IN THE SUPREME COURT OF MISSOURI

Appeal No. SC95918

KATHRYN J. LANDEWEE,

Appellant,

vs.

JOHN E. LANDEWEE,

Respondent,

Appeal from the Circuit Court of Cape Girardeau County

Cause No. 13CG-DR00319

Honorable Scott E. Thomsen

SUBSTITUTE BRIEF OF RESPONDENT JOHN E. LANDEWEE

RICE, SPAETH, SUMMERS & HEISSERER, LC

John P. Heisserer, #29379
Brian D. Payne, #56159
Cape Girardeau, MO 63703
jheisserer@capelawfirm.com
bpayne@capelawfirm.com
ATTORNEY FOR RESPONDENT
JOHN E. LANDEWEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Missouri Statutes

Missouri Supreme Court Rules

JURISDICTIONAL STATEMENT

Respondent, John E. Landewee (hereinafter "Respondent") accepts the Jurisdictional Statement filed by Appellant, Kathryn J. Landewee (hereinafter "Appellant").

STATEMENT OF FACTS

Respondents note that Missouri Supreme Court Rule 84.04 (c) states that the statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument. "Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that appellate courts do not become advocates by speculating on facts and arguments that have not been asserted." *Wilson v. Carnahan,* 25 S.W.3d 664, 667 (Mo.App. W.D. 2000).

"The primary purpose of the statement of facts is to afford an immediate, accurate, complete and unbiased understanding of the facts of the case." *In re Marriage of Weinshenker,* 177 S.W.3d 859, 862 (Mo.App. E.D. 2005) [quoting *Kent v. Charlie Chicken, II, Inc.*, 972 S.W.2d 513, 515 (Mo.App. E.D. 1998)].

"An appellant may not simply recount his or her version of the events, but is required to provide a statement of the evidence in the light most favorable to the judgment." *Weinshenker* 177 S.W.3d at 862. "An appellant's task on appeal is to explain why, even when the evidence is viewed in the light most favorable to the respondent, the law requires that the judgment of the trial court be reversed." *Evans v. Groves Iron Works,* 982 S.W.2d 760, 762 (Mo.App. E.D. 1998). Failure to provide a fair and concise statement of the facts that complies with Rule 84.04(c) is a basis for dismissal of the appeal. *Weinshenker,* 177 S.W.3d at 863.

Appellant's Statement of Facts fails to satisfy this standard for multiple reasons, to be highlighted herein.

Overview

Appellant begins her evasion of the established rules for preparing a Statement of Facts in her second paragraph as it is nothing more than a biased recounting of her trial testimony regarding events she believes exhibit marital misconduct perpetrated by Respondent. (Appellant's Brief, 5). Appellant willfully ignores any of the testimony presented by Respondent regarding these allegations. (Appellant's Brief, 5). The trial judge made no findings of marital misconduct, such as would warrant an unequal division of marital property, and Appellant's failure to "provide a statement of the evidence in the light most favorable to the judgment," [per *Weinshenker*, 177 S.W.3d at 862], renders these statements meaningless.

Knaup Floral, Inc. and the Real Property Associated with Knaup Floral, Inc.

Appellants makes a wholly unsupported statement that the John "provided minimal contributions to its operation," without so much as noting clear testimony from Respondent to the contrary, to wit:

> **A: I was kind of the handyman, if you will, as far as taking care of the properties. . .**
>
> **I helped with those phases, as far as getting the house fixed up, demoed, fences, maintenance . . .**
>
> **As far as the business, I helped out some on weekends where I could . . . did the basic oil changes, maintenance on the vehicles . . .**

> **On major holidays I would take days off work to help out in the shop, on like Valentine's Day, especially. Mother's day usually a day. Just different holidays I would help out. Funeral runs on Sundays sometimes or whatever. (Tr. 89).**

Respondent's 457 Retirement Plan and Appellant's IRA

When discussing the value of Appellant's personal retirement account through Charles Schwab & Co., Appellant intimates that her decision to withdraw approximately $6,800.00 from her account was necessitated by Respondent's failure to her assist her with child support during the pendency of the divorce. (T. 54). This is hardly a fair representation of the facts as Appellant conveniently fails to mention that, since the parties separated, Respondent has continued to provide for both Appellant and the children and pay his half of the children's school tuition. (Tr. 90). Appellant even concedes this point in her own testimony. (Tr. 85.)

Marital Misconduct

It is with this section that Appellant goes beyond strategic presentation of trial testimony to cast herself in the best light, and presses forward with a four-page diatribe that seeks to curry favor rather than provide a fair and balanced presentation of the evidence in the light most favorable to the judgment. The inescapable problem with her account, though, is that it is undermined by not only the opposing testimony of Respondent, but by her own inconsistent statements during the trial. Appellant begins by portraying herself as a frightened adult women who had to get her husband "permission" before she could go to work. (Tr. 64-65). The only

support she offered, however, was a single instance when Respondent came over to the flower shop to ask if she was coming home. (Tr. 64). Respondent couldn't recall Appellant ever asking permission to go work, and even expressed his concern that she was overworking herself. (Tr. 97).

Appellant claims in her Statement of Facts that Respondent was "so controlling" that he dictated bedtimes for Appellant and the children. (Tr. 68). However, the testimony that she presented at trial was actually that it was "an implication by him" [Respondent] that he wanted the children in bed by 9:00 p.m. (Tr. 68). She then further admitted that it was not, in fact, an absolute. (Tr. 68).

Appellant implies that further evidence of Respondent's controlling nature was that he wanted to know what she did during the day and the evening. (Appellant's Brief, 13). She, however, leaves out any mention of Respondent's actual testimony in response to questions from Counsel for Appellant:

Q: In your marriage to Kathryn, did you want to know what she was up to during the day and during the evening?

A: As a general rule, just as a concern, yes. (Tr. 97).

Appellant's statements regarding the nature of the parties' physical intimacy are based solely on unsubstantiated opinion testimony and offer no benefit to the Court.

Perhaps most troubling in its deviation from the mandated structure of a proper statement of facts, however, is Appellant's recounting of the night of March 31, 2013. (Appellant's Brief, 14; Tr. 70-71). Appellant devotes an inordinate

amount of time to setting the stage with unsubstantiated opinion testimony presented as fact. (Appellant's Brief, 14). Respondent was never even questioned as to whether the events as described by Appellant were, in any way, true. (Tr. 99-101). Instead, his only testimony, that he grasped Appellant's face in an attempt to make a point, was offered as some type of corroborating admission. (Tr. 99-100; Appellant's Brief, 14).

Whether Appellant's failure to comport to the requirements for a statement of facts established by the courts in cases such as *Weinshenker* and *Groves Iron Works* is so blatant and compromising as to require dismissal of her appeal is a question that only this Court may decide. However, Respondent contends that the improper argument should be stricken, or at a minimum, disregarded. Respondent, for the sake of clarity if nothing else, offers his supplemental statement of facts.

RESPONDENT'S SUPPLEMENTAL STATEMENT OF FACTS

Appellant was self-employed as a florist, and paid herself a salary of $69,000.00 per year (Tr. 45; LF 31, 55). The trial court awarded her marital property valued in excess of $550,000.00. (Tr. 77, LF 73).

Respondent is employed as a construction engineer for the City of Cape Girardeau and earns approximately $52,000.00 per year. (Tr. 46, LF 55). The trial court awarded him marital property that totaled approximately $180,000.00 in value. (LF 73). Due to the enormous disparity in the award of marital property, the trial court ordered Appellant to make an equalization payment to Respondent of

$196,496.50, in an effort to equalize the division of marital assets and debts. (LF 105).

Regarding Respondent's LAGERS plan, testimony was adduced and uncontroverted that Respondent would have to survive until age 60 to receive any benefits. (Tr. 25, 29; A-32).

POINTS RELIED ON

I. The trial court did not err in its division of the marital property of the parties because the court did not misapply the law in equitably dividing all of the couple's marital property and debts, in that the deferred distribution of the vested but non-matured LAGERS pension benefit was definite, capable of enforcement, and within the broad discretion of the trial court.

Kutcha v. Kutcha, 636 S. W.2d 664 (Mo. 1982)

Lynch v. Lynch, 665 S.W.2d 20 (Mo.App. E.D. 1983)

Hagerman v. Hagerman, 682 S.W.2d (Mo.App. W.D. 1984)

II. The trial court did not err in assigning a present value of zero dollars to Respondent John Landewee's LAGERS plan because its ruling was supported by the evidence and not against the weight of the evidence, in that there was sufficient evidence presented upon which the trial court, using its broad discretion in the valuation of marital property, could base such a determination.

Kutcha v. Kutcha, 636 S. W.2d 664 (Mo. 1982)

Houston v. Crider, 317 S.W.3d 178 (Mo.App. S.D. 2010)

III. The trial court did not err in its division of marital property of the parties in because its ruling is not against the weight of the evidence and well within the discretion of the trial court, in that there is no evidence that the trial court failed to consider the factors listed in RSMo §452.330 in determining a

property division that was fair and equitable given the circumstances of the case.

In Re Marriage of Hash, 838 S.W.2d 455 (Mo.App. S.D. 1992)

Ballard v. Ballard, 77 S.W.3d 112 (Mo.App. W.D. 2002)

RSMo. §452.330 (2011)

ARGUMENT

I. The trial court did not err in its division of the marital property of the parties because the court did not misapply the law in equitably dividing all of the couple's marital property and debts, in that the deferred distribution of the vested but non-matured LAGERS pension benefit was definite, capable of enforcement, and within the broad discretion of the trial court.

INTRODUCTION

Appellant's first point on appeal, despite containing several arguments that are not clearly delineated, is essentially a claim that the trial court misapplied the law in dividing Respondent's LAGERS pension plan. Appellant apparently believes that the court's decision to use a deferred distribution method rather an immediate offset is reversible error. Missouri courts have held, however, that the trial courts are granted a great deal of discretion in the division of marital property. Given the complex nature of the property at issue, such a granting is imperative.

STANDARD OF REVIEW

A judgment in a court-tried case will be affirmed if there is substantial evidence to support it, it is not against the weight of the evidence, and it does not erroneously declare or apply the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). "Great deference must be given to the trial court's resolution of conflicts in evidence, and this Court gives due regard to the court's opportunity to have judged the credibility of the witnesses before it." *In re Competency of Parkus,* 219 S.W.3d 250, 255 (Mo. banc 2007). This Court accepts all evidence and

inferences therefrom in the light most favorable to the prevailing party and disregards all contrary evidence. *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 652 (Mo. banc 2009).

"In considering whether the judgment of the trial court is 'against the weight of the evidence,' this Court may exercise its power to set aside the judgment of the trial court only with caution and only if it possesses a firm belief that the judgment is wrong." *Lewis v. Gibbons*, 80 S.W.3d 461, 466 (Mo. banc 2002) [citing *Murphy*, 536 S.W.2d at 32].

When reviewing a division of marital property, deference is given to the trial court, which is vested with considerable discretion in dividing marital property. *Lagermann v. Lagermann*, 109 S.W.3d 239, 242 (Mo.App. E.D. 2003). This Court, like all Appellate courts, will interfere only if the division of property is so heavily and unduly weighted in favor of one party as to amount to an abuse of discretion. *Dardick v. Dardick*, 670 S.W.2d 865, 869 (Mo. banc 1984).

ARGUMENT

The Use of Deferred Distribution of Pension Assets is Within the Discretion of the Trial Courts

It is unquestioned that Respondent's LAGERS plan is, in part, marital property subject to division. Similarly, Appellant's recitation of the tenants of RSMo. §452.330 (2011) and the Dissolution of Marriage Act are all facially correct. However, Appellant's requested application of these tenants to the division of

Respondent's LAGERS plan, and seemingly all similar plans, proposes a clear change to the accepted law of this state and would set a dangerous precedent.

There can be no dispute that the most desired result in any dissolution proceeding would be a full and final division of marital property without contingencies. *Kuchta v. Kutcha*, 636 S.W.2d 663, 666 (Mo. 1982). The *Kuchta* Court realized, however, that certain circumstances might proscribe that object, and correctly surmised that trial courts must be given broad discretion to design plans that protect the rights and interests of the parties. *Kuchta* 636 S.W.2d at 666.

Respondent's retirement benefits under the LAGERS plan would be considered "vested" but "non-matured" as he is presently entitled to receive benefits in excess of any contributions, but not until such time as a reaches a designated retirement age. *Id.* at 665. The *Kuchta* court pointed out that "speculative and perhaps insoluble questions often will be present," in cases dealing with "vested" but "non-matured" benefits, "that do not lend themselves to rigid and fixed rules." *Id.* Accordingly, they held that it was, "imperative that trial courts be authorized to apply a flexible approach to accommodate the particular facts of each case." *Id.* "The quickest way to preempt the wise discretion of the trial courts would be to outline immediately fixed rules for division of such property." *Id.* at 666.

Appellant, in the present case, argues that *Joyner* mandates that all LAGERS plans be reduced to present value and divided according to an "immediate offset." "The offset or immediate offset method of distributing the pension plan is when the court awards one party all of the pension benefits, offset by other marital property

awarded to the remaining spouse." *In re Marriage of Cope*, 805 S.W.2d 303, 305 (Mo.App.S.D.1991). In the present case, it is accepted that should Respondent die before reaching the age of sixty (60), he will not receive any of the benefits of his LAGERS plan. If the trial court were forced to utilize the immediate offset method, Appellant would receive an immediate benefit without bearing any risk that Respondent's interest in the plan might never mature in the event that he were to die prior to reaching the age of eligibility. This cannot be said to be fair or equitable.

Respondent does not believe that the Western District Court of Appeals would intend such a rigid rule that not only sets a dangerous precedent, but flies in the face of previous court decisions. In fact, the Eastern District Court of Appeals held that the immediate offset method is not realistic in every case. *Lynch v. Lynch*, 665 S.W.2d 20, 23 (Mo.App. E.D. 1983). The *Lynch* court approved the trial court's use of the "wait-and-see" approach, to divide marital property as it becomes payable to the eligible spouse. *Lynch*, 665 S.W.2d at 23. The "wait-and-see" approach more equally divides the risk that the pension plan will fail to mature. *Id.* (citing *Kuchta*, 636 S.W.2d at 666). The "wait-and-see" or deferred distribution option is "the now almost standard approach to division of pension benefits." *Redlinger v. Redlinger*, 111 S.W.3d 413, 415 (Mo.App. E.D. 2003) [citing *Ward v. Ward*, 34 S.W.3d 288, 292 (Mo.App. W.D. 2000)].

The considerable discretion granted trial courts with regard to the division of marital property includes the discretion to choose which method of pension benefit distribution fits each particular case. The Eastern District Court of Appeals in the

present case recognized this by stating that "this type of division was explicitly within the range of options a trial court is allowed under *Kuchta*. *Landewee v. Landewee,* 2016WL3919617 at 3 (Mo.App. E.D. 2016). It is clear to see that the trial court did not view the use of the immediate offset method as a viable option and there is support for that view. The parties offered a wide array of present values for the pension, and each of the offered valuations had glaring weaknesses in their respective calculations. Appellant's valuation did not account for any possible tax consequences and failed to recognize that a significant portion of the plan was non-marital. Respondent's valuation was initially based on expected benefit projections that were more than one year old. Neither Appellant nor Respondent's valuations clearly indicated that they factored in the risk that Respondent might perish before reaching the age of eligibility.

This uncertainty makes the immediate offset method a less desirable option. Choosing to defer the distribution of the pension assets until such time when they are actually earned is fair and equitable to both parties as it is the only option that equally divides the risk that the pension will fail to mature.

As Appellant has failed to show that the trial court abused its discretion in opting to defer distribution of the LAGERS plan, the decision of the trial court must be affirmed.

<u>The Division of the LAGERS Plan is Definite</u>

Appellant argues that the trial court's order with respect to the deferred distribution of the LAGERS pension benefits is not definite because it cannot be

viewed as having divided all of the marital property. Appellant finds support in the Western District's opinion in *Joyner v. Joyner*, 460 S.W.3d 467 (Mo.App. W.D. 2015). If *Joyner* is to be read as saying that the utilization of a deferred distribution method for a pension plan is a failure to divide all marital property, then it is clear that such a ruling cannot withstand judicial scrutiny. Missouri court rulings are littered with examples were deferred distribution was approved as a proper manner of distribution. [see *Kuchta v. Kuchta*, 636 S.W.2d 663 (Mo. 1982); *Lynch v. Lynch*, 665 S.W.2d 20 (Mo.App. E.D. 1983); *Hagerman v. Hagerman*, 682 S.W.2d 28 (Mo.App. W.D. 1984); *Redlinger v. Redlinger*, 111 S.W.3d 413 (Mo.App. E.D. 2003)]. Additionally, as the Eastern District clearly pointed out, the mere fact that Respondent is "ordered to make certain continuing payments" to Appellant does not create a unity of possession problem. *Landewee*¸ 2016WL3919617 at 5. Once the pension benefits are divided by the trial court, there is no unity of possession. *Id.*

The cases upon which *Joyner* finds its footing for the apparent proposition that a deferred distribution of pension assets is not a full division of marital property cannot be said to be support of such a reading. *Gillette v. Gillette* involved a case where the dissolution failed to address the distribution of a business and was rightfully reversed for failing to properly distribute all marital property. 416 S.W.3d 354, 356 (Mo.App. S.D. 2013). Similarly, *Jonusas v. Jonusas* involved a case that was decided without consideration of marital debts that were discussed at trial and the judgment did not either divide those debts or declare them nonmarital or non-existent. 168 S.W.3d 117, 120 (Mo.App. W.D. 2005). In each of those cases it was

clear that judgment could not have been viewed as having divided all of the marital property as required by RSMo. §452.330.1. The present case does not suffer the same flaw.

The only item of marital property in dispute is the LAGERS pension plan. The Judgment states that at the time of dissolution, Respondent had accumulated 27.33 years of service in the LAGERS plan, and that he and Appellant were married for 22.33 years of that service. (LF 105). The Judgment also clearly states that the monthly pension benefit applicable to the date of dissolution was $1,676.00 per month, with 82% of that total qualifying as marital property. (Id.) Accordingly, the judgment held that Appellant was entitled to receive half of the marital portion ($1,374.00), or $687.00 per month, less applicable income taxes. (Id.).

Respondent is having a difficult time seeing how the judgment as entered fails to distribute all of the marital property.

The Division of the LAGERS plan is Enforceable

Appellant also argues, again citing *Joyner*, that the order of deferred distribution with regard to the LAGERS plan is reversible error because LAGERS is not subject to a QDRO and therefore unenforceable. In support, the *Joyner* court appears to accept the argument that without a QDRO, the spouse would be unable to legally compel payment of her portion of the marital property, thereby making the overall division inequitable and unconscionable. *Joyner*, 460 S.W. 3d at 473. The only problem with this argument is that it is completely untrue.

The Uniform Marriage and Divorce Act provides that the terms of a separation agreement relating to the division of property and set forth in the decree are enforceable by contempt. Uniform Marriage and Divorce Act 306(e), 9A U.L.A. 217 (1987). *Reeves v. Reeves*, 693 S.W.2d 149 (Mo.App. E.D., 1985).

"Dissolution decrees, as well as the property agreements incorporated therein, are enforceable like any other judicial judgment." *Booher v. Booher*, 125 S.W.3d 354, 356 (Mo.App. E.D.2004). In *Yeager v. Yeager*, this court ruled that "a spouse's conscious failure to make mortgage payments pursuant to the property provisions of a decree, should be enforced in the same manner as the failure to make maintenance and support payments." 622 S.W.2d 339, 343 (Mo.App. E.D. 1981). *Yeager* was adopted and broadened by *Haley v. Haley*, 648 S.W.2d 890 (Mo.App. E.D. 1982) and *Reeves v. Reeves*, for enforcement for failure to comply with the provisions of a dissolution decree ordering the payment of money as a part of the division of marital property. *Reeves v. Reeves*, 693 S.W.2d 149 (Mo.App. E.D. 1985).

Contempt may be used to effectuate all constitutionally permitted orders contained in the dissolution decree. *Ellington v. Pinkston*, 859 S.W.2d 798, 801 (Mo.App. E.D., 1993). "Civil contempt is intended to benefit a party for whom an order, judgment, or decree was entered. Its purpose is to coerce compliance with the relief granted." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo. banc 1994). "Contempt may be used to effectuate all constitutionally permitted orders contained in a dissolution decree." *Ellington v. Pinkston*, 859 S.W.2d at 800.

To establish a prima facie case of civil contempt, the complaining party must prove: "(1) the contemnor's obligation to perform an action as required by the decree; and (2) the contemnor's failure to meet the obligation." *Walters v. Walters*, 181 S.W.3d 135, 138 (Mo.App.2005). Where the proceeding for civil contempt arises from an alleged failure to comply with a judgment of dissolution, " 'the contemnor has the more ready access to any facts to excuse the default [ ]' " and therefore "bears the burden to prove that the non-compliance was not an act of contumacy." *Id.* (quoting *State ex rel. Watkins v. Watkins*, 972 S.W.2d 609, 611 (Mo.App.1998)).

Clearly, deferred distribution orders can be pursued through contempt. As such, the orders are enforceable and Appellant's argument lacks merit.

Appellant's Reading of *Joyner* is a Potential Public Policy Nightmare

Appellant appears to position *Joyner* as standing for the proposition that all LAGERS plans should be reduced to present value and divided using an immediate offset method. We have already discussed how the immediate offset method can be patently unfair to an individual who is "vested" but "non-matured" in the plan because it provides the non-paying spouse with an immediate benefit and leaves the employee to bear all of the risk that the plan may not mature. There is also the inherent difficulty in calculating a true value when the possibility of death before maturation is a significant factor that is routinely overlooked.

LAGERS is a non-profit public pension system created by statute to provide retirement, disability, and survivors' benefits to Missouri's local government

employees.[1] LAGERS employers must cover, at a minimum, their general department, and may also elect to add police and/or fire department personnel.[2] LAGERS currently has 33,000 active members in the state of Missouri.[3] These hardworking men and women are, for the most part, not independently wealthy, and given the relatively low wage scale for public governmental employees, it is very possible that they have accumulated little in the way of assets.

A recent report from the CDC indicates that in 2014, Missouri's divorce rate was 3.3 divorces per 1000 people.[4] Simple math tells us that this equates to, on average, 109 LAGERS participants involved in a dissolution during a given year. A fair number of these dissolutions will likely involve few collective assets for division. Under Appellant's reading of *Joyner*, it would not be difficult to imagine a scenario where a LAGERS recipient is ordered to make an equalization payment for half of the present value of his pension when there are few, if any, other assets

---

[1] Missouri LAGERS, *Frequently Asked Questions*, (visited December 9, 2016), www.molagers.org/faqs.html

[2] Missouri LAGERS, *Eligibility*, (visited December 9, 2016), www.molagers.org/eligibility.html

[3] Missouri LAGERS, *Frequently Asked Questions*, (visited December 9, 2016), www.molagers.org/faqs.html.

[4] CDC/NCHS, National Vital Statistics System, *Divorce Rates by State*, (visited December 9, 2016), www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99_14.pdf

to offset the amount against. Now, to take that one step further, the recipient might be forced to take out a note to pay the equalization payment and could then pass away before he has the opportunity to realize any of the value he paid for. This scenario does not even account for the additional cost to the parties for the retention of expert witnesses to reduce these plans to present day value. As we have seen in this case, the opinions of the retained experts can be costly and widely divergent; often leading the parties no closer to resolution.

The potential is there for a large number of people to be adversely affected by the inherently inequitable system that Appellant's reading of *Joyner* creates. A better way is to continue deferring to the learned trial court, and permit them to use their deference to fashion a workable plan; a plan that might include the use of deferred distribution of pension proceeds should the court see fit.

It is of little consequence that the present case involves parties who have substantial assets with which to offset the pension benefits under a present value analysis. The question presented to this Court is only whether the trial court's utilization of a "wait and see" approach with regard to Respondent's pension was within the vast discretion granted to the trial court by *Kuchta* and its progeny.

II. The trial court did not err in assigning a present value of zero dollars to Respondent John Landewee's LAGERS plan because its ruling was supported by the evidence and not against the weight of the evidence, in that there was sufficient evidence presented upon which the trial court, using its broad discretion in the valuation of marital property, could base such a determination.

Appellant's next point on appeal centers on the claim that the trial court's finding that the LAGERS pension had no present value was not supported by the evidence and was against the weight of the evidence. Appellant appears to contend that because both parties presented evidence of present value for the plan, that the court was prohibited from utilizing any method of division other than the immediate offset method. As we have already seen, however, the trial court is authorized to apply a flexible approach to each case and is granted great deference in its division of marital property.

STANDARD OF REVIEW

A judgment in a court-tried case will be affirmed if there is substantial evidence to support it, it is not against the weight of the evidence, and it does not erroneously declare or apply the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). "Great deference must be given to the trial court's resolution of conflicts in evidence, and this Court gives due regard to the court's opportunity to have judged the credibility of the witnesses before it." *In re Competency of Parkus,* 219 S.W.3d 250, 255 (Mo. banc 2007). This Court accepts all evidence and

inferences therefrom in the light most favorable to the prevailing party and disregards all contrary evidence. *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 652 (Mo. banc 2009).

"In considering whether the judgment of the trial court is 'against the weight of the evidence,' this Court may exercise its power to set aside the judgment of the trial court only with caution and only if it possesses a firm belief that the judgment is wrong." *Lewis v. Gibbons*, 80 S.W.3d 461, 466 (Mo. banc 2002) [citing *Murphy*, 536 S.W.2d at 32].

When reviewing a division of marital property, deference is given to the trial court, which is vested with considerable discretion in dividing marital property. *Lagermann v. Lagermann*, 109 S.W.3d 239, 242 (Mo.App. E.D. 2003). This Court, like all Appellate courts, will interfere only if the division of property is so heavily and unduly weighted in favor of one party as to amount to an abuse of discretion. *Dardick v. Dardick*, 670 S.W.2d 865, 869 (Mo. banc 1984).

ARGUMENT

Appellant's Argument is Moot

In the present case, the trial court opted to utilize a "wait-and-see" or "deferred distribution" method in order to distribute the LAGERS plan proceeds at such time that Respondent became eligible to receive them. This Court has previously held that utilizing a deferred distribution method, "renders it unnecessary for the court to compute the present value of the pension rights, and divides equally the risk that the pension will fail to mature." *Kuchta*, 636 S.W.2d at 666. [citing *In*

Re Marriage of Brown, 544 P.2d 561 (Cal. 1976); *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976)].

Accordingly, any reference to the assigned present value of the plan is immaterial and moot. That having been said, there remains support for the court's findings.

The Present Value Assigned by the Court is Supported by the Evidence

Appellant claims that the trial court erred by not selecting one of the valuations presented by the parties or determining a value somewhere in between. (Appellant's Brief, 29). Appellant concedes that the trial court is not expressly required to assign values to marital property, but notes that evidence from which a value can be determined must appear. *Stuckmeyer v. Stuckmeyer*, 117 S.W.3d 687, 692 (Mo.App. E.D.2003). In this matter, both sides presented expert testimony regarding the present value of the LAGERS pension plan. However, the respective values differed by more than $160,000.00. (L.F. 98-99). Additionally, both expert valuations had considerable shortcomings, as referenced in Argument I, infra. The trial court is entitled to believe or disbelieve testimony concerning the valuation of marital property. *Taylor v. Taylor*, 25 S.W.3d 634, 645 (Mo.App. W.D. 2000).

Additional evidence was elicited at trial that clearly indicated that Respondent would have to live for a minimum of nine (9) more years before he became eligible to receive any funds from the plan. (A-32).

The trial court found that the evidence reflecting the loss of all benefits if Respondent died before reaching 60 years of age indicated that the plan had no real

value until such time as it was available to Respondent. This was precisely the rationale found by the Eastern District, as they held that the "trial court's valuation of $0 was correct, in that were Husband to die before the LAGERS pension plan matures, his benefits would be worth $0.

The real point at issue is not that the court assigned a zero value, but that it opted to defer distribution of the pension plan until such time as it became realistically available to Respondent. The evidence supported such a finding, given the statistically significant possibility that Respondent might die before becoming eligible to receive pension benefits.

Appellant's Against the Weight of the Evidence Challenge is Fatally Flawed

Appellant challenges the court's determination that the LAGERS plan had no present value as being against the weight of the evidence because the court opted to defer the distribution of the plan benefits when they became available rather than assign a value for an immediate offset. "Weight of the evidence refers to weight in probative value, not quantity or the amount of evidence. *Houston v. Crider*, 317 S.W.3d 178, 186 (Mo.App. S.D. 2010). An against-the-weight-of-the-evidence challenge requires completion of four sequential steps:

> (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
>
> (2) identify all of the favorable evidence in the record supporting the existence of that proposition;

(3) identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and,

(4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition. *Houston*, 317 S.W.3d at 186.

As we have discussed, infra, the Missouri Supreme Court has stated that courts who choose to defer distribution of a pension plan do not have to calculate a present value for same. From her brief, Appellant fails to identify the factual proposition that is necessary to sustain the judgment (the court's ability to opt for a deferred distribution) in satisfaction of Step 1. Also, she fails to identify any evidence in the record that is favorable to factual proposition. It is clear that Appellant focused her efforts on expanding the holding in *Joyner*, in an attempt to satisfy Step 3. However, Appellant's failure to satisfy Steps 1 and 2, dooms her ability to satisfy Step 4 of a successful challenge to the weight-of-the-evidence.

Appellant cites no facts favorable to the trial court's finding that a deferred distribution of the LAGERS plan was an option that was within the trial court's discretion. There is, additionally, no mention of the risk borne by Respondent that he might not live to see any of the LAGERS benefits.

Appellant's failure to fully identify all material favorable evidence prevents her from being able to demonstrate why such evidence was so lacking in probative

value, when considered in the context of the totality of the evidence, that it failed to induce belief in the trial court's ability to find that an equal division would be unjust given the relative contributions of the parties in the acquisition of the marital property. Appellant's argument is, therefore, without any analytical value or persuasiveness.

Under *Essex Contracting*, this Court reviews the evidence in the light most favorable to the trial court's judgment, disregarding evidence to the contrary and defer to the trial court even if the evidence could support a different conclusion. *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d at 652. In the present case, there is sufficient evidence in the record on which the trial court could have determined that the speculative nature of the LAGERS pension made its valuation problematic and opted, instead, to defer distribution of the pension plan until it was actually received. Having failed to prove that the trial court's decision is against the weight of the evidence, the judgment of the trial court must be affirmed.

III. The trial court did not err in its division of marital property of the parties in because its ruling is not against the weight of the evidence and well within the discretion of the trial court, in that there is no evidence that the trial court failed to consider the factors listed in RSMo. §452.330 in determining a property division that was fair and equitable given the circumstances of the case.

Appellant's recitation of the requirements of RSMo. §452.330.1 is correct, in so much as the statute requires only a "just" division rather than an equal one. Another generally accepted, but often unexpressed principle, is that the division should be substantially equal unless one or more of the statutory and non-statutory factors causes such a division to be unjust. *In Re Marriage of Hash,* 838 S.W.2d 455, 459-460 (Mo.App. S.D. 1992)

STANDARD OF REVIEW

A judgment in a court-tried case will be affirmed if there is substantial evidence to support it, it is not against the weight of the evidence, and it does not erroneously declare or apply the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). "Great deference must be given to the trial court's resolution of conflicts in evidence, and this Court gives due regard to the court's opportunity to have judged the credibility of the witnesses before it." *In re Competency of Parkus,* 219 S.W.3d 250, 255 (Mo. banc 2007). This Court accepts all evidence and inferences therefrom in the light most favorable to the prevailing party and disregards all contrary evidence. *Essex Contracting, Inc. v. Jefferson County,* 277

S.W.3d 647, 652 (Mo. banc 2009).

"In considering whether the judgment of the trial court is 'against the weight of the evidence,' this Court may exercise its power to set aside the judgment of the trial court only with caution and only if it possesses a firm belief that the judgment is wrong." *Lewis v. Gibbons*, 80 S.W.3d 461, 466 (Mo. banc 2002) [citing *Murphy*, 536 S.W.2d at 32].

When reviewing a division of marital property, deference is given to the trial court, which is vested with considerable discretion in dividing marital property. *Lagermann v. Lagermann*, 109 S.W.3d 239, 242 (Mo.App. E.D. 2003). This Court, like all Appellate courts, will interfere only if the division of property is so heavily and unduly weighted in favor of one party as to amount to an abuse of discretion. *Dardick v. Dardick*, 670 S.W.2d 865, 869 (Mo. banc 1984).

ARGUMENT

Appellant's argument appears to be that she should not have been ordered to make an equalization payment to Respondent. In essence, she argues that the unbalanced division that showed her receiving in excess of 75% of the marital property was a just division. To prove this, Appellant must show that one or more of the statutory and non-statutory factors prohibits a substantially equal division to Respondent to be unjust. Appellant focuses on only three factors: (1) the economic circumstances of each spouse at the time the division of property is to become effective. . .; (2) the contribution of each spouse to the acquisition of the marital property; and (3) the conduct of the parties during the marriage.

The Economic Circumstances of Each Spouse at the Time the Division of Property is to Become Effective

The evidence was clear that Appellant ran her own business, and paid herself a yearly salary of $69,000.00. Respondent was employed by the City of Cape Girardeau, earning approximately $52,000.00.

Appellant was also awarded the only income producing property owned by the parties. Despite testimony that the business was suffering, there was no clear evidence that Appellant would be unable to continue working and earning a living at a substantially similar level as she had during the marriage. In fact, if her testimony is to be believed, she would be able to devote more time to the business now that she was no longer under the controlling thumb of Respondent.

Appellant cites no credible evidence that the parties' respective financial positions are so disparate as to prohibit Respondent from receiving a substantially equivalent share of the marital property. As Appellant received the marital home, the sole incoming producing asset, and her own retirement fund, there were no assets available to make up the inequity, so an equalization payment was ordered.

The Contribution of Each Spouse to the Acquisition of the Marital Property

Appellant contends that her investment in Respondent's Nationwide Account entitles her to a disproportionate amount of marital property and a portion of said

account during the dissolution. There was no evidence presented that the court failed to consider this during the allocation of property. In fact, the court could very well have weighed her contributions against Respondent's not-insignificant contributions in furtherance of Appellant's business.

The Conduct of the Parties During the Marriage

Appellant Failed to Show that Respondent's Misconduct Changed the Balance of the Partnership Load

While Appellant has taken no responsibility for the demise of the parties' relationship, or for the sometimes explosive arguments, Respondent freely admits that the parties were high strung and accepts that he made a mistake by grabbing Appellant's face in anger on one occasion. Respondent categorically denies Appellant's other contentions of abuse. Appellant seeks to utilize a self-serving recounting of the parties' history as justification for not having to make an equalization payment that would bring the respective marital property division into balance. Misconduct alone, however, is not sufficient to require a disproportionate division of marital property. *Ballard v. Ballard*, 77 S.W.3d 112, 117 (Mo.App. W.D. 2002). "It is only when 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 affect the distribution of property." *Ballard*, 77 S.W.3d at 117 [quoting *Nelson v. Nelson*, 25 S.W.3d 511, 519 (Mo.App. W.D. 2000)].

In *Ballard*, as in the present case, there were no specific complaints or evidence as to the extent and nature of the alleged extra burdens the wife was caused

to endure as a result of the alleged misconduct. There was only Appellant's disputed testimony regarding mere allusions to the emotional and financial stress placed upon her by Respondent's conduct.

Herein, Appellant has not provided any tangible evidence that Respondent's "controlling" behavior has added any emotional or financial stresses to her in her role in the marital relationship.

Because the Appellant failed to provide any actual evidence that Respondent's misconduct had, in any way, caused her to assume a greater share of the partnership load or placed an undue burden on the parties' relationship, the trial court was within its discretion to refrain from allocating property disproportionately in favor of Appellant. The decision of the trial court should be affirmed.

CONCLUSION

Based upon the arguments and authorities cited to this Honorable court, the Respondent requests that the rulings of the trial court with regard to the division of marital property and the deferred distribution of the pension benefits be affirmed.

Respectfully submitted,

/s/ John P. Heisserer
John P. Heisserer
Missouri Bar #29379
Rice, Spaeth, Summers & Heisserer, L.C.
P.O. Box 1568
Cape Girardeau, MO 63702-1568
Phone: (573) 334-6061
Fax: (573) 334-0979
Email: jheisserer@capelawfirm.com

CERTIFICATE OF COMPLIANCE

I, John P. Heisserer, hereby certify the following:

The attached *Substitute Brief* complies with the limitations contained in Rule 84.06(b) and contains the information required by Rule 55.03. The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. The brief contains 8,380 words, exclusive of the cover sheet, certificate of compliance, certificate of service, and signature block. This number being within the word-limit prescribed for a Respondent's Brief by Rule 84.06(b).

/s/ John P. Heisserer
John P. Heisserer,
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

On this 9th day of December, 2016, Counsel states as follows:

1. *Respondent's Substitute Brief* is submitted in electronic format, to the Court Clerk;
2. Exact copy of said *Brief* is sent via electronic mail to Counsel for Appellant at the email addresses registered with this Court: LauraClubb@TheClubbLawFirm.com.
3. Upon acceptance of *Respondent's Substitute Brief* for filing, Counsel will mail paper copies to the Court Clerk, if necessary, and will dispatch by first class mail, postage prepaid, copies of *Respondent's Substitute Brief* to Appellant at the address below:

   Laura Clubb
   The Clubb Law Firm, LLC
   718 Caruthers
   Cape Girardeau, MO 63701
   Attorney for Appellant

/s/ John P. Heisserer
John P. Heisserer,
ATTORNEY FOR RESPONDENT