# SUPREME COURT OF MISSOURI
## en banc

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| JEANNE H. OLOFSON,<br><br>Appellant,<br><br>v.<br><br>SCOTT W. OLOFSON, in his Capacity as Personal Representative of the Estate of TOM W. OLOFSON,<br><br>Respondent. | ) | ***Opinion issued July 22, 2021***<br><br><br><br>No. SC98043 |

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
The Honorable Susan E. Long, Judge

Jeanne Olofson (Wife) appeals from the judgment on the pleadings dismissing her Rule 74.06(b) motion to set aside, for fraud, the judgment of dissolution of her marriage to Tom Olofson (Husband) or, alternatively, the property division portion of the judgment. After Wife filed her Rule 74.06(b) motion, but before the circuit court ruled on the motion, Husband died, and the personal representative of his estate was substituted as the respondent. The personal representative filed a motion for judgment on the pleadings, which the circuit court sustained because it found Husband's death abated and rendered moot Wife's Rule 74.06(b) motion. The circuit court also held Wife's Rule 74.06(b) motion is moot because the relief sought in the motion cannot be granted in that the

property alleged to be the subject of the fraud has been sold and there is no marital estate to reallocate.

The circuit court erred in finding Husband's death abated the proceedings on Wife's Rule 74.06(b) motion. Wife's Rule 74.06(b) motion seeks to vacate the dissolution judgment for fraud related to the property division, an issue not personal to Husband, so the doctrine of abatement is not applicable. The circuit court also erred in finding the motion was moot because meaningful relief is available under Rule 74.06(b). If fraud is proven, the relief that would be "upon such terms as are just" is the vacating of only the portion of the dissolution judgment dividing the marital property while leaving the dissolution of marriage intact. Neither Husband's death nor the sale of marital property after the dissolution judgment preclude the circuit court from readjudicating the division of the marital property pursuant to section 452.330.[1] The circuit court's judgment is vacated, and the cause is remanded.

## Factual and Procedural Background[2]

Wife and Husband married in 1960 and had two children. In 2014, Wife filed for a dissolution of the marriage. The only contested issue in the dissolution proceedings was the property division. The single largest marital asset was the parties' interest in Epiq Systems, Inc., a software company purchased during the marriage using marital assets and

[1] All statutory citations are to RSMo 2016, unless otherwise stated.

[2] Under the standard of review for the circuit court's grant of judgment on the pleadings, the Court assumes the truth of the well-pleaded facts alleged in Wife's Rule 74.06(b) motion and states the facts accordingly. *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000).

debt.[3] Husband was Epiq's chairman of the board of directors, CEO, and an *ex officio* member of Epiq's strategic alternatives committee. The strategic alternatives committee was formed in September 2014 "to explore a full range of strategic and financial alternatives, including among other things, acquisitions, divestitures, or a going-private or recapitalization transaction, in order to determine a course of action that is in the best interest of all shareholders."

After months of discovery and negotiation, Husband and Wife agreed to value the Epiq stock at $13.50 per share and apportion 2,159,416 shares to Husband (the equivalent of approximately $29 million) and 1,076,639 shares to Wife (approximately $14.5 million).[4] Husband was also to receive all Epiq stock options. Husband and Wife submitted a separation and property settlement agreement to the circuit court in February 2016. The circuit court entered a judgment that incorporated the separation agreement and dissolved the marriage in March 2016. Three months later, Epiq notified its shareholders, including Wife, that OMERS/DTI submitted an offer to buy Epiq at $16.50 per share. Epiq entered into an agreement to be acquired through DTI by OMERS, and the sale closed in September 2016. As part of the sale, Husband received over $16 million in golden-parachute benefits and payouts for his outstanding stock options and restricted stock

[3] The Epiq shares were owned solely in Husband's name and by the Tom W. and Jeanne H. Olofson Foundation.

[4] Under the settlement agreement, Husband agreed to assume all $16,106,806 of the marital debt.

awards. Pursuant to the sale, Epiq became a private company combined with DTI, and both Husband's and Wife's shares were paid out in cash.

In February 2017, Wife filed a Rule 74.06(b) motion to set aside the dissolution judgment for fraud. Wife alleges Husband "deliberately misrepresented and failed to disclose facts regarding Epiq's strategic review process during the dissolution," Husband intended for her to rely on these misrepresentations, and she, in fact, relied on his statements during settlement negotiations. Specifically, Wife alleges that during a deposition in December 2015, Husband said there had been "no compelling offers" to purchase Epiq and he planned to continue with the company. He represented at the parties' settlement conference on January 7, 2016, that he had no new information to share regarding the sale of Epiq, and later executed the parties' separation agreement wherein he represented he had "made a full disclosure concerning the nature and extent of the property, assets, liabilities and financial conditions" and warranted that he had disclosed to Wife his "respective properties and income."

Assuming the truth of Wife's well-pleaded allegations pursuant to the standard of review, Husband's statements were false. He was personally pursuing potential buyers in November 2015, potential buyers were performing due diligence in December 2015, and OMERS/DTI, who became the ultimate buyer, made a non-binding preliminary bid of $15.00 per share in January 2016, the time frame in which Husband and Wife were negotiating the final terms of their settlement agreement. Nine days before Husband and Wife submitted their separation agreement to the circuit court that valued the stock at $13.50 per share, Epiq rejected the $15 per share offer because it undervalued Epiq. Then,

within 21 days of the entry of the court's dissolution judgment, Epiq received non-binding indications of interest for the purchase of Epiq from three potential buyers, including the ultimate buyer, with two of the non-binding indications of interest received within 14 days of entry of the judgment.

Wife did not learn this information during the dissolution proceeding because Husband failed to disclose it, despite Wife's discovery requests for non-public information about Epiq that would have revealed sale negotiations were progressing, and failed to update his answers to pattern interrogatories as required by 16th Judicial Circuit Local Rule 68.4.1.5.[5] Wife contends Husband's dishonesty during his deposition, failure to disclose information regarding OMERS/DTI despite Wife's discovery requests, and failure to update his interrogatory answers amounted to fraud. As a result of that alleged fraud, Wife claims Husband received "a significantly greater portion of the marital estate worth millions of dollars, culminating in a materially inequitable division."

On April 6, 2017, Husband filed suggestions in opposition to Wife's motion, denying her fraud allegations and asserting Wife's motion had been filed unreasonably late. Two days later, Husband died. Scott Olofson, Husband and Wife's son and the personal

[5] Local Rule 68.4.1.5 provides, "All information requested in the above interrogatories and document requests shall be updated within 15 days prior to trial if any changes occur prior to the trial date except significant changes such as employment, income or expert witnesses which should be updated immediately." Missouri Supreme Court Rules also require parties to supplement discovery "if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Rule 56.01(e).

representative of Husband's estate, was substituted as respondent, pursuant to Rule 52.13(a)(1).

The personal representative moved for judgment on the pleadings, asserting Wife's Rule 74.06(b) motion was abated and mooted by Husband's death and barred by res judicata and collateral estoppel. The circuit court entered judgment on the pleadings, overruling Wife's motion to set aside part or all of the dissolution judgment, and dismissed the action with prejudice. Wife appealed, and this Court granted transfer after opinion by the court of appeals. Mo. Const. art. V, sec. 10.

The personal representative raises several procedural objections to review on the merits. First, he asserts Wife's claim that the circuit court may set aside only the property division portion of the judgment while leaving the dissolution of marriage intact is a new argument advanced on appeal and, therefore, is unpreserved. Second, he claims Wife's action is barred by res judicata and collateral estoppel because Wife had an opportunity to litigate her claim of fraud in the dissolution proceeding. Finally, the personal representative avers Wife's Rule 74.06(b) motion should be dismissed as untimely. These procedural claims are addressed first.

## I.

### A. Wife's Claim for Vacating Property Division Preserved

The personal representative first contends that Wife, in her Rule 74.06(b) motion, did not properly preserve a claim for the relief of vacating only the property division of the dissolution judgment because such claim for relief was neither presented to nor decided by

the circuit court. He contends Wife sought monetary damages in the circuit court, so on appeal she cannot seek the alternative remedy of setting aside only the property division.

This argument is clearly refuted by the record. In her Rule 74.06(b) motion, Wife asked the circuit court to "set aside the Judgment of Dissolution of Marriage, or, in the alternative, set aside portions of the Judgment, so as to effectuate an equitable division of the marital estate to include the value of the Epiq stock at $16.50 per share and the value of Tom's Golden Parachute Benefits." She, again, articulated she was requesting this relief in her suggestions in opposition to the personal representative's motion for judgment on the pleadings. Because Wife properly raised her claim that, upon proof of fraud, the court may set aside only the division of the parties' property and not affect the dissolution of their marriage, she has preserved her claim of error for review.

### B. Res Judicata and Collateral Estoppel Not Applicable

The personal representative next claims Wife's Rule 74.06(b) motion is barred by the doctrines of res judicata and collateral estoppel because she had "a full and fair opportunity to litigate these issues" in the dissolution proceeding and is, therefore, "bound by the final decree resolving them as with any final judgment."

Res judicata, or claim preclusion, "precludes relitigation of a claim formerly made," *Chesterfield Vill., Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002), and "every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time," *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991). Unlike res judicata, collateral estoppel, also called issue

preclusion, "operates only as to issues previously litigated but not as to matters not litigated in the prior action though such might properly have been determined." *Id.* at 500 (emphasis omitted).

Contrary to the personal representative's contentions, "the doctrines of collateral estoppel and res judicata apply only in a second, subsequent lawsuit." *State ex rel. Cullen v. Harrell*, 567 S.W.3d 633, 641 n.5 (Mo. banc 2019). Because Wife filed her Rule 74.06(b) motion in the original dissolution action, it is not considered a separate, subsequent lawsuit for purposes of res judicata and collateral estoppel. *See id.* at 638 n.2 (holding wife's motion filed more than a year after final judgment could not be considered an independent action because it was filed in the original dissolution action). Therefore, the doctrines of res judicata and collateral estoppel do not apply to Wife's motion, filed in the original dissolution action, to set aside the judgment for fraud.[6] After all, a Rule 74.06(b) motion seeks "to set aside an otherwise final judgment which, but for equity, would not be subject to reconsideration because of the doctrine of *res judicata*." *Sanders v. Ins. Co. of N. Am.*, 904 S.W.2d 397, 401 (Mo. App. 1995).

### C. Timeliness Not Raised in Motion for Judgment on the Pleadings

Finally, the personal representative asks this Court to affirm the dismissal of Wife's Rule 74.06(b) motion because she allegedly failed to file her motion within a reasonable time after entry of the final judgment of dissolution, as required by Rule 74.06(c).

[6] In the alternative to setting aside the judgment for fraud under Rule 74.06(b), Wife also claimed in the circuit court that her Rule 74.06(b) motion should be treated as an independent action for money damages for fraud. The circuit court, however, correctly rejected this claim, and it is not raised on appeal.

Although Husband raised this concern in his suggestions in opposition to Wife's motion, the personal representative did not include this argument in his motion for judgment on the pleadings. When reviewing the grant of a motion for judgment on the pleadings, "this Court considers solely whether the grounds raised in the motion supported dismissal," *City of Lake St. Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010); therefore, this Court need not address this unpreserved claim.

Finding no bar to review on the merits, the Court may review whether the circuit court erred in sustaining the personal representative's motion for judgment on the pleadings.

**II.**

The circuit court's judgment on the pleadings was based, at least in part, on its finding that husband's death abated Wife's Rule 74.06(b) motion and also rendered the proceeding moot because, if the judgment were set aside in its entirety, any further dissolution proceedings would abate due to Husband's death. The circuit court also found Wife's claim for the reallocation of the marital estate was moot because the marital estate no longer exists. Finding the controversy moot, the circuit court concluded it lacked subject matter jurisdiction and dismissed Wife's motion with prejudice.

In her single claim of error, Wife claims the circuit court erred in holding Husband's death abated and rendered moot her Rule 74.06(b) motion because the relief available under Rule 74.06(b) includes setting aside only the portion of the dissolution judgment obtained by fraud – the division of the marital property. In support of this claim of error, Wife argues her Rule 74.06(b) motion did not abate because Husband died after the decree

of dissolution was entered and a dissolution action abates upon the death of a party only when the death occurs prior to the circuit court dissolving the marriage. She further asserts the circuit court erred in ruling there was no justiciable controversy because it found the marital estate no longer exists. Finally, she argues, upon a finding of fraud pursuant to Rule 74.06(b)(2), the circuit court has authority to set aside only the part of the dissolution judgment relating to the property division as an alternative to setting aside the judgment in its entirety.

### A. Standard of Review

This Court reviews a circuit court's ruling on a motion for judgment on the pleadings *de novo*. *Woods v. Mo. Dep't of Corr.*, 595 S.W.3d 504, 505 (Mo. banc 2020). In reviewing a grant of judgment on the pleadings, the Court must decide "whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 12 (Mo. banc 2012) (internal quotation omitted). "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007). Consequently, the circuit court's judgment on the pleadings in favor of the personal representative will be affirmed "only if the facts pleaded by the petitioner, together with the benefit of all reasonable inferences drawn therefrom,

show that petitioner could not prevail under any legal theory." *Emerson Elec. Co.*, 362 S.W.3d at 12 (internal quotation omitted).[7]

**B. Abatement Is Not Applicable**

Wife claims the doctrine of abatement is not applicable to the circumstances of this case because a dissolution action abates upon the death of a party only when the parties' marriage has not been dissolved at the time of death. Both Wife and the personal representative focus on whether the underlying dissolution action abated upon Husband's death. The first inquiry, however, should be whether the death of a party causes abatement of a proceeding on a motion for relief from a judgment under Rule 74.06(b). Broadly speaking, abatement is "the destruction of the cause of action." *In re Thomasson*, 159 S.W.2d 626, 628 (Mo. 1942). Historically, courts applying the rule of abatement followed the common law maxim of *actio personalis moritur cum persona*. *See Cummins v. Kan. City Pub. Serv. Co.*, 66 S.W.2d 920, 940 (Mo. banc 1933). Under the maxim, "the death of the sole plaintiff or of the sole defendant before final judgment abated any personal

[7] The personal representative argues an order overruling a motion for relief under Rule 74.06(b) may be reviewed only for an abuse of discretion. For support, he cites *McCullough v. Commerce Bank*, which held, "The trial court is vested with broad discretion when acting on a motion to vacate a judgment pursuant to Rule 74.06 and [the court of appeals] will not interfere with that action unless the record convincingly demonstrates an abuse of discretion." 349 S.W.3d 389, 392 (Mo. App. 2011). However, the court of appeals in *McCullough* was reviewing a judgment entered on the merits of a Rule 74.06(b) claim where the circuit court had discretion in its ruling. *See id.* at 392-93 (noting the trial court conducted an evidentiary hearing and denied relief based on the plaintiffs' failure to carry their burden of proof). Here, the circuit court's ruling was on a motion for judgment on the pleadings, so the question is whether the moving party was entitled to judgment as a matter of law. That determination is subject to *de novo* review. *Woods*, 595 S.W.3d at 505.

action." *Gerling v. Baltimore & Ohio R.R. Co.*, 151 U.S. 673, 697 (1894). Said differently, a cause of action that was "in its nature personal," such as breach of a promise to marry, did not survive the death of a party; it abated. *Henshaw v. Miller*, 58 U.S. 212, 219 (1854). If, however, an action affected "primarily property and property rights" and an injury to the person was merely incidental, the action did not abate with the death of a party. *Breeden v. Hueser*, 273 S.W.3d 1, 11 (Mo. App. 2008) (internal quotation omitted).

The rationale behind the rule of abatement is pragmatic. An action involving purely personal issues abates with the death of a party, except where otherwise provided by statute, because "the need to redress purely personal wrongs ceases to exist[.]" *Id.* (internal quotation omitted). By contrast, an action that primarily concerns property or property interests and only incidentally implicates personal issues does not abate with the death of a party because such an action can achieve its purpose after death. *Id.* Similarly, section 537.010 provides that wrongs done to property interests survive the death of the wrongdoer,[8] and a fraud claim that involves "a loss of money due to the fraudulent actions of the defendant[]" is a such a wrong. *Breeden*, 273 S.W.3d at 13.

[8] Section 537.010 provides:

> Actions for wrongs done to property or interests therein may be brought against the wrongdoer by the person whose property or interest therein is injured. If the person whose property or interest therein is injured is dead, the action survives and may be brought against the wrongdoer by the person appointed as fiduciary for the estate of the deceased person. If the wrongdoer is dead, the action also survives and may be brought and maintained in the manner set forth in section 537.021. Such actions shall be brought and maintained in the same manner and with like effect in all respects as actions founded upon contracts.

Because Rule 74.06(b) is available to provide relief in all civil matters, whether a proceeding on a Rule 74.06(b) motion abates depends on the nature of the claims presented in the motion, i.e., whether it requires adjudication of issues personal to the decedent. In this case, the issue before the circuit court was whether Husband defrauded Wife and consequently diminished her share of the marital estate. "Actions for fraud and deceit are considered property torts and [are] 'more than merely personal' when they involve matters diminishing the property of the person defrauded." *Gremminger v. Mo. Lab. & Indus. Rels. Comm'n*, 129 S.W.3d 399, 403 (Mo. App. 2004) (quoting *Houston v. White*, 27 S.W.2d 772, 775 (Mo. App. 1930)). Consequently, a proceeding involving a claim of fraud in the property division of a dissolution does not abate upon the death of a party, even if the death occurs after final judgment, contrary to the assertions in Judge Fischer's dissenting opinion.

This has long been the law. In *Richmond v. Richmond*, a plaintiff claimed her husband, before his death, had obtained a dissolution of their marriage without her knowledge by falsely claiming she lived out of state and issuing notice by publication. 225 S.W. 126, 127 (Mo. App. 1920). Although the court of appeals affirmed the circuit court's denial of relief, the court stated, albeit in dicta:

> Shortly after the divorce was granted to plaintiff, he died, which fact [sic] left it unnecessary to set aside the divorce, in so far as concerned a separation between them as husband and wife. But, if it affected her rights in any property left by him at his death, she could have it annulled for the fraud charged.

*Id.* This Court affirmed the principle in 1962, holding that "[a]n equity court has the power to vacate a decree of divorce for extrinsic fraud in the procurement of the

judgment . . . notwithstanding one of the parties has died[.] The divorce judgment in such cases is voidable." *Hemphill v. Quigg*, 355 S.W.2d 57, 62-63 (Mo. 1962).

Likewise, in *Anderson v. Dyer*, years after a final dissolution judgment had been rendered, the husband died, and the wife subsequently filed a motion to set aside the judgment for fraud. 456 S.W.2d 808, 810 (Mo. App. 1970). The court held the wife could set aside the judgment, notwithstanding the death of the husband, if "setting aside the divorce affects or will determine property rights." *Id.* at 814. Because the wife presented evidence that setting aside the divorce could affect her interest in the husband's veteran's and social security benefits, the court reversed and remanded for a new trial on the motion to set aside the judgment for fraud. *Id.* at 814-15.

*Richmond, Hemphill,* and *Anderson* demonstrate that proceedings to set aside a dissolution judgment for fraud after the judgment is final are cognizable and do not abate, as a matter of law, because one of the parties to the marriage has died. Contrary to the assertions in Judge Fischer's dissenting opinion, there is no legal authority supporting a rule that the death of a party requires abatement of all proceedings after a dissolution decree and division of marital property are final, regardless of the nature of the proceedings. The cases it cites do not so hold. They are cases where courts have applied the general principles of abatement and found the proceedings or issues in the proceedings pertained to personal matters and abated for that reason. The issue, instead, is whether there is a right to relief from a final judgment and whether the authorized proceeding to enforce that right abates on the death of a party due to the nature of the issues in the proceeding.

Wife's Rule 74.06(b) motion is limited to adjudication of whether Husband committed fraud as related to the division of property in their underlying dissolution action. Her claim of fraud does not require the adjudication of personal rights, such as the marital status of the parties, so the possible abatement of the underlying dissolution proceeding is relevant only when considering the relief available after a finding of fraud. Here, Wife's Rule 74.06(b) motion includes a prayer to set aside the provisions in the dissolution judgment dividing property without reinstating the marriage. If that relief were granted, she would be in the position of litigating the distribution of marital property after a dissolution has been ordered. Neither the Rule 74.06(b) proceeding for relief from the dissolution judgment nor a subsequent proceeding on remand to readjudicate the division of marital property (but not readjudicate the issue of marital status) would abate due to Husband's death.

Rather than recognize the proceeding on Wife's Rule 74.06(b) motion abates under the same rules as any other action, Judge Fischer's dissenting opinion declares the proceeding abated because the circuit court entered a final dissolution judgment that divided the marital property prior to Husband's death. For support, Judge Fischer's dissenting opinion relies on *Clark v. Clevenger*, 978 S.W.2d 511 (Mo. App. 1998), and *Winters v. Cooper*, 827 S.W.2d 233 (Mo. App. 1991). However, neither *Clark* nor *Winters* involve abatement in a proceeding for relief from a final judgment for fraud but rather involve abatement in proceedings on statutorily authorized motions to modify a final dissolution judgment. *Clark*, 978 S.W.2d at 512; *Winters*, 827 S.W.2d at 234. *Clark* involved the abatement of a motion to modify child support after the death of a party-

parent. 978 S.W.2d at 512. Decretal obligations to pay future child support expire with the obligor and cannot be enforced against the obligor's estate. *Fower v. Fower Estate*, 448 S.W.2d 585, 587 (Mo. 1970). *Winters* involved the abatement of a motion to modify child custody after the death of a party-parent. 827 S.W.2d at 234. Child custody also is an issue personal to the parties. *Marriage of Carter v. Arnett*, 794 S.W.2d 321, 322 (Mo. App. 1990).

Each case involved rights and obligations personal to the parties, and in each case, those personal issues abated. Although *Clark* and *Winters* did not articulate the details of the abatement doctrine, their rulings were proper applications of the abatement doctrine to the nature of the claims at issue. Judge Fischer's dissenting opinion takes the procedural circumstances of these modification cases and presents them as holdings that modification proceedings must abate on the death of a party because the underlying dissolution judgment is final and not subject to appeal or a motion for new trial, a proposition not raised or adjudicated in the cases. Contrary to Judge Fischer's dissenting opinion's assertion, *Clark* and *Winters* are not authority for the proposition that a motion to vacate the property division portion of a dissolution judgment pursuant to Rule 74.06(b) categorically abates upon the death of a party if the underlying dissolution judgment is final and not subject to appeal or a motion for new trial.

Because the proceedings on Wife's Rule 74.06(b) motion alleging Husband's fraud did not involve issues personal to the parties, the circuit court erred in holding the proceedings abated upon husband's death. In so ruling, the circuit court recognized that, if Wife were to prove the alleged fraud, setting aside the entire dissolution judgment would

vacate the dissolution of their marriage and put the parties in the position of litigating the personal issue of marital status. Consequently, proceedings in the underlying dissolution case would abate due to Husband's death, and the circuit court would be unable to effectuate an equitable division of property. The circuit court was correct that if Wife were to prove fraud, effective relief from that fraud could not be accomplished by setting aside the entire dissolution judgment. The circuit court erred, however, in finding alternative relief was not available.

### C. Rule 74.06(b) Allows Relief from Portion of a Final Judgment

After determining that Husband's death precludes setting aside the entire dissolution judgment, the circuit court then considered whether it could grant the alternative relief sought by Wife of vacating only the property division. The circuit court expressly held that, should Wife prevail on her Rule 74.06(b) motion, the only effective relief available to Wife would be for the circuit court "to set aside that part of the judgment dividing marital property entirely and reallocate the marital estate taking into account all of the factors set forth in section 452.330.1." In opposition to the motion for judgment on the pleadings, Wife stated:

> Petitioner seeks to set aside the Judgment which allocated marital property so as to effectuate an equitable distribution of the same. Petitioner does not seek to change the status of the divorce of the parties, nor is such a change in status required as resolution to Petitioner's Motion to Set Aside the Judgment.

While Wife is seeking an allocation of marital property to effectuate an equitable distribution of the increased value of the Epiq stock and Husband's $16 million golden parachute benefits, she is not suggesting that the court vacate only the portion of the

property division relating to the interests in Epiq stock. Rather, she is requesting that the circuit court set aside the entire property division and then make a new equitable distribution of the marital estate in light of the sale of Epiq at $16.50 per share and Husband's golden-parachute benefits. Whether the relief Wife seeks can be granted depends on whether Rule 74.06(b) authorizes a court to set aside only the provisions of a dissolution judgment dividing marital property and debts.

The circuit court found, however, that a new division of the marital estate after a finding of fraud would be a prohibited modification of the original division of marital property. Wife claims she is not seeking a "modification" but rather relief from the property division in the dissolution decree under Rule 74.06(b) because it was induced by fraud. Wife is correct that setting aside the property division for fraud would not be a statutorily prohibited modification.

Generally speaking, a circuit court's "power to modify a judgment ceases when the judgment becomes final." *See Harrell*, 567 S.W.3d at 639. In dissolution proceedings, however, statutes authorize courts to modify some issues decided in a final dissolution judgment in response to changing circumstances. *See Leventhal v. Leventhal*, 629 S.W.2d 505, 507 (Mo. App. 1981); sections 452.410 (custody); 452.400 (visitation rights); 452.370 (maintenance and support). The purpose is to change the terms of the original judgment in response to new facts and circumstances that would make the judgment's original terms unreasonable. *See, e.g.*, section 452.370.1; *see also Marriage of Lindhorst v. Lindhorst*, 347 S.W.3d 474, 476 (Mo. banc 2011) (recognizing the provisions of any judgment respecting maintenance or support may be modified in response to new circumstances that

make the provisions unreasonable). A new proceeding is initiated, albeit in the original cause, to raise and adjudicate the effect of new facts. *See State ex rel. Dreppard v. Jones*, 215 S.W.3d 751, 752 (Mo. App. 2007). Because no statute provides for the modification of a division of marital property and, additionally, sections 452.330.5 and 452.360.2 specifically prohibit it, "[o]rders affecting the distribution of marital property are not modifiable." *See Leslie v. Leslie*, 827 S.W.2d 180, 182 (Mo. banc 1992). This statutory prohibition against modification does not mean a court cannot relieve a party from the division of marital property pursuant to Rule 74.06(b). It means the distribution of marital property is subject to the general rule that circuit courts cannot modify judgments after they become final. Relief can be granted from a final dissolution judgment, like any other final civil judgment, for the reasons stated in Rule 74.06(b). *See* Rule 41.01; *see also Reimer v. Hayes*, 365 S.W.3d 280, 283 (Mo. App. 2012); *see also Chrun v. Chrun*, 751 S.W.2d 752, 755 n.1 (Mo. banc 1988).

The relief available pursuant to Rule 74.06(b) is determined from the language of the rule:

> On motion and *upon such terms as are just*, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is irregular; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force.

(Emphasis added). The Court interprets its rules using principles similar to those employed in interpreting statutes, "with the difference being that this Court is attempting to give effect

to its own intent." *In re Hess*, 406 S.W.3d 37, 43 (Mo. banc 2013). The best evidence of the Court's intent is the plain language of the rule at issue. *State ex rel. Vacation Mgmt. Sols., LLC v. Moriarty*, 610 S.W.3d 700, 702 (Mo. banc 2020).

The language governing the relief available is: "[U]pon such terms as are just" a court may "relieve" a party from a final judgment or order. Rule 74.06(b). The plain and ordinary meaning of this language gives courts the discretion to fashion relief as equity demands. If a court were limited to vacating a judgment in its entirety, the phrase "upon such terms as are just" would be meaningless. This clearly refutes the personal representative's and Judge Fischer's dissenting opinion's narrow interpretation that limits available relief to setting aside the entire judgment because it fails to give meaning to each word of the rule. *See Middleton v. Mo. Dep't of Corr.*, 278 S.W.3d 193, 196 (Mo. banc 2009) ("[I]t commonly is understood that each word, clause, sentence, and section of a statute should be given meaning.").

The law allows for the correction of errors after a judgment is final either through a direct appeal or through proceedings after direct review is exhausted. In criminal cases, the rules provide for postconviction proceedings. *See* Rules 24.035 & 29.15. In civil cases, *inter alia*, Rule 74.06(b) provides for relief after direct review on the limited grounds articulated therein. Like the disposition of an appeal, relief from a judgment under Rule 74.06(b) can be – and should be – afforded by vacating the portion of the judgment tainted by fraud. The difference between error-correcting on direct appeal and relief from a judgment pursuant to Rule 74.06(b) lies only in the scope of errors that can be considered and when error can be raised. In the context of a proceeding under Rule 74.06(b), just as

in the context of a direct appeal, it is unnecessary and inefficient to vacate and, consequently, cause a lower court to readjudicate, issues concluded by correct and untainted portions of the judgment. By providing relief from a judgment "upon such terms as are just," the rule recognizes courts have discretion to relieve a party from a portion of a judgment tainted by fraud and leave untainted portions intact.

As in this case, when the original judgment is incorrect or unfair due to fraud, whether on direct appeal or pursuant to Rule 74.06(b), granting a remedy that corrects the error or unfairness is the purpose of the proceeding. After either a direct appeal or a proceeding pursuant to Rule 74.06(b), issues resolved in the original judgment are readjudicated on remand, and the circuit court readjudicates only those portions of the judgment that have been vacated or reversed. That process would be frustrated by a requirement that the entire judgment be vacated. This is apparent in a dissolution case, like this one, where it would be nonsensical to vacate orders for child custody, support, and visitation when the fraud affects only the division of property.

Additionally, in considering the relief available under Rule 74.06(b), this Court is not writing on a clean slate. It expressly rejected a narrow interpretation of the relief available under Rule 74.06(b) decades ago. In *Kibbons v. Union Electric Co.*, the Court was presented with – and rejected – the argument that the word "relieve" in Rule 74.06(b) contemplates "only the power to set aside." 823 S.W.2d 485, 491 (Mo. banc 1992). It found the common meaning of the word "relieve" is consistent with the term "modify" and expressly held "Rule 74.06(b) permits a trial court to modify a judgment." *Id.* *Kibbons* is consistent with a statement in *Audsley v. Allen*, decided mere months after Rule 74.06 was

adopted, that an irregular judgment is "subject to *modification* under rule 74.06(b)." 774 S.W.2d 142, 146 n.5 (Mo. banc 1989) (emphasis added). The holding in *Kibbons* is also consistent with this Court's recent characterization of the relief available under Rule 74.06(b): "Rule 74.06(b) . . . is a mechanism by which a party can seek relief from or *modification* of a judgment on the basis of mistake, fraud, irregularity, voidability, or satisfaction." *Harrell*, 567 S.W.3d at 638-39 (emphasis added). Under the plain language of Rule 74.06(b), relief is not limited to setting aside the judgment, let alone setting aside the *entire* judgment. Instead, under Rule 74.06(b), a court can give relief upon such terms as are just, which includes amending provisions in a judgment and setting aside part or all of a judgment. To hold otherwise ignores the plain meaning of the word "relieve" and renders meaningless the phrase "upon such terms as are just."

Judge Fischer's dissenting opinion asserts *Kibbons* has no application because it dealt with a different provision in Rule 74.06(b). Specifically, the motion in *Kibbons* dealt with Rule 74.06(b)(3) seeking relief from an irregular judgment unlike Wife's motion under Rule 74.06(b)(2) which seeks relief based on fraud. But Rule 74.06(b) provides a court may "relieve a party or his legal representative from a final judgment or order for the following reasons" and it then sets out in subparts the various reasons for which a court may relieve a party from a judgment. Listed among the reasons for which a party may be relieved from a judgment are both fraud and that the judgment is irregular. The language authorizing relief in subsection (b) applies equally to all its subparts. There is not one meaning of "relieve" for irregular judgments and a different meaning of "relieve" for fraud.

The relief available under Rule 74.06(b) – whatever is just and falls within the ordinary definition of "relieve" – applies uniformly.

*Kibbons* applied the common meaning of "relieve," which is "to ease of an imposition, burden, wrong or oppression by judicial interposition," and found that modification fell within that meaning. *Kibbons*, 823 S.W.2d at 491. The meaning of "relieve" in Rule 74.06(b) did not change between 1992, when *Kibbons* was decided, and today. Setting aside the provisions of the judgment dealing with property rights falls within the ordinary definition of "relieve"; it eases an imposition, burden, wrong, or oppression by judicial interposition. Therefore, setting aside the provisions of the dissolution dealing with property rights, while leaving the dissolution of marriage intact, is within the relief from a final judgment or order authorized by Rule 74.06(b).

The personal representative, nevertheless, argues the circuit court was correct to find Rule 74.06(b) does not authorize it to set aside less than the entire dissolution judgment, citing court of appeals cases contrary to *Kibbons*. Primarily, the personal representative relies on *Spicuzza v. Spicuzza*, 886 S.W.2d 660, 660-61 (Mo. App. 1994), in which the petitioner filed a motion pursuant to Rule 74.06(b) to set aside, vacate, amend or modify a decree of dissolution because the parties' failure to include her state teacher's retirement in the settlement agreement rendered it unconscionable.

While the court of appeals in *Spicuzza* correctly held unconscionability is not a basis in Rule 74.06(b) for relief from a final judgment, it further ruled that Rule 74.06 (b) "makes no provision for the amendment or modification of a judgment, *or for relief from part of a judgment*." *Id.* (emphasis added). This ruling was in direct conflict with *Kibbons*, which

was error because the court of appeals is bound by the constitution to follow this Court's most recent controlling decision. Mo. Const. art. V, sec. 2. Yet the court of appeals did not acknowledge *Kibbons* or make any effort to distinguish its holding. As *Spicuzza* offers no analysis of Rule 74.06(b)'s text or the substantive case law the rule effectuates, it provides no reason for this Court to reexamine its holding in *Kibbons*.

Despite the defects in the *Spicuzza* holding, the court of appeals has cited it in other dissolution cases. *See, e.g.*, *Young v. Young*, 273 S.W.3d 86, 88 (Mo. App. 2008); *Marriage of Rolfes v. Rolfes*, 187 S.W.3d 355, 357-58 (Mo. App. 2006); *Marriage of Ulmanis v. Ulmanis*, 23 S.W.3d 814, 818 (Mo. App. 2000); *Settles v. Settles*, 913 S.W.2d 101 (Mo. App. 1995). Other court of appeals decisions, however, have permitted circuit courts to set aside only portions of a prior judgment. In *Marriage of Dooley v. Dooley*, 15 S.W.3d 747, 758 (Mo. App. 2000), the court of appeals held a default judgment should have been set aside "as to child custody and support" because the circuit court lacked subject matter jurisdiction over those issues when it entered the underlying dissolution judgment but that the remainder of the judgment should not be set aside. Similarly, in *Essig v. Essig*, 921 S.W.2d 664, 667 (Mo. App. 1996), the court of appeals affirmed a judgment setting aside only the maintenance and property division provisions of a dissolution judgment.

The correctness of the conclusion in *Kibbons* with respect to the relief available under language in Rule 74.06(b) is supported by federal precedent applying Federal Rule of Civil Procedure 60(b), which was the model for Rule 74.06(b). *Platt v. Platt*, 815 S.W.2d 82, 83 (Mo. App. 1991). While not binding, federal cases construing a rule this

Court subsequently adopted with virtually identical language are entitled to significant consideration. *Buemi v. Kerckhoff*, 359 S.W.3d 16, 23 (Mo. banc 2011).

Federal cases hold that, under FRCP 60(b), parties may seek relief from part of a judgment. *See, e.g.*, *Walker v. Astrue*, 593 F.3d 274, 279 n.5 (3d Cir. 2010) ("[W]e acknowledge that there are instances when attorney fees are awarded as part of the original judgment. In such cases, counsel may appropriately seek to modify them via Rule 60(b)."); *Flowers v. S. Reg'l Physician Servs., Inc.*, 286 F.3d 798, 802 (5th Cir. 2002) ("[T]hat part of the judgment that formed the basis of the granting of attorney's fees was vacated and Rule 60(b)(5) was appropriate."); *Dist. of Columbia v. Stackhouse*, 239 F.2d 62, 65 (D.C. Cir. 1956) ("[T]he court could, under Fed. R. Civ. P. 60(b)(6), relieve appellee from that part of the judgment ruling that she was not a resident of the District of Columbia.").

The plain language of Rule 74.06(b) authorizes a circuit court to vacate a portion of a judgment as relief from the final judgment.[9] As relevant here, Rule 74.06(b)(2) authorizes the circuit court to vacate only the property division of the dissolution judgment if Wife establishes Husband committed fraud resulting in a materially inequitable division of the marital estate. The circuit court erred in holding Rule 74.06(b) authorized it only to set aside the dissolution judgment in its entirety.

[9] *Spicuzza*, *Young*, *Rolfes*, *Ulmanis*, *Settles*, and other cases holding Rule 74.06(b) makes no provision for relief from part of a judgment are overruled to the extent they conflict with this opinion.

### D. Action Is Not Moot

Finally, the circuit court also erred in holding that, because the marital estate no longer exists in the same form it did when it was originally distributed, Wife's motion was moot. The circuit court rightly noted, that if Wife prevailed, "the only relief available to [her] would be for the Court to set aside that part of the judgment dividing marital property entirely and reallocate the marital estate taking into account all of the factors set forth in § 452.330.1." It wrongly concluded, however, that "where, as here, one party has died and there is no marital estate to allocate, such relief is impossible" and, therefore, the controversy was moot.

"A case is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." *D.C.M. v. Pemiscot Cnty. Juvenile Office*, 578 S.W.3d 776, 780 (Mo. banc 2019) (internal quotation omitted). A party's death after a judgment or order of dissolution or decree of legal separation does not prevent a court from dividing the spouses' property. *Linzenni v. Hoffman*, 937 S.W.2d 723, 726 (Mo. banc 1997); *Cregan v. Clark*, 658 S.W.2d 924, 927 (Mo. App. 1983). Therefore, if the marriage has been dissolved or the parties have been declared legally separated, one party's death does not render a marital property dispute moot. *Linzenni*, 937 S.W.2d at 726. Rather, "when property rights of the parties are involved, the parties are entitled to have [their property rights] decided though one of the parties has died." *Cregan*, 658 S.W.2d at 927; *accord Fischer v. Seibel*, 733 S.W.2d 469, 472 (Mo. App. 1987). Contrary to the circuit court's findings, Husband's death does not moot the proceedings, and the personal representative

of his estate has been substituted as a party to litigate the issues in Husband's place, including division of marital property on remand if fraud is proven.

The other circumstances the circuit court held precluded effectual relief, if the property division were to be vacated under Rule 74.06(b), were changes in the form of marital property and the passage of time. Specifically, the circuit court found it would be unable to grant Wife relief because the shares of Epiq stock no longer exist and, therefore, could not be divided. The circumstances identified by the circuit court as precluding effectual relief are no different from the circumstances when a division of property is reversed on appeal and the case remanded for retrial of the property division. Courts frequently account for changes in the property and parties' circumstances since the date of the initial trial and judgment. *See, e.g.*, *Hanson v. Hanson*, 738 S.W.2d 429, 438 (Mo. banc 1987); *Marriage of Miller v. Miller*, 806 S.W.2d 516, 518 (Mo. App. 1991); *Puga v. Puga*, 730 S.W.2d 567, 570 (Mo. App. 1987).

The sale of Epiq does not preclude effectual relief. "[W]hen an order or judgment is vacated, the previously existing status is restored and the situation is the same as though the order or judgment had never been made." *State ex rel. Off. of Pub. Couns. v. Pub. Serv. Comm'n of Mo.*, 266 S.W.3d 842, 843 (Mo. banc 2008). If Wife proves fraud, readjudication of the division of marital property would require the circuit court to divide the marital estate as if it were dividing it for the first time. The circuit would be required to determine the property possessed by the parties, the value of the property, and whether the property is marital or separate. *See* section 452.330. After setting apart nonmarital property, the court would then be required to divide the marital property and debts as it

deems just, applying the statutory factors in section 452.330. In other words, after setting aside the division of property, the court would simply divide whatever marital property the parties possess at the time of readjudication.

As it would if dividing the property for the first time, the circuit court could account for dissipated or squandered assets that existed at the time of first trial but not the second trial by holding the dissipating or squandering party liable for the value of the asset through the nature of its division of property. *Kester v. Kester*, 108 S.W.3d 213, 222 (Mo. App. 2003). Courts can order reimbursement or use a pre-dissipation valuation and award that asset to the wrongdoer, thereby reducing that party's award of other marital assets. *See, e.g. Martin v. Martin*, 504 S.W.3d 130, 136 (Mo. App. 2016); *Marriage of Thomas v. Thomas*, 21 S.W.3d 168, 173 (Mo. App. 2000). Further, if it is impossible to divide property in kind, the court may order a monetary award to justly divide marital property. *Chambers v. Chambers*, 910 S.W.2d 780, 785 (Mo. App. 1995); *see also Dickerson v. Dickerson*, 580 S.W.3d 98, 107 (Mo. App. 2019) (recognizing a monetary award is appropriate where necessary to affect a fair and equitable distribution).

Likewise, the passage of time and change in the value of marital property since the date of the dissolution does not preclude relief. In general, the appropriate date for valuing marital property in a dissolution proceeding is the date of trial, *Taylor v. Taylor*, 736 S.W.2d 388, 391 (Mo. banc 1987), 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." *Wright v. Wright*, 1 S.W.3d 52, 57 (Mo. App. 1999). In such cases, "the court should hold another hearing to determine the value of the marital property at the time of its

division." *Id.* at 58. On remand in this case, the circuit court will need to consider the current value of marital property. *See Morgan v. Ackerman*, 964 S.W.2d 865, 869 (Mo. App. 1998) (directing the circuit court to receive evidence of value of property on remand in view of the likelihood that 30-month-old valuation was stale); *Marriage of Rickard v. Rickard*, 818 S.W.2d 711, 715 (Mo. App. 1991) (holding the proper date for valuation of marital property was date of *retrial* after remand, rather than date of dissolution).

Because the circuit court is not precluded from granting relief due to Husband's death or OMERS/DIT's payment for the marital Epiq shares and Husband's golden-parachute benefits, outstanding stock options, and restricted stock awards, the cause is not moot. If Wife establishes Husband procured the division of marital property through fraud, the circuit court has authority to vacate its division of marital property in the dissolution judgment and readjudicate the division of the marital estate. In readjudicating the division of property pursuant to section 452.330, the court must divide the marital estate as it exists at the time of readjudication, which would include proceeds from the sale of Epiq shares and funds Husband received as benefits.[10]

[10] Judge Fischer's dissenting opinion disparages Wife for making "speculative" allegations of fraud that she has yet to prove. While Wife's allegations in her Rule 74.06(b) motion are unproven, the circuit court's erroneous judgment on the pleadings has denied her the opportunity to present evidence of Husband's fraud. Judge Fischer's dissenting opinion further suggests Wife is litigious despite the fact the only litigation Wife initiated after the dissolution of marriage proceeding is the underlying Rule 74.06(b) proceeding. This criticism of Wife by Judge Fischer's dissenting opinion is unwarranted and puzzling.

## Conclusion

Because the cause is neither moot nor abated, the circuit court erred in sustaining the personal representative's motion for judgment on the pleadings and dismissing Wife's Rule 74.06(b) motion. The circuit court's judgment is vacated, and the cause is remanded.

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PATRICIA BRECKENRIDGE, JUDGE

Russell and Draper, JJ., and
Dowd, Sr.J., concur; Powell, J.,
dissents in separate opinion filed;
Fischer, J., dissents in separate opinion
filed; Wilson, C.J., concurs in opinion
of Fischer, J. Ransom, J., not participating.

# SUPREME COURT OF MISSOURI
## en banc

| | | |
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| JEANNE H. OLOFSON, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. SC98043 |
| | ) | |
| SCOTT W. OLOFSON, in his Capacity as Personal Representative of the Estate of TOM W. OLOFSON, | ) | |
| | ) | |
| Respondent. | ) | |

**DISSENTING OPINION**

I write separately because I disagree with the principal opinion's conclusion that the doctrine of abatement does not apply to Wife's Rule 74.06(b) motion. Because the circuit court rendered a final judgment dividing the property and that judgment is not subject to appeal or a motion for new trial, any action attempting to modify the judgment has abated due to Husband's death. Even if Wife's motion did not abate, the plain language of Rule 74.06(b) does not contemplate relief from a portion or portions of a final judgment or order, only relief from that final judgment or order as a whole. Therefore, even if Wife could eventually prove her speculative allegations, the circuit court could not merely provide relief from the property division; Rule 74.06(b) requires it to vacate the entire original dissolution decree. For these reasons, I respectfully dissent.

## I.

## Husband's Death Caused Wife's Motion to Abate

The principal opinion holds, "[b]ecause the proceedings on Wife's Rule 74.06(b) motion alleging Husband's fraud did not involve issues personal to the parties, the circuit court erred in holding the proceedings abated upon husband's death." *Slip op.* at 16. In reaching this conclusion, the principal opinion believes the relevant abatement test is whether or not the issue is "personal" to the parties—this is not so.[1] Instead, as demonstrated by other court of appeals cases, the test is whether the circuit court entered a final property division order before one of the parties died. In any event, Wife's motion abates because the property division portion of the dissolution decree is indivisible from the dissolution decree itself; therefore, it is subject to the same abatement principles as a dissolution action.

In *Clark v. Clevenger*, the circuit court dissolved Husband and Wife's marriage, awarded them joint physical custody of their children, and ordered Husband to pay Wife weekly child support. 978 S.W.2d 511, 512 (Mo. App. 1998). Five years later, Wife filed a motion to modify the dissolution decree, seeking an increase in child support and attorney fees. *Id.* Before the circuit court ruled on the motion, Husband died. *Id.* Nevertheless, the circuit court modified the dissolution decree and awarded Wife increased child support and attorney fees. *Id.* Husband's personal representative appealed. *Id.*

[1] In reaching its untenable conclusion, the principal opinion relies heavily on tort principles involving the "personal" nature of the action. *Slip op.* at 11-12. Of course, this case is not a tort action, it involves a Rule 74.06(b) motion to set aside a dissolution decree.

On appeal, Wife argued the modification action did not abate on Husband's death. *Id.* at 513-14. Specifically, Wife argued—much like the principal opinion holds now—that any action involving property rights does not abate on the death of a party. *Id.* at 514. The court of appeals rejected this very argument, holding:

> We are not willing to interpret the language in *Carter* to mean that a modification action involving property rights never abates. ***Instead, we believe that a modification action involving the distribution of property abates upon the death of a party, except where no final order dividing the property is in effect***. In the present case, a final order addressing [Husband]'s obligation to pay child support was entered prior to [Husband]'s death on March 8, 1991, thus, the current modification action abated regardless of whether the action involved property rights.

*Id.* (emphasis added).

In *Winters v. Cooper*, 827 S.W.2d 233 (Mo. App. 1991), the court of appeals held similarly. In that case an Arizona court dissolved the parties' marriage and awarded them joint custody of their three children. *Id.* at 234. The parties relocated to Missouri and Husband remarried. *Id.* Subsequently, Husband filed a motion to modify the divorce decree, requesting he be awarded primary custody of the children. *Id.* The circuit court heard evidence on the motion but Husband died before the circuit court entered its judgment, which granted full custody to Husband.[2] *Id.* Wife appealed, arguing the motion to modify abated on Husband's death. *Id.*

The court of appeals agreed and determined the circuit court lacked jurisdiction to modify the dissolution decree. *Id.* In so holding, that court recognized:

> Once the court entered a valid dissolution decree, the court retained limited jurisdiction to make subsequent modifications and alterations of the

[2] The circuit court awarded custody to Husband's new wife after his death. *Winters*, 827 S.W.2d at 234.

> provisions of the decree relating to child custody, child support and spousal maintenance.[3] ***If a motion to modify was brought, death of either party, again, operated to abate any further action of the court and the court lost jurisdiction.***

*Id.* (emphasis added) (internal citations omitted).

Taken together, *Clark* and *Winters* demonstrate the relevant inquiry in an abatement analysis is whether the circuit court has entered a final judgment of dissolution declaring the property rights of the parties.[4] Put another way, in this circumstance, the law cares that the property rights of Husband and Wife were finally decided, not necessarily how they were decided. Here, neither Wife nor the principal opinion quarrel with the fact the circuit court entered a final judgment that included a property division. Neither party appealed that judgment and it is not subject to a motion for new trial. It is also undisputed Wife filed a motion to set aside the dissolution decree, or in the alternative, just the property division, and Husband died before the circuit court ruled on that motion. These facts put this case squarely within *Clark* and *Winters*' purview; therefore, Wife's action to set aside the property division portion of the dissolution decree abated upon Husband's death.

Nevertheless, the principal opinion argues "*Clark* and *Winters* are not authority for the proposition that a motion to vacate the property division portion of a dissolution

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[3] Notably, the *Winters* court did not mention property division in this passage, presumably because such a decree is statutorily nonmodifiable. § 452.330.5, RSMo 2016.

[4] In *Cregan v. Clark*, 658 S.W.2d 924, 926 (Mo. App. 1983), Husband and Wife appealed from an order decreeing legal separation of the parties, dividing property, and providing for maintenance and child support. During the pendency of appeal, Husband died. *Id.* Wife argued Husband's death abated the cause of action. *Id.* The court of appeals rejected this argument, noting that the dissolution decree (including the property division) were not "final" because "the court has not spoken the last word on the dispute and the rights of the parties are not conclusively settled." *Id.* at 927. Clearly, the same concerns present in *Cregan* are not present here. The circuit court conclusively divided the property between Husband and Wife and that judgment is not subject to appeal or new trial; only a collateral attack on the dissolution judgment as a whole.

judgment pursuant to Rule 74.06(b) categorically abates upon the death of a party if the underlying dissolution judgment is final and not subject to appeal or a motion for new trial." *Slip op.* at 16. This statement highlights the principal opinion's misunderstanding of the nature of Wife's motion to set aside the property division portion of the dissolution decree.

A property division is wholly dependent upon the resolution of marital status between the parties. *See* § 452.330.1, RSMo 2016 (stating a property division can only take place in the context of a "proceeding for dissolution of the marriage or legal separation"); *see also Cregan*, 658 S.W.2d at 927. Said a different way, property division may not take place in a vacuum; it must take place during the determination of marital status. It follows that the setting aside of the property division portion of a dissolution decree is a modification of the dissolution decree itself.[5] Courts have recognized a motion to modify the dissolution decree abates upon a party's death just like a dissolution proceeding abates upon a party's death. *See Smithart v. Sportsman*, 614 S.W.2d 320, 322 (Mo. App. 1981) ("[Motions to modify the dissolution decree] are in a sense a continuation of the original action for dissolution, and are ancillary thereto. As an action based on an action which does not survive, they abate along with the original action for dissolution[.]") (internal citations omitted); *see also Leventhal v. Leventhal*, 629 S.W.2d 505, 507 (Mo. App. 1981).

[5] As previously mentioned, property divisions, unlike other portions of the dissolution decree, are statutorily nonmodifiable. § 452.330.5, RSMo 2016; *Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo. banc 2002). Without a statutory avenue to modify a portion of the dissolution decree, the property division portion is inseparable from the overall dissolution decree.

Here, Wife filed a motion to set aside judgment of dissolution of marriage, or, alternatively, the property division portion of the judgment. I do not quarrel with the fact that the ***entire*** dissolution decree (which, is composed of many different portions, property division included) may be set aside if Wife's speculative allegations of fraud are eventually proven.[6] However, if Wife is successful and the entire dissolution decree is set aside, she could not institute a second dissolution proceeding because Husband's death will have abated any such action. *Linzenni v. Hoffman*, 937 S.W.2d 723, 726 (Mo. banc 1997).

Cognizant of the result if Wife succeeds on her primary argument, the principal opinion focuses on Wife's alternative argument of setting aside only the property division portion of the judgment.[7] Tellingly, the principal opinion cites no cases from this Court and no persuasive cases from the court of appeals where a husband or wife was able to set aside only the property division portion of a dissolution decree for fraud. Instead of citing cases on point, the principal opinion attempts to rely on *Anderson v. Dyer*, 456 S.W.2d 808 (Mo. App. 1970), *Hemphill v. Quigg*, 355 S.W.2d 57 (Mo. 1962), and *Richmond v. Richmond*, 225 S.W.126 (Mo. App. 1920), which merely stand for the unremarkable proposition that a court may vacate an ***entire*** dissolution decree for fraud. The fact that the principal opinion can cite no cases supporting its conclusion demonstrates two things: (1) the only method to attack a property division portion of a dissolution decree is to attack

[6] The principal opinion notes, "[a]ssuming the truth of Wife's well-pleaded allegations. . . Husband's statements were false." *Slip op.* at 4. This is a correct statement of the law at this stage in the proceedings because Wife's allegations have not been proven. It is not for this Court to determine facts in the first instance and the burden remains on Wife to prove her allegations on remand.

[7] Of course, this assumes Rule 74.06(b) allows for relief from portions of judgments, and it does not. *See infra* Section II.

the dissolution decree as a whole; and (2) the decision reached today is wholly unprecedented.

## II.

## Rule 74.06(b) Allows for Relief Only from Final Judgments or Orders in Their Entirety

Assuming *arguendo* Wife's motion was not abated by Husband's death, Rule 74.06(b) may not be used to modify or set aside portions of a final judgment. "The principles used to interpret Missouri rules are the same as those used to interpret statutes." *State ex rel. Universal Credit Acceptance, Inc. v. Reno*, 601 S.W.3d 546, 548 (Mo. banc 2020). "This Court's primary rule of interpretation is to apply the plain language of the rule at issue." *In re Hess*, 406 S.W.3d 37, 43 (Mo. banc 2013). Rule 74.06(b) provides:

> On motion and upon such terms as are just, ***the court may relieve a party or his legal representative from a final judgment or order*** for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is irregular; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force.

(Emphasis added).

Simply put, the plain language of Rule 74.06(b) does not specify providing relief from ***portions*** of judgments or orders, only "a final judgment or order." While guidance from this Court on the meaning of Rule 74.06(b)'s language is scarce at best, numerous court of appeals opinions have held Rule 74.06(b) does not allow relief from portions of final judgments or orders; only final judgments or orders in their entirety. *Spicuzza v. Spicuzza*, 886 S.W.2d 660, 661 (Mo. App. 1994) ("Rule 74.06 makes no provision for the

amendment or modification of a judgment, or for relief from part of a judgment[.]"); *Settles v. Settles*, 913 S.W.2d 101, 103 (Mo. App. 1995) (same); *Young v. Young*, 273 S.W.3d 86, 89 (Mo. App. 2008); *In re Marriage of Rolfes*, 187 S.W.3d 355, 358 (Mo. App. 2006). In this same vein, the court of appeals has astutely held "[i]f [Rule 74.06(b)] applies, the judgment is vacated." *Lombardo v. Lombardo*, 120 S.W.3d 232, 241 n.6 (Mo. App. 2003).

Instead of following the plain language of Rule 74.06(b) and the court of appeals decisions uniformly holding the Rule does not apply to provide relief from portions of judgments, the principal opinion undertakes a strained interpretation of the Rule's plain language to reach its desired conclusion. Additionally, the principal opinion dismisses *Spicuzza* and its progeny as failing to follow this Court's "most recent controlling decision" in *Kibbons v. Union Electric Co.*, 823 S.W.2d 485 (Mo. banc 1992). *Slip op.* at 22. However, a close review of *Kibbons* demonstrates that case is sufficiently distinguishable from *Spicuzza*, its progeny, and this case so as not to be controlling.[8] Because the principal

[8] *Kibbons* did not involve relief sought from a dissolution decree. In that case, the decedent's surviving spouse and children received a wrongful death judgment against a real estate developer and an electric utility. 823 S.W.2d at 486-87. After the circuit court entered judgment, the plaintiffs filed a Rule 74.06(b)(3) motion claiming the judgment was "irregular" because it did not provide for joint and several liability. *Id.* at 487. The circuit court agreed and amended the judgment to reflect joint and several liability. *Id.*

On appeal, the electric utility conceded Rule 74.06(b)(3) allowed the circuit court to relieve a party from an irregular judgment as a whole, but argued the Rule did not allow the circuit court to modify the original judgment. *Id.* at 490. This Court disagreed and held Rule 74.06(b) permits a circuit court to modify an ***irregular*** judgment. *Id.* at 491. In so holding, this Court reasoned:

> [A] motion to set aside a judgment for irregularity ... is available as a remedy only in those cases where there is some irregularity appearing in the judgment itself or on the face of the proceeding antecedent thereto. And, while this irregularity need not be one which would render the judgment absolutely void, and therefore subject to be defeated on collateral attack, it must be one which indicates at least that the judgment was given contrary, in some material respect, to the established form and mode of procedure for the orderly administration of justice. An irregularity in the

opinion's interpretation of the Rule distorts its plain language and would overrule a number of correctly decided court of appeals cases with no compelling justification, I do not concur with it.

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> sense of the law may be said to be a want of adherence to some prescribed rule or mode of procedure, consisting either in omitting to do something that is necessary for the due and orderly conduct of the suit, or in doing it at an unseasonable time or in an improper manner.

*Id.* at 490 (alterations in original) (quoting *Cross v. Gould*, 110 S.W. 672, 676 (Mo. App. 1908)).

After considering this description, this Court determined the circuit court's original judgment contained "patent and procedural" error because the circuit court's judgment was contrary to an established mode of procedure, i.e. the circuit court was not allowed as a matter of law to enter separate judgments against each defendant. *Id.* Additionally, this Court, relying on *Audsley v. Allen*, 774 S.W.2d 142, 146 n.5 (Mo. banc 1989), held that the Rule's use of the word "relief" allows a circuit court to modify a judgment as well as to set aside the judgment in its entirety. *Id.* at 491.

*Kibbons* is certainly different than the case at hand. First, *Kibbons* did not involve a dissolution case. This distinction makes a difference, as the property division portion of the dissolution decree in this case, unlike the judgment in *Kibbons*, is statutorily nonmodifiable. *See supra* n.5. Second, in this case, Wife does not allege any portion of circuit court's judgment is "irregular." Said another way, Wife does not point to a prescribed rule or mode of procedure the circuit court failed to follow. Instead, she argues the dissolution decree was completely tainted by fraud.

Finally, *Kibbons* extended the *Audsley* footnote past its stated boundaries when it held *Audsley* "recognizes that Rule 74.06(b) permits a trial court to modify a judgment." 823 S.W.2d at 491. In *Audsley*, the circuit court modified its original judgment. 774 S.W.2d at 144. On appeal, this Court noted the language included in the modified judgment was contradictory and stated, pursuant to Rule 84.14, it would amend the judgment to reflect the order the circuit court should have entered. *Id.* at 146. In a corresponding footnote, this Court stated, "Inasmuch as the judgment, as modified by the trial court, is internally inconsistent, it is very probably 'irregular' and subject to modification under Rule 74.06(b). We see no need for protracted litigation over a matter that we can easily correct." *Id.* at 146 n.5. Clearly, the *Audsley* footnote cannot be so broadly read as to allow a circuit court to modify final judgments for any reason stated in Rule 74.06(b), only irregular judgments, which, as this Court has hinted at, are issues with the procedure of the circuit court's judgment. Wife's claim of fraud certainly extends to the merits of the overall dissolution action and does not actually attack the method or procedure of the circuit court's judgment.

Rule 74.06(b) seems to permit a circuit court to grant relief for any of the reasons enumerated in the Rule. However, caselaw makes it clear that irregular judgements are *sui generis* and are treated differently than other grounds for relief set out in this Rule. Because *Kibbons* involves irregular judgments, is distinguishable from dissolution cases, and relies on an impermissible expansion of *Audsley*, the court of appeals in *Spicuzza* and its progeny were correct in not following *Kibbons* as binding precedent.

## III.

### Property Division Decree Is Not a Separate "Final Judgment or Order"

What is more, the property division itself cannot be characterized as an independent "final judgment or order" from which a party may seek relief under Rule 74.06(b). In a dissolution action, the "final judgment or order" is the dissolution decree, *Carr v. Carr*, 253 S.W.2d 191, 194 (Mo. 1952), which "completely and finally dissolves the marital relationship between a husband and wife on the date of its entry, insofar as the responsibilities and duties incident to their marriage relationship are concerned, and restores the parties to the status of single persons, and permits each to marry again." 24 Am. Jur. 2d *Divorce and Separation* § 391 (2021). While the divorce decree is undoubtedly composed of several different portions—child custody, child support, property division, and maintenance—all of these portions are incidental to the overall objective of a dissolution proceeding—resolution of marital status between spouses. *Carr*, 253 S.W.2d at 194; *Cregan*, 658 S.W.2d at 927. ("[T]he power to distribute the marital and non-marital property of the parties, the power to grant permanent maintenance and the like are all predicated upon the decree of legal separation.").[9]

In my view, Rule 74.06(b) does not provide relief from a portion of a final judgment of dissolution of marriage. The property division portion of the dissolution decree is not a separate or independent final judgment. Therefore, if Wife is able to prove fraud, her only

[9] This State's statutes also support this proposition. *See* § 452.305.1(3), RSMo 2016 ("The court shall enter a judgment of dissolution of marriage if . . . [t]o the extent it has jurisdiction, the court has considered and made provision for child custody, the support of each child, the maintenance of either spouse and the disposition of property.").

recourse is to have the entire dissolution decree set aside, which, of course, would cause the entire dissolution action to abate due to Husband's death. *See Linzenni*, 937 S.W.2d at 726. With this possible result in mind, Wife should proceed with caution in the underlying action.[10]

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Zel M. Fischer, Judge

[10] Although the procedural history of this case does not yet rival that of *Jarndyce v. Jarndyce*, this protracted litigation—which, at this point, has yet to prove any allegations of fraud to set aside the dissolution decree—over the previously-decided property division, may someday make *Olofson v. Olofson* the non-fictional *Jarndyce*. CHARLES DICKENS, BLEAK HOUSE (Norman Page ed., Penguin Books 1971) (1853).

# SUPREME COURT OF MISSOURI
## en banc

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| JEANNE H. OLOFSON, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | No. SC98043 |
| | ) | |
| SCOTT W. OLOFSON, in his Capacity as Personal Representative of the Estate of TOM W. OLOFSON, | ) | |
| | ) | |
| Respondent. | ) | |

**DISSENTING OPINION**

I concur with Judge Fischer's ultimate conclusion in Section I of his separate opinion that Jeanne Olofson's action abated upon the death of her husband, Tom Olofson. Because the circuit court rendered a final judgment dividing and disposing the marital property and that judgment is not subject to appeal or motion for new trial, any further action seeking to set aside this judgment and distribute the marital assets and debts pursuant to section 452.330, RSMo 2016, abated upon Tom Olofson's death. For this reason, I dissent and would affirm the circuit court's judgment.

_____
W. Brent Powell, Judge