SC95918

IN THE SUPREME COURT OF MISSOURI

KATHRYN J. LANDEWEE,

Appellant

v.

JOHN E. LANDEWEE,

Respondent.

APPELLANT'S SUBSTITUTE BRIEF

THE CLUBB LAW FIRM, LLC

LAURA CLUBB
Missouri Bar No. 47704
718 Caruthers
Cape Girardeau, MO 63701
Phone (573) 651-1900
Fax (573) 651-1902
lauraclubb@theclubblawfirm.com
www.theclubblawfirm.com
ATTORNEY FOR APPELLANT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authority	**Referenced**
Kuchta v. Kuchta, 636 S.W.2d 663 (Mo. 1982)	17, 27, 28, 29
Lewis v. Lewis, 978 S.W.2d 64 (Mo. App. W.D. 1998)	34
Seal v. Raw, 954 S.W.2d 681 (Mo. App. W.D. 1997)	23
Spaudlin v. Spaudlin, 945 S.W.2d 665 (Mo. App. W.D. 1997)	18, 34
Whaley v. Whaley, 805 S.W.2d 681 (Mo. App. E.D. 1990)	24
Section 452.330, RSMo. 2016	17, 19, 21, 22, 23, 26, 36, 37, 38, 39, 44, 45
Section 70.695, RSMo. 2016	17, 23, 25, 29
29 U.S.C. Section 1056(d)(3)	23
Keith S. Bozarth, *QDROs and Public Pensions in Missouri*, 51 J. Mo. B. 149 (1995)	32, 36

JURISDICTIONAL STATEMENT

Kathryn J. Landewee, appeals the trial court's dissolution of marriage judgment regarding the division of marital property in the matter of *Kathryn J. Landewee v. John E. Landewee*, Case Number 13CG-DR00319. The Missouri Supreme Court has jurisdiction to hear this case pursuant to Article V, Section 10 of the Missouri Constitution in that the Court has ordered transfer after opinion by the Eastern District Court of Appeals.

STATEMENT OF FACTS

Background

Kathryn Jo Landewee, Appellant, and John Eugene Landewee, Respondent, were married for nearly twenty-three years. L.F. at 96; Tr. at 43-44. They married on July 5, 1991 had two children together, separated on or about April 1, 2013 and were divorced on December 3, 2014. L.F. at 96; Tr. at 43-44.

John Landewee engaged in marital misconduct throughout the marriage, including controlling behavior, unreasonable sexual demands, and domestic assault. Tr. at 63-75.

The parties acquired property and debts during their marriage, including the following: Knaup Floral, Inc., the business established by Kathy's family in 1920; a home physically connected to Knaup Floral, Inc.; the real estate on which Knaup Floral, Inc. sits; debts associated with the business; vehicles associated with the business; personal vehicles; retirement accounts; life insurance policies; and credit card debts. L.F. at 96-100, 115-125; Tr. at 48-55, 57-59.

The circuit court divided the property and debts, awarding Kathy Knaup Floral, the real estate for the business, the home physically attached to the business, the debts of the business, Kathy's IRA, and all marital debts except for John's car loan. L.F. at 102-105. The circuit court allowed John to keep all of his non-LAGERS retirement plan and ordered Kathy to pay John an equalization payment of more than $196,000.00. L.F. at 102-105. Finally, the circuit court

deferred division of the marital portion of John's LAGERS retirement plan for an indeterminate period, but at least for a minimum of nine years. L.F. at 102-105.

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

Kathy's family established Knaup Floral, Inc., a floral design shop, in 1920. Tr. at 59-60. Kathy has worked at the shop since she was sixteen years old, except for a brief period when she visited Europe to train in floral design. Tr. at 60. The circuit court found the value of the real property on which Knaup Floral sits to be $410,000.00 with debt of $52,000.00. L.F. at 103-104, 122.

During the marriage, John did not work at Knaup Floral, Inc., and provided minimal contributions to its operation. Tr. at 60-61, 63-65. John's marital misconduct impacted Kathy's ability to work at the shop. Tr. at 63-75. The shop has been struggling financially for the past few years and is in dire financial straits, but Kathy is able to draw a modest salary each month. L.F. at 31-32; Tr. at 63. The parties agreed that the value of the floral shop going forward was zero dollars. L.F. at 122; Tr. at 63.

Another piece of real estate associated with Knaup Floral, Inc. is the marital home located at 138 South Pacific, Cape Girardeau, Missouri. L.F. 102; Tr. at 76. The marital home is physically connected to Knaup Floral by a hallway with a fire door. Tr. at 50. The circuit court awarded Knaup Floral, Inc. to Kathy, along with the real estate upon which the shop sits, the marital home, two business vehicles, and all business debts. L.F. at 104-105.

John Landewee's LAGERS Plan

John is employed by the City of Cape Girardeau, Missouri and was so employed for five years before he and Kathy married. L.F. at 99; Tr. at 88, 101. As an employee of the City, John is a participant in the Missouri Local Government Employees Retirement Benefit plan (hereinafter referred to as LAGERS). A-32; L.F. at 98-100; Tr. at 88. The LAGERS plan is a defined benefit plan in which participants receive monthly benefits upon reaching a certain age. A-32; L.F. at 98; Tr. at 5. A defined benefit plan is very different from a 401(k) plan, which is a defined contribution plan. Tr. at 5. With a defined contribution plan, participants contribute an amount of money each year, the money is kept separate, and whatever earning and principal the participant has at the time of retirement determines the amount of the benefit the participant receives. Tr. at 5.

As opposed to a defined contribution plan, with the LAGERS plan, the money for payment of participant benefits is not a separate account; instead it is a pool account and, upon retirement, the participant is paid out of that fund. Tr. at 5.

John's guaranteed benefit as of December 31, 2013 (the date of dissolution was December 3, 2014, but John Landewee did not produce any LAGERS statements dated later than December 31, 2013) was $1,676.00 per month. A-32; L.F. at 98; Tr. at 5. John will be entitled to receive this benefit, approximately nine years from the date of the circuit court's judgment, upon attaining the age of sixty. A-32; L.F. at 98. John began participating in the LAGERS plan on August

18, 1986. A-32. As of December 21, 2013 John had a total of 27.33 years of participation in LAGERS, and five of those years occurred prior to his marriage to Kathy. L.F. at 105; Tr. at 101. The divorce hearing took place in August of 2014, which would add another seven months of marital service to John's total years of service. L.F. at 95.

Kathy presented expert testimony of John Hillin, Certified Public Accountant, and associate at the firm of Hillin & Clark (Now Hillin & Company). L.F. at 98-99; Tr. at 3-15, 21-22. Mr. Hillin performed a present value calculation of John's LAGERS plan. A-34 to A-44; L.F. at 98-99; Tr. at 4-15, 21-22.

In determining the present value of the plan, Kathy's expert first looked to the date that John would be retiring and at John's projected life expectancy, which the expert determined to be another 21.5 years. A-34; Tr. at 6. Kathy's expert explained that, in order to get the same benefit as John would receive under his LAGERS plan, a person would need to invest money now at a guaranteed rate. Tr. at 6-7. Because he needed to use a guaranteed rate to make the calculation, Kathy's expert selected the rate of 3.45 percent, the rate of a U.S. Treasury Thirty-Year bond. A-35; L.F. at 98-99; Tr. at 5-15. The 3.45 percent rate used in the calculation is referred to as the discount rate. L.F. at 98-99; Tr. at 7. The discount rate used to determine present value is the most sensitive part of the calculation. Tr. at 7. If a higher discount rate is used in the present value calculation, it would yield a much lower present value than a lower discount rate would yield. Tr. at 7.

Kathy's expert, Mr. Hillin, assigned a present value to John's LAGERS plan of $216,121.62 as of the date of December 13, 2013. A-36 to A-44; L.F. at 98; Tr. at 9. Mr. Hillin did not deduct estimated income taxes from his present value calculation because John may or may not be required to pay taxes on that benefit income when he receives it and may not have any taxable income at that time. Tr. at 10-11. Kathy's expert found that it was a more realistic valuation to calculate present value without estimating future taxes because the expert would have no way of making such an estimate. Tr. at 10, 11. Kathy requested that the circuit court use Mr. Hillin's valuation of the plan when making its property division. L.F. at 98-99, 121; Tr. at 57.

John presented expert testimony of Paul Schermann, another Certified Public Accountant. L.F. at 99; Tr. at 24. Like Mr. Hillin, Mr. Schermann looked to the date John would be retiring and at John's expected life expectancy. Tr. at 25. Mr. Schermann did not use the most current plan statement available for John's fund, but instead admitted that he used a statement that was nearly two years old at the time of trial. A-45; L.F. at 99; Tr. at 14, 34.

Mr. Schermann used a discount rate of 7.25 percent to calculate a present value for John's LAGERS plan. A-47; L.F. at 99; Tr. at 26. He derived this discount rate from a LAGERS audit that described the annual rate of return for the LAGERS fund. A-45, A-47; Tr. at 12, 26. Mr. Schermann conceded that the rate of return for the LAGERS fund would have no actual effect on the amount of benefits that John will receive when he retires and that John's benefits will not

change if the fund earns 20 percent in the next year. Tr. at 31. This is why Mr. Hillin, Kathy's expert, used a guaranteed rate to calculate the present value of the plan --- because the benefit that John will receive is a guaranteed benefit that does not depend on the rate of return of the fund. Tr. at 10.

Using the discount rate of 7.25 percent, Mr. Schermann calculated the present value of John's LAGERS plan to be $90,260.00 as of December 31, 2012. A-45; Tr. at 28. Then, Mr. Schermann, at the request of John's lawyer, reduced the present value by the estimated taxes that might be paid on John's benefits. A-45 to A-46; L.F. at 99; Tr. 28-30. Mr. Schmermann made "a lot" of assumptions in estimating the amount of taxes that John might pay. A-45 to A-46; Tr. at 29. Mr. Schermann assumed that John would be single, that he would have other taxable income between $24,000.00 and $59,000.00 per year, that Missouri would continue to exempt LAGERS, that tax rates would be the same in 2024 as they are today, and that federal taxes would continue to be based on income as opposed to consumption. A-45 to A-46; Tr. at 29.

After making these assumptions, Mr. Schermann concluded that the present value of John's LAGERS benefit plan was $53,000.00 versus the $216,121.62 that Kathy's expert had calculated. A-46; L.F. at 99; Tr. at 30.

The circuit court failed to follow any of the expert testimony presented at trial and found that John's LAGERS defined benefit plan had a present value of zero dollars. L.F. at 105. The circuit court further found that of the 27.33 years of John's participation in the LAGERS plan as of December 31, 2013, 22.33 of those

years were marital, finding that 82 percent of the plan's monthly benefit would be marital. L.F. at 105. The circuit court, therefore, found that $1,374.00 of the monthly benefit of $1,676.00 was marital. L.F. at 105. The Court then awarded Kathy the sum of $687.00, less applicable income taxes, per month, beginning on the first day of the month John both became eligible to receive the benefit and did, in fact, receive the benefit. L.F. at 105.

Respondent's 457 Retirement Plan and Appellant's IRA

Kathy had an Individual Retirement Account ("IRA") through Charles Schwab & Company, but she stopped contributing to it shortly after the parties separated because she could not afford to contribute. L.F. at 103, 120; Tr. at 53, 54. Kathy was forced to withdraw approximately $6,800.00 from her IRA after the separation to pay school tuition, attorney fees and for support of the children, since John was not assisting her with child support. Tr. at 54.

In addition to his LAGERS plan, John also had a 457(b) plan through Nationwide. L.F. at 104, 121; Tr. at 55. During the marriage, Kathy and John made an agreement that they would contribute more money to John's 457 plan than to Kathy's IRA. Tr. 55-57, 91. As a result of this agreement, which both parties acknowledge at trial, John's 457 plan had much more money in it at the time of the divorce than Kathy's IRA. L.F. at 103-104, 120-121; Tr. at 53, 91. Kathy asked that the circuit court split these retirement accounts between the parties. L.F. at 121. The circuit court awarded all of the $136,316.00 in the

Nationwide plan to John and the $62, 611.00 in Kathy's IRA to Kathy. L.F. at 103-104, 120, 121; Tr. at 53, 78.

Marital Misconduct

John engaged in marital misconduct throughout the marriage, but it was his violent assault of Kathy on or about March 31, 2013 that led the parties to separate. Tr. at 63-74.

During the marriage, John was not supportive of the time that Kathy had to devote to Knaup Floral, Inc. Tr. at 63-64. Kathy, an adult woman, would often have to get John's permission to continue working. Tr. at 64. Kathy sometimes had to sneak to the business to do work. Tr. at 65. Kathy's fear over what John would say and do about her working often prevented her from going to Knaup Floral, Inc. to complete her work. Tr. at 65-66.

Even though the business was connected to the marital home by a hallway, Kathy feared going to the business to finish her work. Tr. at 64-65. On one occasion, when Kathy needed to work, but feared reprisals from John, she used WD-40 and greased the doors so that John would not hear the door that separated the business from the home opening. Tr. at 65. This controlling behavior by John placed an additional economic burden on Kathy, as she was the force behind Knaup Floral, Inc. Tr. at 60-61, 63-65, 97-98.

John was so controlling that he dictated the bedtimes as 9:00 p.m. for Kathy and his two teenage children. Tr. at 68. If the family was not in bed at the time John desired, he would become very upset with all three other family members.

Tr. 68-69. Occasionally, John and Kathy would get into arguments if Kathy was not in bed by 9:00 p.m. Tr. at 69. John wanted to know what Kathy was doing during the day and during the evening. Tr. at 97.

During arguments with Kathy, John would sometimes throw objects against the wall or hit his hand against the wall. Tr. at 66. Once John slammed a door so near to Kathy's head that he caught her hair in the door. Tr. at 66.

Kathy has back problems that have caused her periodic pain over the past few years and necessitated surgery. Tr. at 67-69. She has experienced problems with her sacroiliac joints since the birth of her son, fourteen years ago. Tr. at 67, 69. Kathy suffered a bulging disk in her back and had to undergo surgery to repair it. Tr. at 69. Despite her chronic back problems, John was unsympathetic to Kathy's reluctance to have painful sexual relations with him. Tr. at 66-67. If Kathy had to abstain from sexual relations with John for more than a few days because of pain, John would engage in psychological torment of her. Tr. at 67, 69. John said many unkind remarks to Kathy about her inability to have sexual relations that were so unpleasant that Kathy preferred not to speak them aloud in court. Tr. at 67.

There were times when Kathy was in tears and struggling during sexual relations with John, due to her back problems. Tr. at 67. Kathy would cry and appeal to John when it was painful for her to have sex with him. Tr. at 69-70. Kathy appealed to John for less frequency of sexual relations because of the painful back conditions. Tr. at 67. While John consented to less frequent sexual

relations for a while, he later resorted to sexual relations that were uncomfortable for Kathy. Tr. at 67. This despite Kathy taking John to speak with her physical therapist about different ways the two might have intercourse. Tr. at 67.

On or about March 31, 2013 Kathy had returned to the family home at approximately 5:15 p.m. after working at Knaup Floral, Inc. all day. Tr. at 70. She asked John if he would please allow her to return to the shop because that Sunday was Easter Sunday and she needed to get some things completed for decorating St. Mary Cathedral. Tr. at 70. Kathy went to the shop and returned to the family home around 9:00 p.m. where she heard an argument going on between John and the two teenaged children. Tr. 70-71. Kathy waited downstairs to see if things would calm down and then she finally went upstairs to intervene as John was telling the children to go to bed. Tr. at 71.

Later, as John and Kathy were lying in bed, John accused Kathy of mocking him. Tr. at 71. He then made a demand for sexual relations, became enraged, and jumped on top of Kathy, pinning both of her legs and one of her hands. Tr. at 71. As he was on top of her screaming, John took ahold of Kathy's head and rapidly, violently shook her head down and back. Tr. at 71, 93, 95, 97. John told the circuit court that he put the palm of his hand over the front of Kathy's face and grasped it, while asserting, "Get this – Get it through your thick skull." Tr. at 99-100. Kathy attempted to defend herself and feared that John would break her neck, so she began screaming and did so until John jumped up and ran away. Tr. at 71-72.

At approximately 12:30 a.m. on the night of the assault John came back into the parties' bedroom and began to get in bed, despite Kathy's threat to call 911. Tr. at 72. Kathy slept the rest of the night with an emergency buzzer under her pillow. Tr. at 72. By 2:30 a.m. Kathy could not move her neck well due to inflammation. Tr. at 72. Kathy sought medical advice the next morning due to the pain in her neck and a pounding headache. Tr. at 72-73. Kathy worked on her Easter decorating on Saturday and then went for an MRI on the following Monday. Tr. at 73. Kathy is still receiving treatment for the injury she sustained, including seeing a neurosurgeon in St. Louis. Tr. at 73. She has had pain shots in her spine and will eventually have surgery. Tr. at 73. The parties separated approximately three days after John attacked Kathy. Tr. at 74. Kathy and both children have been seeing counselors since the attack. Tr. at 75.

Points Relied On

1. The circuit court erred in its division of marital property because the division fails to satisfy the circuit court's obligation under Section 452.330 to equitably divide all of the couple's marital property and debts in a manner that is definite and capable of enforcement in that it deferred allocation of a portion of Respondent John Landewee's LAGERS pension benefit to Appellant Kathy Landewee.

***Joyner v. Joyner*, 460. S.W.3d 467 (Mo. App. W.D. 2015)**

***In re Marriage of Accurso*, 234 S.W.3d 556 (Mo. App. W.D. 2007)**

***Kuchta v. Kuchta*, 636 S.W.2d 663 (Mo. 1982)**

Section 452.330, RSMo 2016

Section 70.695, RSMo 2016

2. The circuit court erred in assigning a present value of zero dollars to Respondent John Landewee's LAGERS plan because that present value was not supported by substantial evidence and was against the weight of the evidence in that the circuit court heard expert testimony that the LAGERS plan had a present value of between $53,000.00 and $216,121.62.

***Joyner v. Joyner*, 460. S.W.3d 467 (Mo. App. W.D. 2015)**

***Spaudlin v. Spaudlin*, 945 S.W.2d 665 (Mo. App. W.D. 1997)**

***Farley v. Farley*, 51 S.W.3d 159 (Mo. App. S.D. 2001)**

***Jarvis v. Jarvis*, 131 S.W.3d 894 (Mo. App. W.D. 2004)**

3. The circuit court erred in its division of marital property because the division fails to satisfy the circuit court's obligation to consider the factors set forth in Section 452.330, RSMo. in that the court did not properly consider the factors and instead used an oversimplified formula that resulted in an unfair, unjust, and unconscionable division that orders Appellant Kathy Landewee to pay more than $196,000.00 to Respondent John Landewee.

***Baker v. Baker*, 986 S.W.2d 950 (Mo. App. S.D. 1999)**

***Griffin v. Griffin*, 986 S.W. 2d 534 (Mo. App. W.D. 1999)**

Section 452.330, RSMo. 2016

ARGUMENT

Standard of Review

The Court must sustain the judgment in a court-tried case unless there is no substantial evidence to support it, it is against the weight of the evidence or it erroneously declares or applies the law.[1] "The burden of demonstrating error is on the party challenging the divorce decree."[2] The Court views the evidence and all permissive inferences in the light most favorable to the judgment and disregards all contrary evidence and inferences.[3]

[1] *Joyner v. Joyner*, 460 S.W.3d 467, 470 (Mo. App. W.D. 2015).

[2] *Id*., quoting *Hernandez v. Hernandez*, 249 S.W.3d 885, 888 (Mo. App. W.D. 2008).

[3] *Joyner*, citing *Bridgeman v. Bridgeman*, 63 S.W.3d 686, 689 (Mo. App. E.D. 2002).

1. The circuit court erred in its division of marital property because the division fails to satisfy the circuit court's obligation under section 452.330 to equitably divide all of the couple's marital property and debts in a manner that is definite and capable of enforcement in that it deferred allocation of a portion of Respondent John Landewee's LAGERS pension benefit to Appellant Kathy Landewee.

The circuit court's division of property is inconsistent with the goals, language, and legislative intent of the Dissolution of Marriage Act.

The circuit court disregarded the evidence presented by both parties of the present value of Respondent John Landewee's LAGERS plan, finding that the plan had a present value of zero dollars and ordering John to pay Appellant Kathy Landewee her half of the marital portion of that plan at an indefinite date in the future, at least a minimum of nine years form the date of the judgment.[4] The circuit court's order is neither definite nor capable of enforcement because of the speculative nature of Kathy's future receipt of pension proceeds from John. Therefore, not only does the overall property division lack finality as required by law, it is unfair and unjust.

The circuit court's division of marital property is subject to the provisions of section 452.330, RSMo., which provides that the court "shall set apart to each spouse such spouse's nonmarital property and shall divide the marital property and

[4] L.F. at 105.

marital debt in such proportions as the court deems just after considering all relevant factors."[5] Both the division of marital property and marital debts is mandatory on the part of the trial court.[6] While the statute requires a fair and equitable division, it does not mandate an "equal" division.[7]

The circuit court's failure to value the LAGERS benefits and include them in the overall property division deprived Kathy of the benefits she helped build throughout the marriage and left her with a bill to pay her ex-husband John nearly $197,000.00 as equalization. The circuit court misapplied section 452.330, RSMo., which resulted in an inequitable and unconscionable division of property. This Court should reverse the circuit court's division of property and remand this matter for a reallocation of the overall division of property after a hearing to consider evidence as to the value of the LAGERS plan.

LAGERS plans are not amenable to QDROS or other legal process.

John's LAGERS retirement benefits are marital property and are subject to division in a dissolution action.[8] Typically, the division of a spouse's retirement

[5] Section 452.330.1, RSMo. 2016.

[6] *Joyner v. Joyner*, 460 S.W.3d 467, 471 (Mo. App. W.D. 2015) (citing *Jonusas v. Jonusas*, 168 S.W.3d 117, 119-120, n. 1 (Mo. App. W.D. 2005).

[7] *Joyner* at 471 (citing *Bright v. Bright*, 429 S.W.3d 517, 520 (Mo. App. W.D. 2014)).

[8] *Joyner* at 471.

plan is accomplished via a Qualified Domestic Relations Order ("QDRO").[9] Section 70.695, RSMo. provides that LAGERS benefits are not "subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or to any other process of law whatsoever, and shall be unassignable . . . ." Benefits under the LAGERS pension plan are not assignable, nor are they subject to a QDRO, but they are still marital property if they were acquired during the marriage.[10]

Missouri adopted its Dissolution of Marriage Act in 1973.[11] One of the goals of the Act was to "eliminate any carryover of the animosity which brought about the severance of marriage by terminating, without recourse to further litigation, all unity of possession, as well as unity of title, between the spouses when consummating a 'just' division of 'marital property.'"[12] Section 452.330, RSMo. "seeks to effectively minimize the necessity for recourse to further litigation to completely sever all relations between the parties."[13] Missouri courts

---

[9] See *Seal v. Raw*, 954 S.W.2d 681, 685 (Mo. App. W.D. 1997) (citing 29 U.S.C. Section 1056(d)(3)).

[10] *Joyner* at 473; Section 452.220.2, RSMo.

[11] *Joyner* at 473.

[12] *Joyner* at 473; *In re Wax*, 63 S.W.3d 668, 671 (Mo. App. E.D. 2001).

[13] *Joyner* at 473 (citing *In re Marriage of Accurso*, 234 S.W.3d 556, 557 (Mo. App. W.D. 2007)).

have held that "a division of 'marital property' which stops short of severing the relationship attached to the common ownership of property 'should be reserved for the unusual situation where the economics involved call for such a solution.'"[14]

A deferred division of the LAGERS plan is unnecessary.

The present case does not present an unusual situation that calls for a deferred allocation of marital property and the circuit court did not find that this was an unusual situation requiring a division that stopped short of severing the common ownership of John's LAGERS plan. Both parties at trial presented evidence of the present value of the LAGERS plan and both advocated for a complete and final division of marital assets.[15] Instead of adopting the present value calculation of one of the parties' experts and using that, in conjunction with the statutory factors, to determine the overall division of property, the circuit court entered a "wait and see" order that will leave Kathy hanging for a minimum of nine years to begin to effect a division of all the martial assets.[16] This violates the plain language, goal, and legislative intent of the Dissolution of Marriage Act.

---

[14] *Joyner* at 473 (citing *Wax*, 63 S.W.3d at 671); see also *Whaley v. Whaley*, 805 S.W.2d 681, 682 (Mo. App. E.D. 1990).

[15] A-32, A-34 to A-47; L.F. at 98-99, 101, 105; Tr. at 3-15, 21-22, 24, 26, 28, 30, 31, 57.

[16] L.F. at 105.

Future litigation is virtually guaranteed.

Likewise, the judgment entered by the circuit court keeps the parties inextricably tied together for an indefinite period of time. It ensures, rather than minimizes, the need for future court intervention and it is unclear what type of intervention would enable Kathy to receive her marital portion of the LAGERS plan. Section 70.695, RSMo., prevents Kathy from levying against the LAGERS plan or filing a garnishment against it to recover her marital portion. The circuit court's judgment is an oversimplification of the many contingencies attendant with a deferred division of this marital asset.

By deferring division of the LAGERS plan and requiring Kathy to pay more than $196,000.00 in equalization right now, the circuit court placed all of the risk of the failure of the LAGERS plan benefits to be received on Kathy. Not only does Kathy bear the risk that John will elect a lump sump after eligibility, in which case Kathy has nothing in the judgment to enforce distribution of her marital portion of the lump sum, but Kathy was ordered to pay husband more than $196,000.00 ***immediately***. Similarly, if John retires before he becomes eligible to receive benefits, Kathy gets nothing but pays more than $196,000.00 ***now***. If John works past his date of eligibility, Kathy must wait to receive any benefits, but she still pays him more than $196,000.00 ***now***. If John dies before his date of eligibility, Kathy gets nothing, but she will still have paid him more than $196,000.00 ***now***. If John dies next week, Kathy will owe his estate more than

$196,000.00, but she will never see a penny of her marital portion of this martial asset.

If John simply refuses to pay her ten years from now, does Kathy file a motion for contempt of the Judgment of Dissolution? Since the event of John receiving his benefits could be more than ten years after the entry of the circuit court's judgment, does that mean that Kathy needs to revive the judgment in order to enforce it later? Neither Missouri law nor the circuit court's judgment provide answers to these questions. In any case, under any scenario, John gets his share immediately while Kathy must wait a minimum of nine years to even begin receiving her marital portion of the LAGERS benefits, let alone getting the full value of those benefits. All of these questions and contingencies demonstrate the uncertainty and lack of finality created by the circuit court's judgment.

The circuit court had an obligation, under section 452.330.1, RSMo., to equitably divide all of the parties' marital property in such a way that the division is definite and capable of enforcement. Instead, the circuit court's order stated that John would pay Kathy her portion of the LAGERS benefits "beginning on the first day of the first month that Respondent both becomes eligible to receive such benefits and does, in fact, receive such benefits."[17] The circuit court's order does not satisfy its obligation under section 452.330.1, RSMo. John's LAGERS benefits are not amenable to a QDRO and the provisions in the circuit court's

[17] L.F. at 105.

judgment did not effectuate a division of the LAGERS benefits. Kathy's receipt of her portion of the benefits is wholly dependent on John paying her when he starts receiving his pension, providing that he ever does start receiving it. That portion of the judgment is not definite, since it did not divide the marital property, nor is it capable of enforcement.

None of these contingencies need to play a part in the division of John and Kathy's marital assets: the most logical and fairest and most equitable solution is to figure out the value of the plan as of the date of the divorce and include it in the property division.

***Kuchta v. Kuchta* is inapplicable to the facts of this case.**

Throughout the appellate process, John Landewee has relied on the thirty-four-year-old Missouri Supreme Court case, *Kuchta v. Kuchta,*[18] as authority for allowing the circuit court in the present case to defer division of one of the marriage's largest assets for an indeterminate period with no viable enforcement mechanism for Kathy to collect. The *Kuchta* case is factually distinct from the present matter and it does not address division of LAGERS retirement benefits.

In *Kuchta*, the circuit court made a deferred division of the husband's TWA (Trans-World Airlines) pension, the district appellate court affirmed, and the Supreme Court affirmed the division.[19] The opinion in *Kuchta* provides little

[18] *Kuchta v. Kuchta*, 636 S.W. 2d 663 (Mo. 1982).

[19] *Kuchta v. Kuchta*, 636 S.W.2d 663, 666 (Mo. 1982).

factual information that would allow a parallel to be drawn between Mr. Kuchta's TWA pension and John Landewee's LAGERS plan. The Court provides an analysis of how some pension plans vest and mature and the Court styles three categories of vested and matured benefits, but acknowledges that there an "untold number of 'pension plans' which appear to have their own singular and unique requirements for meeting 'vesting' and 'maturing' provisions."[20] These thirty-four-year-old classifications do not reference the statutorily created LAGERS plan and do not support the contention that the circuit court was correct in deferring division of the LAGERS plan.

The *Kuchta* Court acknowledges that a pension or retirement plan may often be the most valuable asset of a marriage but does not discuss finality or enforcement mechanisms.[21] We cannot know whether the TWA pension of Mr. Kuchta was amenable to a QDRO or to garnishment and whether the Court thought that was sufficiently enforceable for Mrs. Kuchta because the Court did not address those issues. By contrast, in John and Kathy's case, there is no uncertainty about the lack of an enforcement tool; Kathy has no real way to enforce this deferred division of property under the current judgment. This Court

[20] *Kuchta* at 665.

[21] *Kuchta* at 664.

should not rely on *Kuchta* as support for an unenforceable, deferred division of property. The proper legal authority is *Joyner v. Joyner*.[22]

The Western District's analysis in *Joyner v. Joyner* is on point.

In the case of *Joyner v. Joyner*, the Western District Court of Appeals faced an issue almost identical to the one currently before this Court.[23] In *Joyner*, the parties accumulated marital property, including husband's LAGERS retirement benefits.[24] In *Joyner* neither party presented evidence as to the present value of the LAGERS plan, only that husband would be entitled to a monthly benefit payment of $573.00. The Court calculated wife's percentage of the benefit to be $135.00 per month, ordering that "[Wife] is awarded $135 of the monthly retirement benefit that [Husband] has accrued through LAGERS, during the marriage, to be received by [Wife] when and if [Husband] draws retirement from the LAGERS account[.]"[25]

On appeal, wife claimed, among other errors, that the circuit court's order with respect to the LAGERS plan was "irregular and void" because LAGERS benefits are not subject to execution or garnishment under section 70.695, RSMo.,

[22] *Joyner v. Joyner*, 460 S.W.3d 467 (Mo. App. W.D. 2015).

[23] 460 S.W.3d 467 (Mo. App. W.D. 2015).

[24] *Joyner* at 470.

[25] *Joyner* at 472.

and wife could not legally compel payment of her portion of the benefits.[26] The Appellate Court agreed, reversing the circuit court's deferred award of the benefits to wife, and remanding the matter with instructions to reallocate the overall division of property.[27] The Appellate Court further instructed that the trial court might wish to receive evidence as to the current value of all marital property, since the division would be effectuated so far in time from the original trial.[28]

The *Joyner* court found that the circuit court had used the only information before it in making its "if and when" order and that the parties failed to supply the circuit court with sufficient evidence for it to properly value the LAGERS benefits so that those benefits could be factored into the overall division of property.[29] *Joyner* is directly on point.

Kathy and John both presented expert testimony at trial that the LAGERS plan had a present value and that the present value of the plan should be factored into the division of marital property. The circuit court, however, ignored this evidence in favor of a deferred allocation of the plan and that was reversible error. The circuit court's division of property should be reversed and remanded for a new hearing to reallocate the division of marital property.

---

[26] *Joyner* at 472-473.

[27] *Joyner* at 476.

[28] *Joyner* at 477.

[29] *Joyner* at 476.

The general rule is that the proper date for valuation of marital property is the date of trial, but "where the division of property is not reasonably proximate to the time of trial, the valuation date should be the date of the division of property."

2. The circuit court erred in assigning a present value of zero dollars to Respondent John Landewee's LAGERS plan because that present value was not supported by substantial evidence and was against the weight of the evidence in that the circuit court heard expert testimony that the LAGERS plan had a present value of between $53,000.00 and $216,121.62.

Respondent John Landewee has retirement benefits through LAGERS and these benefits are not amenable to division via a QDRO.[30] Both parties presented expert testimony as to the present value of the LAGERS plan, but the circuit court ignored the evidence, finding that the LAGERS plan had a present value of zero dollars.[31] By ignoring the evidence on the record, the circuit court failed to include the true value of the LAGERS benefits in the overall division of property, basing its finding on no evidence in the record and leaving Kathy with the burden of paying John more than $196,000.00 in equalization.[32] This result is unfair and constitutes reversible error. This Court should reverse the circuit court's finding on the present value of the LAGERS plan and remand this matter for a new hearing on the value of the LAGERS plan.

---

[30] A-32; L.F. at 98-100; Tr. at 88. Keith S. Bozarth, *QDROs and Public Pensions in Missouri*, 51 J. Mo. B. 149, 149 (1995).

[31] L.F. at 105.

[32] L.F. at 102-105.

While the circuit court has broad discretion in dividing property in a dissolution, an abuse of discretion can be found if the division is unduly weighted in favor of one party.[33] In the present case, the circuit court's valuation of the LAGERS plan at zero dollars is so clearly against the logic of the circumstances that it shocks one's sense of justice and fairness. No one at the trial – not John, not Kathy, not the two experts, not the two attorneys – advanced an opinion, theory, or argument that the LAGERS plan was worth nothing in the overall division of property. To the contrary, the record is filled with testimony, both from the parties and the experts, and documentary evidence demonstrating that the plan is capable of a present value calculation.[34]

Instead of selecting one of the valuations presented by the parties or the parties' experts or determining a value somewhere in between, the circuit court concluded that the present value of the LAGERS plan was zero dollars. Although the trial court is not expressly required to assign values to marital property, "evidence from which the value of the marital property can be determined must

[33] *Joyner v. Joyner*, 460 S.W.3d 467, 471 (citing *Bright v. Bright*, 429 S.W.3d 517, 520 (Mo. App. W.D. 2014).

[34] A-32, A-34 to A-47; L.F. at 98-99, 101, 105; Tr. at 3-15, 21-22, 24, 26, 28, 30, 31, 57.

appear."[35] Thus, a trial court is "prohibited from entering a valuation of marital property not supported by the evidence at trial . . . ."[36]

In this case, both parties advocated for the position that the LAGERS plan was capable of a present value calculation, each presenting expert testimony. The experts agreed as to the methodology by which the present value calculation of the LAGERS plan could be made, and differed only in their determination of the appropriate discount rate to use in the calculation and whether taxes should be withheld from any present value calculation.[37]

In *Jarvis v. Jarvis*, the trial court found the present value of a husband's LAGERS plan to be $100.00 based on the testimony of the husband at trial.[38] The wife did not present any evidence of the present value of the LAGERS plan, but appealed claiming that the trial court should have assigned a higher present value

---

[35] *Spaudlin v. Spaudlin*, 945 S.W.2d 665, 669 (Mo. App. W.D. 1997).

[36] *Farley v. Farley*, 51 S.W.3d 159, 164 (Mo. App. S.D. 2001), See also *Lewis v. Lewis*, 978 S.W.2d 64, 66 (Mo. App. W.D. 1998) (holding that the trial court, in dividing marital property, is prohibited from relying on valuations not supported by the evidence at trial)).

[37] A-32, A-34 to A-47; L.F. at 98-99, 101, 105; Tr. at 3-15, 21-22, 24, 26, 28, 30, 31, 57.

[38] *Jarvis v. Jarvis*, 131 S.W.3d 894 (Mo. App. W.D. 2004).

to the plan.[39] In affirming the trial court's decision assigning a present value of $100.00 to husband's plan, the Court stated, "Thus, where, as here, there is evidence on the record on which the trial court could properly rely in establishing the present value of Husband's pension, we find no error in the court's failure to reject that evidence and employ another method of valuation for which there is no evidentiary support in the record."[40]

The result of the circuit court's finding is that John gets the benefit of being a LAGERS member because he will receive the monthly payments or lump-sum payment when he is eligible, and reaps an additional benefit in that the value of the plan is not shown as an asset awarded to him in the overall division of property. Kathy's expert found that the present value of the LAGERS plan as of December 31, 2013 was $216,121.62. If the court had made the exact same property distribution with the addition of putting the $216,121.62 value of John's LAGERS plan in John's column, Kathy's equalization payment to John would have been approximately $80,000.00, not more than $196,000.00. This demonstrates that the circuit court's finding and order is arbitrary, unreasonable, and unfair.

The LAGERS plan is not amenable to division via a QDRO, but, even if it were amenable, the parties could still elect a present value calculation at trial to effect an immediate and final division of that asset. The Court in *Joyner* pointed

[39] *Jarvis* at 900-901.

[40] *Jarvis* at 900-901.

out that section 104.312, RSMo., which applies to Missouri state employees seeking a division of benefits order, provides that "[n]othing prevents the parties to a dissolution from performing a present value calculation and allocating other property to compensate for that value" to "avoid the shared risk which results from a division of benefits order."[41] The circuit court should not have used a deferred allocation or a "wait and see" approach to the LAGERS benefits. The whole point of a dissolution of marriage is finality, not for the parties to be indefinitely tied together as they "wait and see" if John starts receiving his retirement payments, and if he pays Kathy her share, or if John takes a lump sum payment, or if John dies, or if John wins the lottery, etc.

The circuit court had all of the information before it to adopt the most credible present value calculation of the LAGERS plan, $216,121.62, and make a just and equitable division of property after considering all of the factors in section 452.330, RSMo. The circuit court's division of property should be reversed and remanded for a new hearing to reallocate the division of property.

[41] Keith S. Bozarth, *QDROs and Public Pensions in Missouri*, 51 J. Mo. B. 149, 149 (1995).

3. The circuit court erred in its division of marital property because the division fails to satisfy the circuit court's obligation to consider the factors set forth in section 452.330, RSMo. in that the court did not properly consider the factors and instead used an oversimplified formula that resulted in an unfair, unjust, and unconscionable division that orders Appellant Kathy Landewee to pay more than $196,000.00 to Respondent John Landewee.

"Equal" is not synonymous with fair. While section 452.330.1, RSMo., requires a "fair and equitable division" of marital property, it does not mandate an "equal" division. Some trial courts try to simplify the process by dividing the martial property by simply making two columns on a page with the headings "Wife" and "Husband," placing all of the property and debts in the columns, totaling each column, and then forcing the party who comes out "ahead" to pay money in equalization to the other party. In John and Kathy's case, the trial court did just this.[42] This is not fair and is not a property application of the statutory factors.

According to the calculation sheet emailed to the parties by the circuit court and then attached as an exhibit to a subsequent motion, the circuit court put all of the assets and debts awarded to Kathy into one column and came up with a total of

[42] See L.F. at 73, the court's calculation for dividing the parties' marital property.

$549,488.00.[43] The circuit court put all of the assets awarded to John into the other column and came up with a total of $176,995.00.[44] Then the circuit court subtracted John's number from Kathy's and ordered Kathy to pay John one-half of the difference.[45] While this may be a quick and easy way to divide the marital property, it is an unfair simplification of the division of property and demonstrates that the circuit court failed to consider the factors set forth in section 452.330.1, RSMo.

Consideration of the statutory factors is mandatory; there are no shortcuts.

Section 452.330.1, RSMo., provides that the circuit court "shall set apart to each spouse such spouse's nonmarital property and shall divide the marital property and marital debt in such proportions as the court deems just after considering all relevant factors."[46] The factors listed are "(1) the economic circumstances of each spouse at the time [of the property division]; (2) The contribution of each spouse to the acquisition of the martial property . . .; (3) The

[43] This final number in Kathy's column was later changed when the judgment was amended to reflect a different value for Kathy's personal vehicle. L.F. at 95-123.

[44] L.F. at 73.

[45] L.F. at 73, 100-106.

[46] *Joyner* at 470.

value of nonmarital property set apart to each spouse; (4) The conduct of the parties during the marriage; and (5) Custodial arrangements for minor children."[47]

(1) the economic circumstances of each spouse at the time [of the property division]

Kathy's sole source of income is Knaup Floral, Inc., the shop her family established in 1920 and where Kathy has worked since the age of sixteen.[48] The shop is struggling financially and, although Kathy has been able to keep things afloat and pay herself a modest salary, the parties both agreed at trial that the business itself is worth nothing.[49] The most valuable aspect of Knaup Floral is the ground on which it sits, real estate, and a building worth a total of $410,000.00.[50] One of the problems with the business is that the Knaup Floral shop is actually physically connected to the marital home.[51] Kathy asked the circuit court to award her Knaup Floral and that necessarily meant that Kathy would receive the real estate for Knaup Floral AND the marital home, since the two properties cannot be physically separated. These three marital assets totaled $553,000.00 in Kathy's

[47] Section 452.330.1, RSMo. 2016.

[48] Tr. at 59-60.

[49] L.F. at 31-32, 122; Tr. at 63.

[50] L.F. at 103-104, 122.

[51] L.F. at 102; Tr. at 50, 76.

"column" on the circuit court's calculation sheet, but the circuit court did not take into consideration the statutory factors in making the overall property division.[52]

Kathy testified at trial that the business is struggling and the parties agreed that there was no value to the business going forward.[53] Looking at the numbers in a vacuum, it might appear that the circuit court was generous in awarding Kathy these three marital assets, but neither these assets, nor this marriage, nor these parties, exist in a vacuum. Kathy's family has operated Knaup Floral for nearly a century and John contributed little to it during the couple's marriage.[54] In fact, his conduct in preventing her from working at the business placed additional burdens on her.[55] It was not enough that she had to work all day, but if she needed to complete a project or job for the business, she had to fear reprisals from John.[56]

The circuit court heard testimony that Kathy had to stop contributing to her IRA after the parties separated and had to withdraw funds from it to pay bills and school tuition while John contributed no financial support to the children during the pendency of the divorce.[57] Kathy's economic situation at the time of the

---

[52] L.F. at 73.

[53] L.F. at 122; Tr. at 63.

[54] Tr. at 59-61, 63-65.

[55] Tr. at 63-66.

[56] Tr. at 63-66, 70-75.

[57] L.F. at 103, 120; Tr. at 53-54.

divorce was much worse than John's and the court was required to take that factor into consideration when dividing the property. The court did not and that is reversible error.

(2) The contribution of each spouse to the acquisition of the martial property . . .

John and Kathy made an agreement, early in their marriage, that they would contribute more of their marital funds to John's Nationwide retirement account than to Kathy's Schwab IRA.[58] There is no dispute that this agreement caused John's Nationwide account to grow faster than Kathy's IRA and left Kathy with significantly less retirement benefits in her own name at the time of trial.[59] It was clear from the parties' testimony that they made this agreement believing that they would both share in the increased retirement benefits in the future.[60] But, when the circuit court made its calculation, it simply put Kathy's IRA in her "column" and John's Nationwide plan into his "column."[61] Kathy should have received a portion of that Nationwide plan, pursuant to the parties' agreement. By failing to consider Kathy's contribution to the health and balance of John's Nationwide plan, the circuit court committed reversible error.

---

[58] Tr. at 55-57, 91.

[59] L.F. at 103-104, 120-121; Tr. at 53, 91.

[60] Tr. at 53, 91.

[61] L.F. at 73.

(4) The conduct of the parties during the marriage

John was a controlling and abusive husband.[62] He made Kathy afraid to go to work, he dictated her bedtime, he wanted to know what she was doing day and night, he did not support her in her career, he threw objects and slammed doors during arguments.[63] He insisted that Kathy engage in painful sexual relations, despite her injuries and protestations.[64] In March of 2013, he viciously attacked Kathy, physically injuring her and precipitating the parties' separation.[65] This conduct is outrageous and clearly did not enter into the circuit court's calculation of the division of marital property. The fact that the circuit court ordered Kathy to pay her abuser nearly $197,000.00 is a shock to one's sense of justice and indicates that the circuit court did not take this conduct into consideration, as required by the statute. This is error and this Court should reverse the circuit court's property division.

The circuit court did not properly consider the factors set forth in the statute, but these statutory factors are not exclusive, and "there is no formula respecting the weight to be given the relevant factors which a court may

[62] Tr. at 63-74.

[63] Tr. at 63-74.

[64] Tr. at 66-70.

[65] Tr. at 63-74.

consider."[66] In dividing marital property, the trial court must follow the two guiding principles of section 453.330: "(1) that property division should reflect the concept of marriage as a shared enterprise similar to a partnership; and (2) that property division should be utilized as a means of providing future support for an economically depend[e]nt spouse."[67]

Given the guiding principles described above, it is clear that dividing the property in a simplified two-column calculation without considering the statutory factors and requiring Kathy, the spouse with much less in retirement, a victim of domestic assault, with residential custody of the two children, a failing business, and two pieces of property that are akin to albatrosses, to pay John nearly $197,000.00 is unjust, inequitable, unfair, and a clear abuse of discretion.

The division of marital property need not be "equal," but must only be fair and equitable given the circumstances of the case.[68] "That one party is awarded a higher percentage of marital assets does not *per se* constitute an abuse of the trial court's discretion."[69]

---

[66] *Baker v. Baker*, 986 S.W.2d 950, 957 (Mo. App. 1999); *In re Marriage of Medlock*, 990 S.W.2d 186, 190 (Mo. App. S.D. 1999).

[67] *Griffin v. Griffin*, 986 S.W.2d 534, 536 (Mo. App. W.D. 1999).

[68] *Finnical v. Finnical*, 992 S.W.2d 337, 343 (Mo. App. W.D. 1999); *Gendron v. Gendron*, 996 S.W.2d 668, 673 (Mo. App. W.D. 1999).

[69] *Klockow v. Klockow*, 979 S.W.2d 482, 487 (Mo. App. W.D. 1998).

The circuit court failed to consider the factors set forth in section 452.330.1, RSMo. in dividing the marital property and this Court should reverse the circuit court's judgment and remand with instructions for the court to reallocate the marital property.

Conclusion

Appellant, Kathryn J. Landewee, respectfully requests that this Court reverse the circuit court's division of marital property. The circuit court erred by deferring the allocation of Kathy's portion of the LAGERS retirement plan, by valuing the LAGERS plan at zero dollars, and by failing to consider the factors contained in section 452.330.1, RSMo. and ordering Kathy to pay John more than $196,000.00 in equalization. The division of property is unjust, unfair, and unconscionable and Appellant requests that this Court reverse and remand the matter to the circuit court for further action consistent with this Court's ruling.

Respectfully submitted,

THE CLUBB LAW FIRM, LLC

/s/Laura Clubb

Laura E. Clubb, Missouri Bar: 47704
718 Caruthers Ave.
Cape Girardeau, MO 63701
Telephone : (573) 651-1900
Facsimile: (573) 651-1902
Email:
lauraclubb@theclubblawfirm.com

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 9,253 words, excluding the cover and this certification, as determined by Microsoft Word software. This brief was scanned and is free of viruses.

I hereby certify that a copy of this brief was sent to all attorneys of record and all unrepresented parties via the Missouri eFiling System this 21st day of November, 2016.

/s/Laura E. Clubb

Laura E. Clubb