appellant,

v.

ROWENA A. SIMPSON,

Respondent.

On Appeal from The Circuit Court of St. Louis County
Hon. Thomas J. Prebil, Circuit Judge
Cause No. 04FC-011541

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I. ARGUMENT

A. SECTION 452.370.3 IS THE SOLE DETERMINANT OF WHAT REBUTS THE STATUTORY PRESUMPTION

Wife's first argument turns on this sentence. "Section 452.370 creates a presumption that is rebuttable if the true facts conflict with the presumed facts." Resp. Br. at 9. Wife cites no authority to support this statement. There is none.

Section 452.075, RSMo (2000), which formerly regulated divorce, terminated alimony upon remarriage. Section 452.370.3, RSMo (2000), which speaks to maintenance in a dissolution setting, tempers the former law somewhat, while expressing the same statutory preference. Section 452.370.3 thus sets out the only way in which the statutory presumption – that maintenance terminates on remarriage – can be rebutted.

> Unless otherwise agreed in writing or expressly provided in the judgment, the obligation to pay future statutory maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

§ 452.370, RSMo. *Cates v. Cates*, 819 S.W.2d 731 (Mo. banc 1991) restates the obvious – and unambiguous – meaning of the statute.

> The statutory presumption is rebutted by an agreement in writing that the obligation to pay statutory maintenance extends beyond

> remarriage or death. The presumption is also rebutted by a decree of dissolution expressly extending the obligation to pay future statutory maintenance beyond the death of either party or the remarriage of the receiving party.

Cates, 819 S.W.2d at 734. The statute leaves no room for parol evidence to overcome the statutory presumption.

Wife's contention that "Missouri's most basic rules of statutory construction favor pragmatic interpretation of statutory provisions," Resp.Br.13, is simply inapplicable here. Wife makes no claim that the statute is ambiguous. That is the necessary precondition for the application of any rule of statutory construction.

> "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying the rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue,* 311 S.W.3d 732, 735 (Mo. banc 2010).

St. Louis County v. Prestige Travel, Inc., ___ S.W.3d. ___, ___, (Mo. banc 2011) 2011 WL 2552572 *4 (Case No. SC91228, June 28, 2011). Indeed, appellate courts that have considered the issue have found these same statutory provisions clear and unambiguous. *See*, e.g. *Clark v. Clark*, 601 S.W.2d 614, 615 (Ky. App. 1980)("The language of [the identically worded statute] is clear and unambiguous").

In the absence of ambiguity there is no basis for application of the canons of construction. All that is left is the plain mandate of the statute.

B. HUSBAND'S TESTIMONY DESCRIBING THE WRITTEN SEPARATION AGREEMENT IS NOT A NEW AGREEMENT

Because § 452.370.3 uses the phrase "agreed in writing," Wife next asserts that the transcription of oral testimony at the dissolution hearing constitutes an agreement in writing within the meaning of §452.370.3. She says" "[E]ven if his statement had not been transcribed, an open-court sworn declaration of a party is as binding on him as a written agreement." Resp.Br.12. Further, she states "Husband's statement is a self-contained, express agreement to extend his maintenance beyond Wife's remarriage." Resp.Br.15.

Wife's argument does not burden itself with the logical progression necessary to reach this conclusion or consideration of its consequences for the law of contracts, dissolutions of marriage or evidence. She simply announces the conclusion she needs. And this conclusion is, respectfully, destructive to settled legal principles.

Wife's argument necessarily depends on the Court concluding that this transcribed oral testimony constitutes an agreement that (a) either amends

the written separation agreement or (b) is an entirely new agreement that is both separate from and yet controlling over the written separation agreement.

Wife agrees that the statement does not amend or modify the written Separation Agreement. "It need not "amend" the parties' settlement agreement or the circuit court's dissolution judgment, as Husband contends." Resp.Br.15.

Wife's statement must be read in the context of the previous pleadings in this case, which took a decidedly different position.

This portion of the unitary dissolution case began with Husband's Motion to Terminate Maintenance. Wife responded with a Motion to Dismiss. She argued there:

> The testimony of Petitioner is binding on him as a post-execution admission by an obligated party. It thereby acts to confirm and support the terms of the written Agreement wherein only the death of a party and no other event could terminate Petitioner's maintenance obligation."

LF52 ¶ 6.

This is an altogether different position than Wife takes in her brief before this Court. Again, here she says: "Husband's statement is a self-contained, express agreement to extend his maintenance beyond Wife's remarriage." Resp.Br.15. In other words, Wife appears to argue, this

supposed new agreement supersedes that part of the written Separation Agreement that addresses maintenance.

How can that be? Wife never agreed to the alteration of the terms of the Separation Agreement. Nowhere does the record indicate her assent to this modification or "new" agreement. Indeed, Wife testified that the Separation Agreement as written embodied the parties' agreement.

> Q. And is the maintenance award as set out in Exhibit 1 the maintenance award that you've agreed to?
>
> A. [By Wife] Yes.

LF56; Tr.7. This is contrary to the position she now takes. It is a fundamental tenant of contract law that absent agreement between the parties, there is no contract. "The essential elements of a contract are: (1) competency of the parties to contract; (2) proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Baris v. Layton,* 43 S.W.3d 390, 396[13] (Mo.App.2001)." *Arndt v. Beardsley,* 102 S.W.3d 572, 575 (Mo. Ct. App. 2003). Here, there is no mutuality of agreement.

Can there be more than one separation agreement? If so, the trial court never approved this "new" one. Instead the trial court's decree found only that Exhibit 1, the written Separation Agreement, was not unconscionable in its as-submitted, unaltered form. If this testimony somehow becomes a distinct separation agreement (or part of one), as Wife seems to argue (and to

which she never agreed), it was not approved by the Court, that is, not found "not unconscionable" as required by § 452.325.2, RSMo (2000)

Can this "new" agreement supersede the maintenance provisions of the written Separation Agreement? As noted in Husband's opening brief, the written Separation Agreement has a merger clause. It recites:

> This document constitutes the entire agreement between the parties. The parties acknowledge that no promises, agreements, representations or inducements have been made by anyone which are not expressly contained herein.

(LF 24).

Under these circumstances, *In re Marriage of Rea*, 773 S.W.2d 230, 235 (Mo. Ct. App. 1989), as understood by *Unterreiner v. Unterreiner*, 899 S.W.2d 596 (Mo. App. E.D. 1995), is directly on point.

> In *Rea*, the court's rendered judgment was embodied by a signed, written agreement of the parties that, by its terms, was a complete declaration of the dissolution agreement and was modifiable only in writing. The testimony offered by wife in the hearing transcript, therefore, was not properly a part of the rendered judgment, and it was parol to a writing setting out the entire understanding of the agreement that was not modifiable except in writing.

Unterreiner, 899 S.W.2d at 599. Unagreed-to testimony cannot form the basis for a new agreement, especially in the presence of a merger provision in an agreement on the same subject.

There is simply no basis in the law of contracts, dissolution of marriage, or, as discussed below, evidence, that supports a conclusion that Husband's testimony constitutes a new agreement enforceable in a dissolution proceeding.

C. HUSBAND'S TESTIMONY IS CLASSIC PAROL EVIDENCE THAT THE TRIAL COURT IMPROPERLY CONSIDERED.

If one reads the testimony of Husband in context, it is clear that what Wife said in her initial papers is what really occurred – Husband was testifying about the meaning of the written Separation Agreement. See. LF52 ¶6. This testimony is classic parol evidence, that is, it is extrinsic evidence designed to interpret the meaning of the contract.

> The parol evidence rule prohibits a trier of fact from using evidence of prior or contemporaneous oral agreements that varies or contradicts the terms of an unambiguous, final, and complete written contract unless there is fraud, accident, mistake, or duress. *Jake C. Byers, Inc. v. J.B.C. Investments,* 834 S.W.2d 806,

811 (Mo.App. E.D.1992). A written contract that appears to be a complete agreement on its face is presumed to be a final and complete agreement between the parties. *Id.* at 812. Therefore, only when a written contract appears to be an incomplete agreement on its face may extrinsic evidence be admitted to show the final and complete agreement between the parties. *Id.*

Barone v. United Indus. Corp., 146 S.W.3d 25, 29 (Mo. App.E.D. 2004)

Here is Husband's testimony in context:

Q. You fully read the marital settlement agreement previously?

A. [By Husband] I did.

Q. Changes have been made as recently as two, three weeks ago, and you've gone through those?

A. I did.

Q. And all the changes that have been made you agree with?

A. I do.

Q. All right. You understand, as opposing counsel stated previously, the issues about maintenance?

A. Yes.

Q. And you agree to pay a set amount of money over a period of time?

A. Yes.

Q. And whether she gets remarried or not that doesn't change your obligation to make payments?

A. Right.

Q. And that the only way maintenance terminates is upon your death or her death?

A. Correct

LF58, Tr.13-14.

As previously shown, Wife agreed that the Separation Agreement, as written, embodied the entire agreement. LF56, Tr.7.

Wife's position that Husband's testimony is a subsequent, stand-alone agreement is now seen for what it is – an attempt to avoid application of the parol evidence rule. She says that this is an agreement entered "*after* the contract was entered." Resp.Br.16 (emphasis in original)(citation omitted). As argued previously, this is not a new agreement at all. It is testimony about the existing agreement. And for that reason it offends the parol evidence rule. *Unterreiner*, 899 S.W.2d at 599.

D. SECTION 452.370.3 MANDATES THE MEANING OF MAINTENANCE PROVISIONS IN WRITTEN SEPARATION AGREEMENTS

Written separation agreements are not the usual contracts. Rather, they are creatures of statute, finding the authority for their creation and, for purposes of maintenance, their meaning, from the statute alone. It is for this reason that Wife's allusions to agreements in other contexts are unavailing.

Markwardt v. Markwardt, 617 S.W.2d 461 (Mo. App. E.D. 1981), on which the Wife relies, deserves special mention. There the parties agreed orally to a separation agreement and stated it orally into the record. The trial court approved it. When the wife wished to renege, the trial court ordered her to sign it. She appealed. The Eastern District affirmed, finding that the trial court had fulfilled its duty to determine whether the oral agreement was not unconscionable.

Wife here claims that *Markwardt* stands for the proposition that a written separation agreement is required by the statute. This is not so. The statute speaks in permissive language. "To promote the amicable settlement of disputes between the parties …, the parties *may* enter into a written separation agreement…." § 452.325.1, RSMo 2000 (emphasis added). The

statute understands that the possibility of amicable resolution does not exist in every dissolution. Sometimes such agreements are arrived at at the last minute, or during a trial. In the event of an oral agreement, the statute permits the trial court's decree to provide the agreement. But no statute requires a written settlement agreement before there can be a dissolution.

Where there is a written separation agreement as here, however, the statute dictates in simple, clear terms what lawyers must expect when they write maintenance terms into a settlement agreement. Further, courts are limited by the language of §452.370.3 to reading such agreements within the statutory mandate. This is because the legislative creation of a cause of action in derogation of the common law, limits the cause of action to the grant of authority set out in the statute. *See Simpson v. Kilcher,* 749 S.W.2d 386, 389–91 (Mo. banc 1988)(wrongful death action). Dissolution of marriage is a statutory action in derogation of the common law. *Cates*, 819 S.W.2d at 734. Thus, § 452.370.3 is not subject to judicial expansion, even for equitable purposes. Said differently, where a statute creates the cause of action and determines how it shall proceed, courts cannot go beyond the authority granted them by the statute.

The consequences of silence on the issue of remarriage in a separation agreement are set out in § 452.370.3. The consequences of silence – or even ambiguity – are that maintenance ends upon remarriage. The statute brooks

no deviation from that result absent a written agreement to the contrary or language in the judicial decree extending maintenance beyond remarriage. Both are absent here.

There was no basis for the Court to consider Husband's testimony as either a new agreement, an amendment to the written Separation Agreement or as a valid interpretation of the Separation Agreement.

E. JUDICIAL ESTOPPEL DOES NOT APPLY IN THIS CASE.

At its core, judicial estoppel is designed "to protect the judicial process." *New Hampshire v. Maine*, 532 U.S. 742, 749, (2001). It prevents a litigant from taking one position in one court, and then, hoping that a subsequent court will not learn of the position taken in the prior proceeding, taking a different position in the later proceeding. Said more colloquially, and, for that reason, more precisely, "[t]he doctrine of judicial estoppel exists to prevent parties from playing fast and loose with the court." *State ex rel. KelCor, Inc. v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 404 (Mo. App. E.D. 1998).

One element of judicial estoppel requires the court in the subsequent proceeding to find that the party against whom judicial estoppel is asserted prevailed on that position in the prior proceeding.

> "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee,* 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895).

New Hampshire, 532 U.S. at 749 (2001)(cited in *Vinson v. Vinson*, 243 S.W.3d 418, 422 (Mo. App. E.D. 2007)(holding that pleading in a bankruptcy proceeding stating that Husband had no interest in certain property did not bar Husband from claiming an interest in that property in subsequent dissolution proceeding)).

There is no showing that the trial court adopted Husband's testimony as the proper interpretation of the Separation Agreement, acknowledged that the testimony was a "new" agreement, or found that the testimony admitted anything. Indeed, the trial court incorporated the Settlement Agreement as written and without modification or alteration in any way. No party suggested that the trial court do otherwise. In fact, under settled law at the time of this dissolution, only a statement in the trial court's decree expressly stating that maintenance continued beyond remarriage could have overcome the statutory presumption that arose from the written Separation Agreement's silence on that issue.

Husband's testimony had no effect on the trial court's decrees. Judicial estoppel does not apply.

Even if judicial estoppel applies (which it does not), it applies as well to Wife, who now argues that Husband's testimony is a new agreement. At trial she asked the trial court to approve the written settlement agreement, testifying that it set out the entire agreement between the parties. LF56, Tr.7. She has now changed her position and asks the Court to ignore both her testimony and her statements to the trial court. She cannot limit Husband while claiming that she does not fall under the same limits.

Next, Wife claims that Husband's testimony is a judicial admission. In so doing, she abandons her claim that that his testimony constitutes a new agreement. Rather, she asks the Court to consider the testimony as a binding legal interpretation of the Separation Agreement, despite the clear and contrary statutory mandate and despite the application of the parol evidence rule.

Judicial admissions are about facts, not law. "A judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete *fact* within that party's knowledge, not a matter of law." 29A AM. JUR. 2D Evidence § 783 (emphasis added). "Judicial admissions are used as a substitute for evidence at trial." *Id.* "[J]udicial admissions arising from separate proceedings are admissible merely as ordinary admissions against interest

that the trier of fact may consider, but which in no way bind the parties making the admissions." *Moore Auto. Group, Inc. v. Goffstein*, 301 S.W.3d 49, 54 (Mo. banc 2009). Further,

> [w]hile judicial admissions are conclusive in the proceeding where made, when the admission is introduced in a subsequent proceeding, the admission is not conclusive or binding and may be explained or contradicted. *Id.; Shervin v. Huntleigh Sec. Corp.,* 85 S.W.3d 737, 744 (Mo.App.E.D.2002); 29A Am.Jur.2d *Evidence* § 786 (2008); 32 C.J.S. *Evidence* § 631 (2008)."

Id.

Husband's statement, no matter how it is characterized, is not a judicial admission that binds him in this proceeding. At most, his statement is a legal conclusion which he was not qualified to make. That statement cannot bind Husband or this Court.

II. CONCLUSION

Section 452.370.3 requires that the written Separation Agreement stand on its own. What it says and fails to say are the sole determinants of its meaning on the issue of payment of maintenance beyond remarriage. Section 452.370.3 requires that that Agreement speak directly to the issue of continued payment of maintenance after remarriage, or, failing that, the statute imposes a termination of any requirement that maintenance continue after remarriage.

No one disputes that this Separation Agreement is silent on the issue of the payment of maintenance beyond remarriage. So is the judicial decree.

Wife asks the Court to carve out an exception for her – to rescue her from the failure of her Separation Agreement to follow settled law and clear statutory mandates. Rather than begin creating exceptions to the requirements of § 452.370.3, this Court should, respectfully, affirm *Cates* and its progeny. Those cases are consistent with the statute, place the onus for determining the payment of maintenance beyond remarriage issue on the attorneys drafting separation agreements, and relieve the courts of the necessity of performing judicial rescues when Settlement Agreements ignore the clear law set out in the cases and in the statute.

Husband here is simply asking for the law to be applied to him as it has been consistently applied since *Cates*.

The trial court failed to follow the law. It should be reversed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

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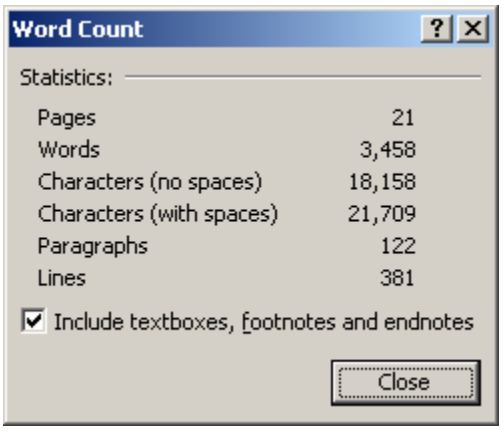

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and accurate copy of the foregoing document (two copies and disk) was served via prepaid United States mail on this 3rd day of August, 2011, to the following:

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