

Appellate Court No. W.D. 79710

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

JARRETT A. ARCHDEKIN,
Appellant,

vs.

SYBIL A. ARCHDEKIN,
Respondent.

APPEAL FROM THE CIRCUIT COURT
OF BUCHANAN COUNTY, MISSOURI
FIFTH JUDICIAL CIRCUIT, DIVISION NO. 4
HONORABLE DANIEL F. KELLOGG, CIRCUIT JUDGE

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the Final Judgment Entry for Dissolution of Marriage entered by the Honorable Daniel Kellogg in the Circuit Court of Buchanan County on April 19, 2016. (L.F. 379). No post-trial motions were filed and Appellant's Notice of Appeal was timely filed on May 24, 2016. (L.F. 404).

This appeal does not involve a challenge to the validity of a treaty or statute of the United States, nor a provision of the Constitution of this State, nor otherwise fall within the exclusive jurisdiction of the Supreme Court of Missouri. This appeal involves the question of whether the trial court erroneously declared or applied the law of the State of Missouri, specifically Chapter 452, R.S.Mo, in designating interlocutory judgments as final, awarding maintenance before completely dividing the marital property and debts, and awarding retroactive maintenance. Therefore, jurisdiction of this appeal is vested in the Missouri Court of Appeals. MO. CONST., amend. art. V, § 3. This cause was tried in the Fifth Judicial District and, therefore, the appeal is within the jurisdiction of the Missouri Court of Appeals, Western District. MO. REV. STAT. § 477.070 (2016).

EXPLANATORY NOTES

To simplify references, Appellant, Jarrett Archdekin, will be identified throughout this Brief as “Husband.” Respondent, Sybil Archdekin, will be identified throughout this Brief as “Wife.” The business entities Archdekin Investments, Inc.; Earthworks Equipment Company, LLC; The Commons Development Group, LLC; Earthworks Real Estate Company, LLC; and Earthworks Excavation Company, LLC will be collectively identified throughout this Brief as “Third Party Respondents.” The Interlocutory Judgment Entry for Dissolution of Marriage, First Amended Interlocutory Judgment Entry for Dissolution of Marriage, and Second Amended Interlocutory Judgment Entry for Dissolution of Marriage will be collectively identified throughout this Brief as “Interlocutory Judgments.”

Abbreviations used are:

A.L.F.	Appellate Supplemental Legal File
L.F.	Legal File
S.L.F.	Supplemental Legal File
Tr.	Transcript

For the sake of this appeal, most of Husband’s arguments refer to evidence from both the 2013 and 2016 trials because, although the trial court treated the 2013 trials as final hearings, it subsequently held another hearing in 2016 and relied on evidence in the 2013 hearings to support its findings in the 2016 hearing.

STATEMENT OF FACTS

Marriage and Background

Husband and Wife were married on May 28, 1994. (Tr. 16-17, Feb. 13, 2013). They separated on or about September 15, 2011. (Id. at 17). The parties have three children who were 16, 13, and 8 years old at the time of the first hearing. (Id.). For most of the parties' marriage, Wife was a stay-at-home mother (id. at 21) and Husband worked to support the family (id. at 133). Wife completed approximately 36 hours of college credit towards a business degree but gave up that opportunity in order to stay home and raise her family. (Id. at 99-100). Although Wife was a "full-time stay-at-home mother" during the marriage, she occasionally earned income by babysitting, cleaning other people's houses (id. at 21), and working part-time at the children's elementary school (id. at 41). Prior to the parties' separation and throughout the proceeding, Wife was employed by Missouri Western State University earning approximately \$2,142.00 per month. (Id. at 41-42, 98; Pet'r's Ex. 4, Feb. 13, 2013). At the beginning of the marriage, Husband earned income by remodeling cars and later became involved in real estate development. (Id. at 132). Husband started multiple businesses, some individually and some with other partners. (Id. at 242-44, 248). The three primary business entities, which were made parties to the dissolution action, were Archdekin Investments, Inc., Earthworks Excavation Company, LLC, and The Commons Development Group, LLC, which was owned by Earthworks Excavation Company, LLC. (Id. at 234).

As a real estate developer, Husband took a substantial amount of risks and during the down turn in the economy, the businesses began to fail. (Id. at 271-73). There was

much dispute about the overall assets, liabilities, and net worth of the companies. At the time of the 2013 hearing, Wife's evidence suggested that the combined net worth of all of the companies exceeded \$7 million (id. at 147) and Husband's evidence suggested that the debts of the companies exceeded its income and assets by about \$280,554.00 with interest incurring at the rate of \$2,259.70 per day (id. at 239-51; Resp't's Summaries Ex. 6A, 6B, and 6C).¹ Husband's evidence also suggested that the business entities' assets were cross-collateralized with one another, that the companies were in the midst of collapsing (Tr. 11-12, Apr. 29, 2013), and that he and had not received a paycheck since 2008 (id. 39:1-2). The companies' assets and debts were also entwined with Husband and Wife's because much of the parties' assets and expenses, including the marital home, were purchased, owned, or collateralized by the businesses (Tr. 21, 242-43, Feb. 13, 2013) and Husband and Wife personally guaranteed debts of the businesses (id. at 65, 266-68).

Procedural History

On September 22, 2011, Wife filed a Petition for Dissolution of Marriage. (L.F. 20). On February 13, 2013 and April 29, 2013, the parties appeared in Buchanan County before the Honorable Judge Daniel Kellogg for trial. (Tr. 10, Feb. 13, 2013; Tr. 4, Apr.

¹ Husband testified that Archdekin Investments, Inc. had approximately \$1,860,000.00 in assets and \$2,474,852.00 in liabilities and that Earthworks Excavation Company had approximately \$12,200,000.00 in assets and \$11,865,704.00 in liabilities. Husband also provided testimony regarding the assets and debts of The Commons Development Group but because Earthworks owns Commons, these amounts were already included in Earthworks' figures.

29, 2013). After taking evidence, the court took the matter under advisement. Prior to the court's judgment, The Commons Development Group, LLC, filed a Chapter 11 bankruptcy on July 9, 2013. (S.L.F. 5). Thereafter, the trial court entered an Interlocutory Judgment Entry for Dissolution of Marriage (hereinafter "Interlocutory Judgment") on July 23, 2013, which dissolved the marriage of Husband and Wife, divided some property, made custody and visitation orders, and awarded maintenance and child support. (L.F. 120-30). Specifically, in the Interlocutory Judgment, the trial court found that Third Party Respondents were the alter ego of Husband and that their corporate veil should be pierced. (L.F. 125). It further found that Wife's expenses as stated in her Income and Expense Statement were necessary and reasonable and that she could not support herself based on her income or the assets awarded to her in the dissolution and awarded her periodic maintenance to commence retroactive to November 1, 2011 (totaling 21 months and \$31,500.00) and to continue monthly thereafter until either party dies, Wife remarries, or otherwise modified or terminated by the court. (L.F. 127). The Interlocutory Judgment further awarded Wife certain marital and non-marital property, awarded Husband "the remaining marital property," and ordered that the division of "property and assets of Third Party Respondents shall be tabled until the bankruptcy stay is lifted." (L.F. 127-29).

On August 22, 2013, Husband filed his Motion for Reconsideration, Correction, Modification and/or Amendment of the July 23, 2013, Interlocutory Judgment Entry for Dissolution of Marriage and/or Motion for New Trial with Suggestions in Support Thereof. (L.F. 131). Also on August 22, 2013, Third Party Respondents filed their

Motion for New Trial by Third Party Respondents Archdekin Investments, Inc., Earthworks Equipment Co., LLC, Earthworks Real Estate Co., LLC, and Earthworks Excavation Company. (L.F. 12). On August 30, 2013, Wife filed her Motion to Amend or, in the Alternative, for Interlocutory Judgment Nunc Pro Tunc. (L.F. 169). On September 27, 2013, the trial court entered a First Amended Interlocutory Judgment Entry for Dissolution of Marriage (hereinafter “First Amended Interlocutory Judgment”), which corrected clerical mistakes and added language that the judgment was “final for purposes of appeal as to all issues herein addressed.” (L.F. 182).

On October 7, 2013, Third Party Respondents filed their Notice of Appeal (L.F. 11). On October 10, 2013, Wife filed Petitioner’s Second Motion to Amend Interlocutory Judgment or, In the Alternative, for Interlocutory Judgment Nunc Pro Tunc. (L.F. 183). On November 7, 2013, Husband filed his Notice of Appeal. (L.F. 186). On November 26, 2013, the Missouri Court of Appeals, Western District consolidated the appeals and entered an order dismissing the appeals pursuant to Rule 74.01(b), finding that the trial court did not make an express finding that “there was no just reason for delay.” (L.F. 212). On December 6, 2013, Earthworks Excavation Company, LLC, one of the Third Party Respondents, filed a Chapter 11 bankruptcy. (S.L.F. 8). On December 12, 2013, Wife filed her Motion to Amend First Amended Interlocutory Judgment Entry for Dissolution of Marriage. (L.F. 213).

On January 14, 2014, the trial court entered a Second Amended Interlocutory Judgment Entry for Dissolution of Marriage (hereinafter “Second Amended Interlocutory Judgment”), which corrected additional clerical mistakes and stated that the judgment

was “final for purposes of appeal as to all issues herein addressed, as there is no just reason for delay.” (L.F. 226). The monthly income imputed to Husband in the Second Amended Interlocutory Judgment was \$5,000.00 per month (L.F. 222-223). The trial court found this amount to be appropriate because of “the monies expended by the Third Party Respondents for [Husband’s] personal and non-business benefit.” (L.F. 222). As support for its finding, the trial court found that Husband made representations to lending institutions that his total net worth was in excess of \$7 million dollars in a personal financial statement dated March, 2010. (L.F. 222).

On March 6, 2014, Third Party Respondents filed their Notice of Appeal (L.F. 227), which this Court dismissed on April 6, 2015 for failure to prosecute within the periods of time allowed (S.L.F. 12). On April 4, 2014, Husband filed his Notice of Appeal (L.F. 241), which this Court dismissed on May 9, 2014 for being untimely (L.F. 255).

On June 23, 2015, with new counsel, Husband filed his Motion to Reconsider and Terminate Maintenance Award. (L.F. 259). The motion was called for hearing on August 12, 2015 and, after taking the matter under advisement, the trial entered a judgment on September 18, 2015 dismissing the motion as untimely. (L.F. 278). On September 30, 2015, Husband filed a Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition with the Missouri Court of Appeals, Western District (A.L.F. 2) along with Suggestions in Support of his Petition (A.L.F. 11). On October 1, 2015, this Court denied Husband’s Writ. (A.L.F. 24).

On October 13, 2015, Wife filed her Motion for Contempt, requesting that the trial court hold Husband in contempt for failure to pay maintenance and child support. (S.L.F. 13). On October 29, 2015, Husband filed his Motion to Reopen Evidence and to Enter an Amended Order Regarding Parenting Time and Child Support and Suggestions in Support (L.F. 288). On March 28, 2016, Wife filed her Third Amended Petition for Dissolution of Marriage and Petition to Disburse Marital Property, seeking, for the first time, to restore her maiden name. (L.F. 303).

On March 30, 2016, the trial court held a hearing on a “Final Judgment,” as stated by the trial court in its Final Judgment Entry for Dissolution of Marriage (hereinafter “Final Judgment”), entered on April 19, 2016. (L.F. 381). On that hearing date, the parties admitted their joint stipulation with respect to the division of property and allocation of debts into evidence. (Tr. 7-9, Mar. 30, 2016; L.F. 308). Wife then dismissed the third-party petition incorporated in her Third Amended Petition and attorney for Third Party Respondents was excused. (Id. at 8). Then, after some discussions off the record, the parties reached an agreement regarding the emancipation of the oldest child and custody and visitation of the two remaining children. (Tr. 9-12, Mar. 30, 2016). The Guardian ad Litem recited the agreement and was then excused for the remainder of the proceedings. (Id.). The remaining issues before the court were child support, maintenance, contempt, and fees. (Id. at 7).

At the hearing, the parties put their respective Income and Expense Statements into evidence. (Pet’r’s Ex. 9, Mar. 30, 2016; S.L.F. 15). Wife testified that she was able to meet all of her reasonable needs except for approximately \$500.00 per month, which

she borrowed from her father. (Tr. 62:19-21, Mar. 30, 2016). At the time of the final hearing on March 30, 2016, one of the business entities had dissolved, all of Third Party Respondents' property had been foreclosed on, all of Third Party Respondents' assets had been liquidated or repossessed, and Third Party Respondents derived no net income. (Tr. 118-19, Mar. 30, 2016).

As stated in its Final Judgment, the trial court reopened the evidence with respect to property and debt issues unresolved by its Second Amended Interlocutory Judgment and took up Husband's Motion to Reopen or Amend; however, the court noted that it treated Husband's Motion as a Motion to Modify. (L.F. 382). The trial court found that there was a substantial and continuing change in circumstances regarding the children that justified a modification. (L.F. 383). The court also found that the income imputed to Husband "in the Interlocutory Judgment" should not be disturbed "due to his income-producing capabilities." (L.F. 396). In regards to maintenance, the court found that Husband did not meet his burden that there had been a substantial and continuing change in circumstances regarding his income and that no modification should occur. (L.F. 397). The court further found that Husband's income remained unchanged and that even if the court ruled on his motion without placing the burden of a motion for modification, the court's finding of Husband's income for purposes of calculating child support and maintenance would be unchanged. (L.F. 397). The trial court entered orders emancipating the parties' oldest child, modifying custody of the two remaining children, modifying child support, dividing marital and non-marital property and debt not

previously divided, and restoring Wife's maiden name. (L.F. 379-403). Appellant filed this Notice of Appeal on May 24, 2016. (L.F. 404).

POINTS RELIED ON

- I. The Trial Court Erred in Finding that its Second Amended Interlocutory Judgment was Final Because It Misapplied the Law in that the Trial Court Did Not Exhaust Its Jurisdiction and Its Decree was Not a Final Judgment from Which an Appeal Can be Taken in that Its Second Amended Interlocutory Judgment Did Not Dispose of All Issues, Including the Complete Division of Marital Property and Debts.**

Atkins v. Jester, 309 S.W.3d 418 (Mo. Ct. App. 2010)

Gould v. Rafaeli, 804 S.W.2d 758 (Mo. Ct. App. 1990)

In re Marriage of Nardini (Nardini I), 306 S.W.3d 165 (Mo. Ct. App. 2010)

Navarro v. Navarro, 465 S.W.3d 912 (Mo. Ct. App. 2015)

- II. The Trial Court Erred in Entering an Award of Maintenance Before a Final Division of Property was Entered and Refusing to Reconsider or Terminate Maintenance Because It Misapplied the Law in that the Division of Marital Property Must Necessarily Precede the Determination of Whether Maintenance is Required.**

Section 452.335 RSMo. (2016)

Vanderpool v. Vanderpool, 250 S.W.3d 791, 796 (Mo. Ct. App. 2008)

- III. The Trial Court Erred in Ordering that Appellant Pay Respondent Retroactive Maintenance Because It Misapplied the Law in that Section 452.335 Only Authorizes Awards of Prospective Maintenance.**

Section 452.335 RSMo. (2016)

In re Marriage of Nardini (Nardini II), 389 S.W.3d 303 (Mo. Ct. App. 2013)

- IV. The Trial Court Erred in Awarding Maintenance Because It Misapplied the Law in that It Applied a Modification of Maintenance Standard at the Final Hearing Instead of the Standards Required by Section 452.335.**

Section 452.335 RSMo. (2016)

Tarneja v. Tarneja, 164 S.W.3d 555 (Mo. Ct. App. 2005)

Stirling v. Maxwell, 45 S.W.3d 914 (Mo. Ct. App. 2001)

- V. **The Trial Court Erred in Its Imputation of Appellant's Income Because (A) It Misapplied the Law in that Appellant's Diminished Income was Not an Attempt to Evade His Support Obligations and Respondent Provided No Evidence to the Contrary and (B) It was Against the Weight of the Evidence in that the Imputed Income was Not Based on Existing Circumstances, Appellant Did Not Have the Capacity to Earn the Imputed Amount, and the Family's Standard of Living Would Have Been Reduced Whether or Not the Marriage Dissolved.**

Buchholz v. Buchholz, 166 S.W.3d 146 (Mo. Ct. App. 2005)

Keck v. Keck, 820 S.W.2d 727 (Mo. Ct. App. 1991)

Laubinger v. Laubinger, 5 S.W.3d 166 (Mo. Ct. App. 1999)

Workman v. Workman, 293 S.W.3d 89 (Mo. Ct. App. 2009)

- VI. **The Trial Court Erred in Awarding Maintenance Because It Misapplied the Law in that the Amount of Maintenance Awarded Improperly Included Expenses of the Children, Improperly Included an Expense for Respondent's Retirement Contribution, Exceeded Respondent's Reasonable Needs, and Exceeded Appellant's Ability to Pay.**

Barth v. Barth, 372 S.W.3d 496 (Mo. Ct. App. 2012)

Buchholz v. Buchholz, 166 S.W.3d 146 (Mo. Ct. App. 2005)

Brooks v. Brooks, 957 S.W.2d 783 (Mo. Ct. App. 1997)

Tarneja v. Tarneja, 164 S.W.3d 555 (Mo. Ct. App. 2005)

ARGUMENT

I. The Trial Court Erred in Finding that its Second Amended Interlocutory Judgment was Final Because It Misapplied the Law in that the Trial Court Did Not Exhaust Its Jurisdiction and Its Decree was Not a Final Judgment from Which an Appeal Can be Taken in that Its Second Amended Interlocutory Judgment Did Not Dispose of All Issues, Including the Complete Division of Marital Property and Debts.

A. Standard of Review

The appellate court will affirm a trial court’s judgment in a dissolution action unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Allen v. Allen (Allen II), 961 S.W.2d 891, 893 (Mo. Ct. App. 1998) (citing Hoffman v. Hoffman, 676 S.W.2d 817, 818 (Mo. 1984) (en banc)); Murphy v. Carron, 536 S.W.2d 30, 32(Mo. 1976) (en banc).

Husband respectfully suggests that the trial court misapplied the law when it declared that its Second Amended Interlocutory Judgment was “final for purposes of appeal as to all issues herein addressed, as there is no just reason for delay” because the judgment did not dispose of all the issues, including complete division of the parties’ assets and debts.

B. A Dissolution Judgment is Not Final and Appealable Unless It Disposes of All Issues

A dissolution decree is not final and appealable unless it disposes of all issues in the case. In re Marriage of Nardini (Nardini I), 306 S.W.3d 165, 171 (Mo. Ct. App. 2010) (citation omitted). It is long held that when a trial court does not fully divide the property of the parties in a dissolution action, it does not exhaust its jurisdiction and, consequently, its decree is not a final judgment from which an appeal can be taken.

Jonusas v. Jonusas, 168 S.W.3d 117, 120 (Mo. Ct. App. 2005). Thus, a dissolution judgment “is not final and appealable unless it disposes of *all* the marital property and debts.” Id. (emphasis added). “A final judgment must resolve all issues in a case and leave nothing for future determination.” Neely v. Neely, 169 S.W.3d 577, 579 (Mo. Ct. App. 2005) (citing Gibson v. Brewer, 952 S.W.2d 239, 244 (Mo. 1997) (en banc)).

The trial court declared that its Second Amended Interlocutory Judgment, entered on January 14, 2014, was “final for purposes of appeal as to all issues herein addressed, as there is no just reason for delay.” (L.F. 226). Said judgment awarded certain marital property to Wife and awarded Husband “the remaining marital property.” (L.F. 225-226). However, the judgment also found that Third Party Respondents were the alter ego of Husband and that their corporate veil should be pierced (L.F. 222) but ordered that the division of their property and assets be “tabled until the bankruptcy stay is lifted” (L.F. 226). Third Party Respondents consist of Husband’s businesses formed during the course of the parties’ marriage. (Tr. 132:13-21, 220:20-21, Feb. 13, 2013). In not disposing of Third Party Respondents’ property and debts, the trial court did not make a complete division of Husband and Wife’s marital property and debts. Because the Second Amended Interlocutory Judgment did not dispose of all of the parties’ property and debts and left division of remaining property for future determination, it could not be considered a final judgment. Thus, the trial court did not exhaust its jurisdiction and erroneously declared that its Second Amended Interlocutory Judgment was final and appealable.

Further, the Second Amended Interlocutory Judgment was not a final judgment and should not have divided the parties' property because the bankruptcy filing by one of the Third Party Respondents automatically stayed the dissolution action because the dissolution action included a division of property. 11 U.S.C. § 362 (2010). The automatic stay precluded the trial court from dividing the parties' property because Third Party Respondents' assets were cross-collateralized with Husband and Wife's assets (L.F. 224), Husband and Wife personally guaranteed Third Party Respondents' debts and liabilities (Tr. 65:2-9, 266:18-268:10, Feb. 13, 2013), and the trial court found that Third Party Respondents were the alter ego of Husband and pierced their corporate veil (L.F. 222). Therefore, the Second Amended Interlocutory Judgment was not final and should not have divided property.

As further evidence that the Second Amended Interlocutory Judgment was not final, the trial court held a final hearing on March 30, 2016 (Tr. 7, Mar. 30, 2016) and subsequently entered its Final Judgment Entry for Dissolution of Marriage on April 19, 2016 (L.F. 379). By the trial court's own admission, as stated in its Final Judgment, the March 30, 2016 hearing was "for hearing on a Final Judgment" (L.F. 381), where the court "considered the evidence reopened with respect to property and debt issues unresolved in [its] Interlocutory Judgment" (L.F. 382). The trial court reopened the evidence in order to make a final and complete division of property, which further indicates that the trial court had not previously exhausted its jurisdiction. In addition to reopening evidence at the final hearing, the trial court took up Husband's Motion to Reopen or Amend, filed on October 29, 2015. (L.F. 288). The trial court stated that it

treated Husband's motion "as a Motion to Modify with the burden on [Husband] to establish that there was a change in circumstances so substantial and continuing since the Second Amended Interlocutory Judgment was entered." (L.F. 382). Essentially, the trial court treated the hearing on March 30, 2016 as a final dissolution hearing on some issues and as a modification hearing on other issues. Despite the trial court's designation of Husband's Motion to Reopen or Amend as a motion to modify, the March 30, 2016 hearing was a final dissolution hearing. This is further evidenced in that the Final Judgment also restored wife's maiden name (L.F. 403) after the trial court permitted Wife to file her Third Amended Petition for Dissolution of Marriage and Petition to Disburse Marital Property on March 28, 2016 (L.F. 303), just two days before the final hearing. Finally, the court also amended the judgment as to custody, visitation, and child support, although no motion to modify had been filed.

Consequently, this Final Judgment, so titled by the trial court, was the one and only final judgment of the court and thus the court's previous Second Amended Interlocutory Judgment was not a final judgment. The final and appealable judgment, which gives this Court jurisdiction, is the trial court's Final Judgment, entered on April 19, 2016, not its Second Amended Interlocutory Judgment, entered on January 14, 2014.

C. An Interlocutory Judgment is Not Final

"An 'interlocutory' judgment is defined as 'not final' and in a legal sense is said to be something intervening between the commencement and the end of a suit which decides some point or matter, but which is not a final decision of the whole controversy." Albright v. Kelly, 926 S.W.2d 207, 210 (Mo. Ct. App. 1996) (citation omitted). If the

decree of dissolution is interlocutory when entered and other issues remained to be disposed of, then the trial court retains jurisdiction of the decree and does not lose power to set the same aside. Dunafon v. Dunafon, 800 S.W.2d 483, 484 (Mo. Ct. App. 1990) (citation omitted).

As stated above, the trial court's Second Amended Interlocutory Judgment left property and assets unresolved and open for future determination and as such, was not a final and appealable judgment.

D. Effects of Judgment Stating "No Just Reason for Delay"

For cases involving multiple parties, Rule 74.01(b) recognizes an exception to the rule that a final judgment must resolve all issues in a case. Neely, 169 S.W.3d at 579. The trial court must make an express determination that "there is no just reason for delay." Id. In order for the Court of Appeals to have jurisdiction, the trial court "must either dispose of all the issues as to all the parties or expressly designate in the judgment that 'there is no just reason for delay.'" Ameriquet Mortg. Co. v. Gehrig, 245 S.W.3d 239, 241 (Mo. Ct. App. 2007). In addition to the designation that there was no just reason for delay, a judgment must also dispose of one entire claim or distinct judicial unit in order to constitute a final judgment. Carney v. Yeager, 231 S.W.3d 308, 310 (Mo. Ct. App. 2007) (citing Gibson, 952 S.W.2d at 244). Claims are considered to be a separate or distinct judicial unit "if they require proof of different facts and application of distinguishable law." Creel v. Union Elec. Co., Inc., 950 S.W.2d 315, 317 (Mo. Ct. App. 1997) (citation omitted). A trial court should apply the following four-factor test in deciding whether there is, in fact, no just reason for delay:

(1) whether the action remains pending in the trial court as to all parties; (2) whether similar relief can be awarded in each separate count; (3) whether determination of the claims pending in trial court would moot the claim being appealed; and (4) whether the factual underpinnings of all claims are intertwined.

Atkins v. Jester, 309 S.W.3d 418, 424 (Mo. Ct. App. 2010) (citations omitted). The purpose of requiring a court to find that there is no just reason for delay before entering a judgment as to fewer than all claims or parties “is to avoid redundant review of multiple appeals based on the same underlying facts and similar legal issues.” Creel, 950 S.W.2d at 317.

Dissolution of marriage, property disposition, and custody are *not* separate claims that can be certified for appeal as to fewer than all claims or parties, *even if* the trial court finds that its judgment is appealable and states there is no just reason for delay. Gould v. Rafaeli, 804 S.W.2d 758, 759 (Mo. Ct. App. 1990) (emphasis added). “A petition for dissolution advances a single claim...The numerous other issues involved, such as custody, property disposition, and support are merely questions which are ancillary to the cause of action.” Id. (citation omitted). “[A] proceeding for dissolution of marriage must be *fully* adjudicated before review on appeal. Missouri courts have repeatedly held that where the trial court fails to completely divide the marital property, the judgment is not final and the appeal must be dismissed.” Id. (citation omitted) (emphasis added). A dissolution judgment where property has not been distributed is not final or appealable and is subject to revision or modification on all issues. Navarro v. Navarro, 465 S.W.3d

912, 915 (Mo. Ct. App. 2015). “Where a trial court has not been divested of its authority to act,...it ‘retains control over every phase of the case so that it may correct errors, or, in its discretion, modify or set aside orders or judgments until its jurisdiction is extinguished by the judgment becoming final and appealable.’” Nardini I, 306 S.W.3d at 171 (citing Jonusas, 168 S.W.3d at 121).

Despite the trial court’s designation that its Second Amended Interlocutory Judgment was “final for purposes of appeal as to all issues herein addressed, as there is no just reason for delay,” the judgment was not final because it did not dispose of all issues, specifically all property and debts of the parties. Missouri case law is clear that property division, as well as other issues raised in a petition for dissolution of marriage, is ancillary to a single cause of action and all based on similar underlying facts and legal issues. To say otherwise goes against the purpose of Rule 74.01. So long as any of these ancillary issues remain pending, the judgment is not final. Thus, because the trial court did not make a complete division of the parties’ property and debts and left some open for future determination, it did not exhaust its jurisdiction and erroneously designated its Second Amended Interlocutory Judgment as final.

II. The Trial Court Erred in Entering an Award of Maintenance Before a Final Division of Property was Entered and Refusing to Reconsider or Terminate Maintenance Because It Misapplied the Law in that the Division of Marital Property Must Necessarily Precede the Determination of Whether Maintenance is Required.

A. Standard of Review

The appellate court will affirm a trial court’s maintenance determination unless it is not supported by substantial evidence, is against the weight of the evidence,

erroneously declares or applies the law, or is an abuse of discretion. Scruggs v. Scruggs, 161 S.W.3d 383, 394 (Mo. Ct. App. 2005) (citing Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976) (en banc); Hammer v. Hammer, 139 S.W.3d 239, 240 (Mo. Ct. App. 2004)).

Husband respectfully suggests that the trial court misapplied the law when it ordered Husband to pay maintenance to Wife before it made a complete division of the parties' marital property and debts.

B. The Division of Property Must Precede the Determination of Maintenance

Because the Second Amended Interlocutory Judgment was not final and did not contain a complete division of the parties' marital property and debts, its award of maintenance to Wife was improper. Pursuant to Section 452.335 of the Missouri Revised Statutes, a trial court can only award maintenance if it finds that the party seeking maintenance "[l]acks sufficient property, *including marital property* apportioned to him, to provide for his reasonable needs" and he "[i]s unable to support himself through appropriate employment." (Emphasis added). Therefore, in order to determine whether maintenance should be awarded, the trial court must *first* determine whether the party seeking maintenance lacks sufficient property to provide for her needs and is unable to support herself through appropriate employment. Vanderpool v. Vanderpool, 250 S.W.3d 791, 796 (Mo. Ct. App. 2008) (emphasis added). "It is clear...that the award of maintenance and the appropriate division of marital property are distinct matters for trial court determination." Id. Accordingly, "[t]he division of marital property *must necessarily precede* the determination of whether maintenance is required." Id. (citing Elrod v. Elrod, 144 S.W.3d 373, 381 (Mo. Ct. App. 2004) (emphasis added)).

In Vanderpool, the Court of Appeals reversed and remanded the trial court's award of maintenance, stating that "the trial court must first consider its division of the parties' marital and nonmarital properties" before determining the amount of maintenance. 250 S.W.3d at 797. In the instant case, the trial court ordered Husband to pay Wife maintenance in its Second Amended Interlocutory Judgment, entered on January 14, 2014, despite not having fully divided the property and debts of the parties. (L.F. 225). The final division of the parties' property and debts did not occur until the trial court entered its Final Judgment on April 19, 2016, over two years later. (L.F. 379). The trial court improperly awarded maintenance prior to dividing all of the parties' property and debts in clear contradiction to Vanderpool. 250 S.W.3d 791. Because the trial court's Second Amended Interlocutory Judgment was interlocutory and not final, the trial court did not have the authority to award maintenance in its Second Amended Interlocutory Judgment or in any judgments prior to its Final Judgment.

On June 23, 2015, with new counsel, Husband filed his Motion to Reconsider and Terminate Maintenance Award praying for an order to set aside the maintenance award, including the retroactive maintenance order, suggesting that the award of maintenance was not proper because a final division of property had not occurred and thus, a final judgment had not been entered. (L.F. 259). On July 13, 2015, Wife filed her Suggestions in Opposition to Husband's motion suggesting that said motion was not timely filed and even if it were, it should be denied because the Second Amended Interlocutory Judgment was final and Husband failed to challenge the court's findings following the entry of its judgment. (L.F. 265). Husband's Response to Wife's Suggestions in Opposition argues

that the trial court's Second Amended Interlocutory Judgment was not final because it did not dispose of all issues and, therefore, the court retained jurisdiction of the decree and retained the authority to correct, modify, or set aside its orders or judgments. (L.F. 274). After a hearing on the matter on August 12, 2015, the trial court took the matter under advisement and subsequently, on September 18, 2015, entered a judgment dismissing Husband's motion as untimely. (L.F. 278). Husband argued then, and continues to argue now, that the trial court's Second Amended Interlocutory Judgment improperly awarded retroactive maintenance because it was not a final judgment. Husband's Motion to Reconsider gave the trial court an opportunity to correct its judgment and set aside its award of maintenance, which the court had the authority to do because it retained jurisdiction and never divested itself of its authority to act.

III. The Trial Court Erred in Ordering that Appellant Pay Respondent Retroactive Maintenance Because It Misapplied the Law in that Section 452.335 Only Authorizes Awards of Prospective Maintenance.

A. Standard of Review

The appellate court will affirm a trial court's maintenance determination unless it is not supported by substantial evidence, is against the weight of the evidence, erroneously declares or applies the law, or is an abuse of discretion. Scruggs, 161 S.W.3d at 394 (citations omitted).

Husband respectfully suggests that the trial court misapplied the law when it ordered Husband to pay retroactive maintenance to Wife because Section 452.335 authorizes only prospective maintenance.

B. Section 452.335 Authorizes Prospective, Not Retrospective, Maintenance

Section 452.335.1 invests the trial court with authority to award maintenance as part of a dissolution of marriage so long as other requirements are met. Stock v. Stock, 158 S.W. 3d 284, 286 (Mo. Ct. App. 2005). “It is well-settled” that this Section only authorizes a trial court to award maintenance prospectively and not retroactively. In re Marriage of Nardini (Nardini II), 389 S.W.3d 303, 304 (Mo. Ct. App. 2013) (citations omitted). Because Section 452.335 only authorizes the trial court to award prospective maintenance, an award of retroactive maintenance in a judgment of dissolution is a misapplication of the law. See Richmond v. Richmond, 164 S.W.3d 176 (Mo. Ct. App. 2005). The trial court in the present case entered a Second Amended Interlocutory Judgment on January 14, 2014 and awarded maintenance to Wife retroactive to November 1, 2011. (L.F. 223). The trial court reiterated this retroactive maintenance award in its Final Judgment, entered on April 19, 2016, stating that “its Interlocutory Judgment found that...the maintenance award should be entered *retroactively* to the first date of the month immediately following the Entry of Appearance in this cause by [Husband].” (L.F. 380) (emphasis added).

In a case nearly identical to this case, the Court of Appeals reversed an award of maintenance as a prohibited award of retroactive maintenance when the trial court, on remand, awarded maintenance retroactive to the date of its original judgment, which the appellate court had previously concluded was not final and appealable. Nardini II, 389 S.W.3d 303. In that case, Husband’s earlier appeal, Nardini I, 306 S.W.3d 165, was dismissed because the trial court did not dispose of “all of the parties’ property and debts” and thus did not enter a final judgment. Nardini II, 389 S.W.3d 303, 304. The

Court of Appeals held that the trial court's original judgment was "an interlocutory order that was subject to revision until the actual final judgment was entered." Id. at 305 (citation omitted). On remand, the trial court made a complete division of property and debts and awarded maintenance retroactive to the date of its original judgment. Id. at 304. The Nardini II court held that the trial court's second judgment, entered on remand after the first appeal, was the trial court's "first, and only, final judgment" and thus maintenance could not commence earlier than the date of the latter judgment. Id. at 305-06. If the appellate court in Nardini II, held that maintenance was impermissible before a final judgment was entered, where the trial court and parties believed that all property had been divided, the trial court in this case certainly should not have awarded maintenance when it acknowledged that not all of the property had been divided.

Nardini II also held that the trial court's award of maintenance could not be considered as temporary maintenance permitted under Section 452.315 because no motion for temporary maintenance was filed. Id. at 306 n.2. Wife in this case never filed a motion requesting temporary maintenance, therefore, the trial court's award of retroactive maintenance was improper and should be set aside.

IV. The Trial Court Erred in Awarding Maintenance Because It Misapplied the Law in that It Applied a Modification of Maintenance Standard at the Final Hearing Instead of Standard Required by Section 452.335.

A. Standard of Review

The appellate court will affirm a trial court's maintenance determination unless it is not supported by substantial evidence, is against the weight of the evidence,

erroneously declares or applies the law, or is an abuse of discretion. Scruggs, 161 S.W.3d at 394 (citations omitted).

Husband respectfully suggests that the trial court misapplied the law when it applied a modification of maintenance standard at the final hearing instead of applying the requirements of Section 452.335.

B. Application of the Wrong Standard is Reversible Error

As argued above, the trial court's final judgment was its Final Judgment, entered on April 19, 2016, and not its Second Amended Interlocutory Judgment, entered on January 14, 2014. In its Final Judgment, the trial court stated that it reopened the evidence with respect to unresolved property and debt issues and treated Husband's Motion to Reopen or Amend as a motion to modify with the burden on Husband to establish a substantial and continuing change in circumstances. (L.F. 382). The trial court subsequently found that Husband "failed to meet his burden...with respect to his income" and that "no modification should occur." (L.F. 397). The court further found that even if it had not placed this burden on Husband, Husband's income remained unchanged. Id. However, by the time of the final hearing, all of the assets of the businesses had been foreclosed upon, the businesses derived no income (Tr. 118-19, Mar. 30, 2016), and Husband's income and income potential were significantly reduced (id. at 77-86, 98). Because the final hearing did not occur until March 30, 2016, the trial court should not have applied this modification standard and should have instead applied the statutory requirements of Section 452.335 in its determination of maintenance.

Under Section 452.335, the determination of a maintenance award is a two-step process. Tarneja v. Tarneja, 164 S.W.3d 555, 564 (Mo. Ct. App. 2005) (citing Crews v. Crews, 949 S.W.2d 659, 666 (Mo. Ct. App. 1997)). First, pursuant to Section 452.335.1, the trial court must determine that there is a need for maintenance by finding that the spouse seeking maintenance lacks sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment. Id. (citation omitted). Next, the trial court must determine the amount and duration of maintenance based on the statutory factors of Section 452.335.2, which requires the trial court to balance the reasonable needs of the spouse seeking maintenance against the ability of the other spouse to pay. Id. (citation omitted). Instead of applying the required two-step process of Section 452.335, the trial court in this case improperly applied a modification standard. The trial court committed reversible error when it applied the wrong standard. Stirling v. Maxwell, 45 S.W.3d 914, 916 (Mo. Ct. App. 2001). In Stirling, the appellate court found that the trial court’s judgment and remarks indicated that the trial court “applied the wrong standard in weighing the evidence by searching for changed circumstances.” Id. The Stirling court further noted that in declaring that the trial court applied the wrong standard, the appellate court could not infer what the trial court’s judgment would have been if it had applied the correct standard and, consequently, reversed and remanded the matter to the trial court. Id.

In the present case, in regards to maintenance, the trial court applied a modification standard at the final hearing instead of applying the statutory requirements

of Section 452.335. In applying the wrong standard, the trial court misapplied the law and committed reversible error.

V. The Trial Court Erred in Its Imputation of Appellant's Income Because (A) It Misapplied the Law in that Appellant's Diminished Income was Not an Attempt to Evade His Support Obligations and Respondent Provided No Evidence to the Contrary and (B) It was Against the Weight of the Evidence in that the Imputed Income was Not Based on Existing Circumstances, Appellant Did Not Have the Capacity to Earn the Imputed Amount, and the Family's Standard of Living Would Have Been Reduced Whether or Not the Marriage Dissolved.

A. Standard of Review

The appellate court will affirm a trial court's judgment in a dissolution action unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Allen II, 961 S.W.2d at 893 (citations omitted).

Husband respectfully suggests that the trial court abused its discretion in imputing a \$5,000.00 monthly income to him because the imputed income amount was a misapplication of the law and against the weight of the evidence.

B. Imputation of Income Requires Evidence of Evading Support Obligations

In Buchholz v. Buchholz, the appellate court held that the imputation of \$145,000.00 annual income to husband was not supported by substantial evidence and was a misapplication of the law despite the fact that husband previously earned an annual income of about \$145,000.00 prior to the failure of his business and bankruptcy filing. 166 S.W.3d 146 (Mo. Ct. App. 2005). The Buchholz court found that nothing in the record indicated that husband's reduced income was a result of a deliberate or voluntary attempt to avoid support obligations and wife did not present any evidence that husband

had made less than a good faith effort to obtain employment or that such employment was available. Id. at 154-56. “The theory behind imputing income to a spouse...is directed toward preventing a spouse from escaping responsibilities to the family by deliberately or voluntarily reducing his or her income.” Id. at 152 (citations omitted). Under *proper circumstances*, a trial court may impute income to a spouse according to what he or she could earn using his or her best efforts to gain suitable employment. Id. at 153 (citation omitted). Although these circumstances are determined on a case-by-case basis, it includes cases where a party has voluntarily reduced his or her income without justification and cases where a party involuntarily lost a job but failed to use best efforts to obtain a new job, refused to accept employment offers, or failed to show that the unemployment was other than temporary. Id. “[I]t is axiomatic that there must be evidence to support a finding that the parent is deliberately limiting his or her work to reduce income before it is appropriate to impute income.” Id. at 156 (citation omitted). “Courts should not impute income where the record does not establish an attempt to evade parental responsibilities.” Id. at 156 (citation omitted).

The Buchholz court held that despite the trial court's finding that husband's testimony regarding his efforts to obtain employment was not credible, wife did not present any evidence that husband “failed to make good faith efforts to find better employment, that such employment was available, or evidence that would support the imputation of \$145,000[.00] per year annual income to [h]usband.” Id. at 154. The appellate court further found that nothing in record indicated that husband's diminished income was a result of a deliberate or voluntary attempt to avoid support obligations. Id.

at 156. Likewise, in our present case, there was no evidence that Husband deliberately diminished his income to avoid support obligations or did not use good faith efforts to obtain employment. In fact, as Wife admitted, Husband is an extremely hard worker (Tr. 109:12-15, Feb. 13, 2013) and prior to the parties' separation and throughout the proceeding, Husband continued to work in an attempt to salvage his business entities (Tr. 37:7-21, 69:16-18, Apr. 29, 2013). Then after the failure of his businesses, Husband attempted to find other employment but was unsuccessful (Tr. 83:1-6, Mar. 30, 2016) and continued to work in project management (id. at 98:1-10). Despite this evidence, the trial court imputed a \$5,000.00 monthly income to Husband although, at the time of the final hearing on March 30, 2016, his monthly income was approximately \$2,500.00. (Tr. 77, Mar. 30, 2016).

Because the imputation of income requires evidence that a spouse is deliberately evading parental responsibilities and nothing in the record indicated that Husband's diminished income was a result of a deliberate attempt to avoid his support obligations, the trial court should not have imputed a \$5,000.00 monthly income to Husband. The evidence also does not support a finding that Husband failed to make good faith efforts to obtain better employment or that such employment was available and Wife did not provide any evidence to the contrary, as required by Buchholz. The trial court's imputation of \$5,000.00 monthly income to Husband was against the weight of the evidence and was a misapplication of law and should be set aside in both the trial court's Form 14 calculations and its maintenance determination.

C. Maintenance Must Be Based on Existing Circumstances

In its Second Amended Interlocutory Judgment, the trial court imputed a monthly income to Husband of \$5,000.00. (L.F. 222-223). In its Final Judgment, the trial court found that this income imputed to Husband should not be disturbed “due to his income-producing capabilities.” (L.F. 396). For the sake of the arguments in this section, most of Husband’s arguments regarding the imputed income refer to evidence from both the 2013 and 2016 hearing because after the 2013 hearing, the trial court imputed income to Husband in its Second Amended Interlocutory Judgment and after the 2016 hearing, the trial court found that this imputation should not be disturbed its Final Judgment. Both imputations of Husband’s income were against the weight of the evidence and a misapplication of the law. The trial court found this amount to be appropriate because of “the monies expended by the Third Party Respondents for [Husband’s] personal and non-business benefit.” (L.F. 222). As support for its finding, the trial court found that Husband made representations to lending institutions that his total net worth was in excess of \$7 million dollars from a personal financial statement dated March, 2010. (L.F. 222). The statements that the trial court relied on were nearly three years old at the time of the 2013 hearings and were based on figures that represented the business entities’ financial states more than six years prior to the entry of the court’s Final Judgment in 2016. Additionally, figures on a financial statement can be different from those on a tax return because financial statements can be prepared on a different basis, as acknowledged by Wife’s expert witness. (Tr. 174:2-8, Feb. 13, 2013).

“The case law is clear that ‘[a] dissolution court’s award of maintenance must be based on the parties’ *existing circumstances*.’” Workman v. Workman, 293 S.W.3d 89,

99-100 (Mo. Ct. App. 2009) (citing In re Marriage of Maninger, 106 S.W.3d 4, 11(Mo. Ct. App. 2003)). At the time of the first hearings, on February 13, 2013 and April 29, 2013, the parties' financial state had already been declining for years. (Tr. 272:12-16, Feb. 13, 2013). For several years, including three years prior to the parties' separation, Husband and at least two business partners had not received paychecks. (Tr. 273:5-13, Feb. 13, 2013; Tr. 39:1-2, Apr. 29, 2013). Prior to the entry of the original Interlocutory Judgment, The Commons Development Group, LLC, one of Third Party Respondent business entities, filed a Chapter 11 bankruptcy, which stayed all matters involving that debtor. (S.L.F. 5). In the trial court's Interlocutory Judgment, the trial court found that it could not assign a value or dispose of the debtor's property, could not value or award any assets of Third Party Respondents due to them being cross-collateralized with Husband's assets, and postponed the division of property and assets of Third Party Respondents until the bankruptcy stay was lifted. (L.F. 128, 129). Prior to the Second Amended Interlocutory Judgment, Earthworks Excavation Company, another Third Party Respondent business entity, also filed a Chapter 11 bankruptcy, staying pending matters of that debtor. (S.L.F. 8). By the time of the final hearing on March 30, 2016, one of the business entities had dissolved, all of Third Party Respondents' property had been foreclosed on, all of Third Party Respondents' assets had been liquidated or repossessed, and Third Party Respondents derived no net income. (Tr. 118-119, Mar. 30, 2016). Because of failing businesses, the multiple court actions and garnishment against Husband and Third Party Respondents (id. at 81:7, 83:13-14, 84:20-85:3), and Husband being incarcerated for approximately four and a half months for failure to pay support (id.

at 67:10-11), Husband's income was significantly reduced. Additionally, Husband's credit was diminished (id. at 78:54), Husband's reputation was severely damaged (id. at 86:14-87:5), and Husband's ability to find meaningful employment had been unsuccessful (id. at 83). The trial court should have considered all of these facts in determining its award of maintenance as they were existing at the time of the hearing and were due to circumstances beyond Husband's control. Instead, the trial court relied on a financial statement from March, 2010.

Further, a trial court has the discretion to ignore Husband's income history and instead more accurately "look at his income from a specific year, if it found that amount to be an accurate predictor of his income." Laubinger v. Laubinger, 5 S.W.3d 166, 179 (Mo. Ct. App. 1999) (citation omitted). The trial court should have looked at Husband's financial situation at the time of the original and final hearings instead of his past income history because his then-current income was a much more accurate predictor of his income. Even by Wife's own admission, the economy took a negative turn and had an adverse effect (Tr. 108-109; Feb. 13, 2013) and the parties' tax liabilities had caught up to them (id. at 55). The trial court further failed to take into consideration all of Third Party Respondents' debts and liabilities in determining the overall net worth of Third Party Respondents. The total debts and liabilities of Third Party Respondents significantly outweighed its overall assets and income. (Tr. 160:1-4, Apr. 29, 2013). By the time of the final hearing, Third Party Respondents had virtually no assets, derived no income, and had millions of dollars in debts. (L.F. 308-09; S.L.F. 29-33; Tr. 53:10-13, Mar. 30, 2016).

D. Imputation of Income Requires Capacity to Earn

A party must have the capacity to earn the imputed income and the ability to pay the support awarded. Buchholz, 166 S.W.3d at 153 (citation omitted). The fact that a spouse “previously made more money is not alone a sufficient basis upon which to impute income at those levels.” Id. (citations omitted). For instance in Keck v. Keck, husband refused his company’s offer to rehire him at a twenty-five percent reduction during a strike, was not rehired at the end of the strike, and obtained other employment earning less than eighteen percent of his original income. 820 S.W.2d 727 (Mo. Ct. App. 1991). The Keck court reversed the trial court’s imputation of income to husband, holding that husband did not voluntarily place himself in the position of diminished income without justifiable explanation and his diminished income would have reduced the family’s standard of living whether or not the marriage was dissolved. Id. at 729. Similarly, in Buchholz, where husband previously earned an annual income of about \$145,000.00 prior to the failure of his business and bankruptcy filing, the appellate court found that the “income and standard of living in the Buchholz family would have diminished whether the marriage had dissolved or not.” Buchholz, 166 S.W.3d at 156.

Like Keck and Buchholz, it is clear from the evidence in our present case that the family’s income and standard of living would have diminished even if the marriage remained intact. It is undisputed that even prior to Husband and Wife’s separation, they owed a substantial amount of money to the Internal Revenue Service and Buchanan County for tax debts, among other debts. (Tr. 22, 55, 69, Feb. 13, 2013; 39, 99, 101, Apr. 29, 2013). Third Party Respondent business entities were failing for some time (Tr. 272,

Feb. 13, 2013; Tr. 9-10, Apr. 29, 2013), had substantial debt with personal guarantees by Husband and Wife (Tr. 65, 72, 111, 128-29, Feb. 13, 2013), had multiple court actions filed against them (*id.* at 324, 331; Tr. 86, Mar. 30, 2016), and had foreclosure actions against them (Tr. 82, Apr. 29, 2013; Tr. 81, 115, Mar. 30, 2016), all of which eventually led to the demise of the businesses, considerable debt, and repossession, liquidation, or foreclosure of all property and assets (Tr. 115, 117-18, Mar. 30, 2016; L.F. 309). The collapse of Husband's businesses was essentially inevitable and imminent long before the parties separated and the family would have consequently suffered a reduced standard of living even if the marriage remained intact. Thus, the trial court's imputation of a \$5,000.00 monthly income to Husband was not proper because it was beyond his capacity to earn.

VI. The Trial Court Erred in Awarding Maintenance Because It Misapplied the Law in that the Amount of Maintenance Awarded Improperly Included Expenses of the Children, Improperly Included an Expense for Respondent's Retirement Contribution, Exceeded Respondent's Reasonable Needs, and Exceeded Appellant's Ability to Pay.

A. Standard of Review

The appellate court will affirm a trial court's judgment in a dissolution action unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Allen II, 961 S.W.2d at 893 (citations omitted). The trial court has broad discretion in awarding maintenance. Allen II, 961 S.W.2d at 893 (citing Crews v. Crews, 949 S.W.2d 659, 663 (Mo. Ct. App. 1997)). An appellate court will not disturb a trial court's award of maintenance unless it is "patently unwarranted or wholly beyond means of the spouse who pays maintenance. Allen II, 961

S.W.2d at 893 (quoting Allen v. Allen (Allen I), 927 S.W.2d 881, 885 (Mo. Ct. App. 1996)).

Husband respectfully suggests that the trial court abused its discretion in awarding Wife maintenance in the amount that exceeded her reasonable needs, which included unallowable expenses, and was wholly beyond his means.

B. An Award of Maintenance Should Not Include Expenses of the Children

An award of maintenance is for the needs of the receiving spouse, not for child support, and must be limited to just the needs of the receiving spouse. Buchholz, 166 S.W.3d at 158 (citation omitted). Section 452.335 governs spousal maintenance and does not extend to “amounts expended for the direct care and support of dependent children.” Id. (citation omitted). A trial court errs when it improperly considers expenses of the children “in determining the need and amount of maintenance.” Id. (“The trial court...erroneously included expenses solely attributable to the children in determining the amount of Wife’s reasonable needs for maintenance.”).

The trial court’s Second Amended Interlocutory Judgment in the present case found that Wife’s monthly expenses of \$5,498.87, as reported in her Income and Expense Statement, were necessary and reasonable. (L.F. 223). In its Final Judgment, the trial court did not make a specific finding regarding Wife’s needs or expenses, but instead held that the maintenance award should not be modified because Husband did not prove a substantial and continuing change in circumstances. (L.F. 397). Although the trial court’s Final Judgment was silent as to whether the court found Wife’s expenses to be reasonable and necessary, it is inferred that the court concluded so because it found that

the previously ordered maintenance amount should continue. (L.F. 397). However, Wife's 2013 Income and Expense Statement that the court relied on included mathematical errors and improperly contained expenses for the children. (Pet'r's Ex. 3, Feb. 13, 2013). Wife's monthly expenses as reported in both her 2013 and 2016 Income and Expense Statements included expenses for the children as "Other Monthly Living Expenses" in the amounts of \$1,775.00 [sic] and \$1,800.00, respectively. (Pet'r's Ex. 3, Feb. 13, 2013; S.L.F. 15). Both statements also included an additional \$125.00 weekly [sic] expense for work-related childcare for the youngest child.² (Id.) The trial court should have omitted the children's expenses in its determination of maintenance but instead, in its Second Amended Interlocutory Judgment, found that Wife's monthly expenses of \$5,498.87 were "necessary and reasonable." Based on this finding, the trial court then found that Wife was unable to "support herself based on her income and the assets awarded to her...and, accordingly...[was] entitled to periodic maintenance from [Husband]." (L.F. 223).

An award of maintenance is limited to only the needs of the receiving spouse and should not include expenses for dependent children. Therefore, the trial court erred in that the court included the children's expenses in its determination of maintenance when

² Wife alleges that during a 12-week summer, she pays a total of \$1,500.00 in work-related childcare for the parties' youngest child, which averaged to a monthly expense of \$125.00. However, Wife testified that during the 12-week summer, she actually pays \$25.00 per day and exercises parenting time only two days per week, which totals \$600.00 per summer and averages to \$50.00 per month, not \$125.00. (Tr. 125-26, Feb. 13, 2013).

it relied on Wife's total monthly expenses as stated in her Income and Expense Statements, which included expenses for the children.

C. An Award of Maintenance Should Not Include an Expense for Retirement

The standard for determining which expenses are allowable in determining an award of maintenance is whether that expense is a reasonable need of the receiving spouse. Brooks v. Brooks, 957 S.W.2d 783 (Mo. Ct. App. 1997). Both of Wife's 2013 and 2016 Income and Expense Statements included an expense shown as a payroll deduction for her Mosers retirement account, which is not a reasonable need and should not have been included in the trial court's determination of maintenance. (Pet'r's Ex. 3, Feb. 13, 2013; Pet'r's Ex. 9, Mar. 30, 2016). In Brooks, the western district held that the contribution to wife's retirement fund was not an allowable expense and should not have been considered in the trial court's determination of maintenance for a number of reasons. First, "the purpose of maintenance [is] to provide for the present support [of a spouse] based on present circumstances" and is not intended to provide for future support. Id. at 791. "Future support is to be addressed in the future pursuant to the statutory modification procedure enacted by our legislature." Id. at 793. Additionally, a forced contribution to a spouse's retirement fund would potentially require the paying spouse to support the receiving spouse even after a remarriage or death and would improperly allow the receiving spouse to accumulate capital or build an estate. Id. at 792.

In the present case, Wife's 2013 Income and Expense Statement included a payroll deduction for her Mosers retirement contribution of \$39.54 per pay period, which totals to an average of \$85.67 per month based on Wife's bi-weekly pay. (Pet'r's Ex. 3, Feb.

13, 2013. In Wife's 2016 Income and Expense Statement, the contribution to her retirement account increased to \$42.39 per pay period, which totals to \$91.85 per month. (Pet'r's Ex. 9, Mar. 30, 2016). In its Second Amended Interlocutory Judgment, the trial court found the entire amount of Wife's monthly expenses as stated in her Income and Expense Statement to be her necessary and reasonable expenses. (L.F. 223). The trial court then found that Wife was unable to meet her needs based on her income and ordered Husband to pay maintenance. In its Final Judgment, the trial court did not make a specific finding regarding Wife's needs or expenses, but instead found that the previously ordered maintenance award should continue and the amount should not be modified. (L.F. 397).

D. Amount of Maintenance Award Should Not Exceed Reasonable Needs

Before awarding maintenance, a trial court must determine that there is a need for maintenance by finding that the spouse seeking maintenance lacks sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment. Tarneja, 164 S.W.3d at 564. Once this determination is made, the trial court can then determine the amount and duration of maintenance considering the ten factors in Section 452.335.2 and balancing the "reasonable needs of the spouse seeking maintenance with the other spouse's ability to pay." Id. An award of maintenance is "aimed at closing the gap between the income of the spouse who seeks maintenance and that spouse's monthly expenses." Id. (citation omitted). The amount of maintenance awarded should not exceed the receiving spouse's reasonable needs. See In re Marriage of Buchholz, 139 S.W.3d 607, 609 (Mo. Ct. App. 2004)

(holding that the trial court abused its discretion when it awarded maintenance to wife in an amount that exceeded her reasonable needs by \$866.59 and finding that maintenance should be reduced by \$866.59).

At the final hearing in the present case, Wife requested that Husband continue to pay the \$1,500.00 per month maintenance previously awarded to her in the Second Amended Interlocutory Judgment (Tr. 47:1-2, Mar. 30, 2016). The trial court granted her request for \$1,500 per month in maintenance in its Final Judgment (L.F. 401). Although Wife requested \$1,500.00 per month in maintenance, she testified that her father gives her \$500.00 a month and that she was able to meet her monthly expenses with the \$500.00 she receives from him. (Tr. 62:19-21, Mar. 30, 2016). The trial court's maintenance award of \$1,500.00 per month was an abuse of discretion because it exceeded Wife's reasonable needs by \$1,000.00. Because Wife testified that an additional \$500.00 was sufficient for her to meet her monthly expenses, any award of maintenance to her should not have exceeded \$500.00, notwithstanding whether she was entitled to maintenance or whether Husband had the ability to pay.

E. Award of Maintenance Should Not Exceed Ability to Pay

One of the statutory factors that a trial court must consider in determining the amount and duration of maintenance, which occurs after the determination that a spouse is entitled to maintenance, is whether the paying spouse has the ability to meet his or her needs in addition to paying maintenance. Buchholz, 166 S.W.3d at 153 (citation omitted). Section 452.355.2(8) requires a trial court to consider the "ability of the spouse

from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.”

At the final hearing, Wife’s testified that her monthly income was \$2,142.00 (Tr. 32, Mar. 30, 2016), however, the Income and Expense Statement that she admitted at the final hearing states that her bi-weekly pay is \$1,059.76, totaling an average of \$2,296.15 per month. (Pet’r’s Ex. 9, Mar. 30, 2016). At the time of the final hearing, Husband’s monthly income was approximately \$2,500.00. (Tr. 77, Mar. 30, 2016). Husband reported that his monthly expenses totaled \$6,634.00 (S.L.F. 15) and Wife reported that her monthly expenses totaled \$5,121.51. (Pet’r’s Ex. 9, Mar. 30, 2016). Based on each of the parties’ income and expenses, they were both unable to support themselves and the trial court’s maintenance award of \$1,500.00 per month to Wife further decreased Husband’s ability to meet his own expenses while also meeting the needs of the children and paying maintenance. Even assuming, *arguendo*, that the imputation of \$5,000.00 monthly income to Husband was proper, the trial court’s award of \$1,500.00 monthly maintenance to Wife would leave Wife in a better position than Husband. Wife’s income, as reported in her 2016 Income and Expense Statement, combined with the maintenance award totals to \$3,796.15 per month and Husband’s imputed income, less the maintenance award, totals to \$3,500.00. Even with \$3,500.00 monthly income, Husband is still unable to meet his expenses and those of the children. “An award of maintenance should not exceed the husband’s capacity to provide.” Barth v. Barth, 372 S.W.3d 496, 509 (Mo. Ct. App. 2012) (quoting Squires v. Squires, 734 S.W.2d 613, 614 (Mo. Ct. App. 1987)). The trial court’s award of maintenance to Wife for \$1,500.00 per

month exceeded Husband's ability to support himself and the children while paying maintenance.

In Barth, during the parties' marriage, husband was a real estate developer and husband and wife owned interests in numerous real estate development entities. 372 S.W.3d at 502. The family enjoyed a high standard of living during most of their marriage. Id. at 505. Then "two years leading up to trial the [development entities] generated substantial losses as the result of the declining real estate market" and by the time of the trial, "neither party was capable of supporting themselves." Id. at 502. Although husband's reported annual income was \$133,799.00, it was offset by \$321,149.00 in annual investment losses, and husband used a business line of credit to pay for his personal expenses and the marital residence where wife lived. Id. Wife in that case used an occasional salary she received from the business, loans, insurance proceeds from an automobile accident, and proceeds from the sale of land to pay for her financial needs. Id. Despite the parties' financial positions, husband testified that he agreed to pay maintenance for a limited duration and would borrow funds to do so. Id. at 508. The trial court awarded maintenance to wife for one year and wife appealed. The appellate court stated that "the trial court could have found that no maintenance should be awarded to [w]ife," and had it not been for husband's consent to pay maintenance, it "would have been error for the trial court to order or presume the borrowing of funds in determining [h]usband's ability to pay maintenance, as such a scenario is indistinguishable from ordering or presuming the liquidation of marital property in determining a spouse's ability to pay maintenance." Id. at 508-09 (citation omitted). The

appellate court also held that “while the parties...enjoy[ed] a high standard of living during most of the marriage, the record was clear that because of the down turn in the economy and its impact on the real estate market, the parties would not have continued to enjoy the same high standard of living had they remained married.” Id. 505.

Similarly, in the present case, Husband was a real estate developer for most of the marriage and, because of the down turn in the economy and its impact on the real estate market, his business endeavors began to fail during the marriage and continued to decline until their ultimate collapse, which had occurred by the time of the final hearing. The parties would have suffered financially and would not have continued to enjoy the same standard of living even if they remained married. By the time of the final hearing, Husband was liable for millions of dollars in debts from the business entities (L.F. 309, S.L.F. 29-33), Husband’s employment prospects were seriously diminished (Tr. 83, 86-87, Mar. 30, 2016), Husband’s true monthly income was approximately \$2,500.00 (id. at 77), and Husband’s business entities derived no income (L.F. 309) and had lost all of their assets (Tr. 118-19, Mar. 30, 2016). For the foregoing reasons, Husband does not have the ability to support himself and the children in addition to paying \$1,500.00 per month of maintenance to Wife.

Further, the trial court’s Judgment of Contempt, entered on May 11, 2016, provides additional evidence that Husband did not have the ability to pay \$1,500.00 in maintenance, because the trial court found that Husband was *not* in contempt (S.L.F. 34) in regards to the Motion for Contempt filed by Wife for his failure to pay court-ordered child support and maintenance (S.L.F. 13). “A prima facie case for contempt is

established in a civil contempt proceeding for noncompliance with orders in a dissolution of marriage judgment when the party alleging contempt proves...the contemnor's obligation to pay support in a specific amount and...the contemnor's failure to make payment." Watkins v. Watkins, 839 S.W.2d 745, 747 (Mo. Ct. App. 1992) (citations omitted). Once "the prima facie case is established, the contemnor bears the burden of proving his or her inability to make payments and that noncompliance was not an act of contumacy." Id.

At the final hearing in the present case, Wife established a prima facie case of contempt by presenting evidence that Husband owed maintenance and child support and failed to make those payments, which resulted in his then-current arrearage of \$63,416.00. (Tr. 35:1-10, Mar. 30, 2016). The trial court found that Husband was not in contempt. (S.L.F. 34). It reasonably follows that the trial court believed that Husband did not have the ability to pay or that his failure to pay was not an act of contumacy. Accordingly, Husband's failure to pay the support obligations was beyond his control because it exceeded his ability to pay.

CONCLUSION

Husband respectfully suggests that the trial court committed several reversible errors. The trial court erred when it designated its Second Amended Interlocutory Judgment as final and appealable because that judgment did not dispose of all of the parties' marital property and debts and thus, the trial court did not exhaust its jurisdiction. Therefore, the trial court erred and misapplied the law when it entered an award of maintenance before a final division of property was entered. Additionally, the trial court did not have the authority to enter an award of retroactive maintenance because Section 452.335 authorizes a trial court to award only prospective maintenance. The trial court further erred when it applied a modification standard and required Husband to meet a substantial change of circumstances burden instead of applying the statutory requirements of Section 452.335.

The trial court also erred in imputing Husband's income at \$5,000.00 per month because Husband's reduced income was not an attempt to evade his support obligations and Wife provided no evidence to the contrary. Additionally, the income imputation was not based on existing circumstances, Husband did not have the capacity to earn the imputed amount, and the family's standard of living would have reduced even if the marriage remained intact. It was also improper for the trial court to consider the expenses of the children in its maintenance determination and award maintenance in an amount that exceeded Wife's reasonable needs.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JARRETT A. ARCHDEKIN,)	
)	
Appellant,)	
)	
vs.)	Case No. WD79710
)	
SYBIL A. ARCHDEKIN,)	
)	
Respondent.)	

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant’s Brief complies with the limitations contained in Supreme Court Rule 84.06 and Local Rule XLI, containing 12,840 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix, as determined by Microsoft Word software.

Respectfully submitted,

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