

**MISSOURI COURT OF APPEALS – WESTERN DISTRICT
DIVISION 1
W. DOUGLAS THOMSON, PRESIDING JUDE
ALOK AHUJA, JUDGE
EDWARD R. ARDINI, JR., JUDGE
TERRY TSCHANNEN, SPECIAL JUDGE
OCTOBER 3, 2022
CHARITON COUNTY COURTHOUSE
KEYTESVILLE, MISSOURI**

WD84835

Zachary Robert Davis, Appellant,

vs.

State of Missouri, Respondent.

Appellant Zachary Robert Davis appeals from the judgment of the Boone County Circuit Court denying his Rule 29.15 motion for post-conviction relief. Following a bench trial, Davis was convicted of attempted enticement of a child, sexual misconduct involving a child, and attempted statutory sodomy in the second degree. Davis was found guilty, and the Court sentenced Davis to a total of five years' imprisonment. This Court affirmed Davis' conviction on direct appeal. Davis filed a *pro se* motion to vacate, set aside or correct the judgment and sentence pursuant to Rule 29.15. Post-conviction counsel was appointed, and counsel filed an amended motion. The amended motion alleged ineffective assistance of trial counsel. The assertions focused on allegations that his trial counsel was ineffective for failing to object to certain trial exhibits and testimony despite Davis' belief that the exhibits and testimony were the result of warrantless searches. Specifically, Davis alleged that his trial counsel should have objected to information seized from his phone and items found in the closed console of his car. The motion court held an evidentiary hearing. Trial counsel testified at the hearing regarding various explanations for her decisions to not object or seek suppression of certain evidence. The motion court denied Davis' motion. This appeal followed.

Appellant's point on appeal:

1. The trial court erred in denying Davis' motion for post-conviction relief under Rule 29.15 because Davis was denied his rights to be secure in his person and his affects and to not be subjected to a warrantless search of his cell phone and automobile, his right to due process of law and effective assistance of counsel as guaranteed by the Fourth, Fifth, Sixth and Fourteenth amendments to the United States Constitution and Article I, Sections 10, 15, and 18(a) of the Missouri Constitution in that his counsel did not object or file motions to suppress and thus challenge the legality and constitutionality of the warrantless search of the memory of his cell phone, or the contents in the closed console of his automobile and as a result the state secured testimony concerning the fruits of these illegal searches which was important to its proof of his guilt and was prejudicial to appellant. If counsel had filed a motion to suppress or had objected to the admission of

this evidence the evidence would have not been admitted and the results of the trial would have been different.

WD85008

Michelle Lynn Sporleder, Respondent,

vs.

Patrick Gregory Sporleder, Appellant.

Appellant Patrick Gregory Sporleder (“Husband”) appeals the judgment of the Boone County Circuit Court dissolving his marriage to Michelle Lynn Sporleder (“Wife”). The parties requested that the court divide their marital property and debts in an equitable manner. The parties did not agree as to the division of a number of assets. The parties each owned a separate, equal membership in Atkes Properties, LLC, which, in turn owned commercial real estate. The parties disputed the valuation and allocation of the Atkes Properties, LLC membership interests. Husband and Wife also disputed “unreimbursed marital expenses” Wife incurred between the time the couple separated and when the dissolution decree was entered. Further, the couple disputed the amount of income Husband would receive in bonuses, the division of household goods and personal property, the division of retirement accounts, and the ownership of two vehicles driven by the couple’s adult children. Husband brings the present appeal claiming that the circuit court erred in how it distributed the above property.

Appellant’s points on appeal:

1. The trial court erred in awarding Wife’s membership interest in Atkes Properties LLC to Husband, because it erroneously declared and applied the law in that awarding Wife’s membership interest in Atkes Properties LLC to Husband violated the Atkes Properties LLC operating agreement and section 347.081 RSMo resulting in an inequitable division of the marital estate in violation of section 452.330 RSMo.
2. The trial court erred in crediting to Wife unreimbursed marital expenses in the amount of -\$44,431.50, because it was an abuse of discretion and there was no substantial evidence to support it in that crediting to Wife unreimbursed marital expenses in the amount of -\$44,431.50 double-counted marital expenses as a negative asset to Wife and as marital debt to Wife, it ignored Wife’s use of a joint bank account to pay marital expenses following separation, it ignored Husband’s contributions to marital expenses following separation, and the funds no longer existed at the time of trial, resulting in an inequitable division of the marital estate in violation of section 452.330 RSMo.
3. The trial court erred in awarding Husband “bonus(es) 1st, 2nd, 3rd quarter with 4th quarter ‘true up’” in the amount of \$160,000.00, because it was an abuse of discretion and there was no substantial evidence to support it in that there was no evidence that Husband earned 2021 bonus income in the amount of \$160,000.00 and the parties were not married for the entirety of 2021, resulting in an inequitable division of the marital estate in violation of section 452.330 RSMo.

4. The trial court erred in finding that each parties' household goods and personal property were separate property with no value, because there was no substantial evidence to support it and it erroneously applied the law in that the trial court failed to include the summary of personal property identified as court's Exhibit 1, and it was uncontested the household goods and personal property were acquired during the marriage, resulting in an inequitable division of the marital estate in violation of section 452.330 RSMo.
5. The trial court erred in awarding half of the MFS Heritage Trust SEP retirement assets to Wife, because it is an abuse of discretion and against the weight of the evidence in that Wife received a greater benefit of the retirement assets' appreciation from the February 28, 2021 stipulation to the subsequent trial on July 23, 2021, resulting in an inequitable division of the marital estate in violation of section 452.330 RSMo.
6. The trial court erred in finding that the 2009 BMW was gifted to the parties' son on his 16th birthday and the 2012 VW GTI was gifted to the parties' daughter on her 16th birthday, because there was no substantial evidence to support it in that Husband's and Wife's names were both on the titles of the vehicles, there was no evidence the parties' children received the vehicles as gifts on their 16th birthdays, respectively, and it resulted in an inequitable division of the marital estate in violation of section 452.330 RSMo.

WD85225

In the Interest of: B.K.B., Juvenile; Juvenile Officer, Respondent,

vs.

D.G., Appellant.

Appellant D.G. ("Mother") appeals the judgment of the Cole County Circuit Court terminating her parental rights to her child, B.K.B. In August, 2019, B.K.B. was taken from Mother and placed into protective custody following Mother's arrest. Mother was also charged and pled guilty to Endangering the Welfare of a Child. A petition to terminate Mother's parental rights was filed on August 21, 2021. The petition stated that Mother's last known address was the prison in Vandalia, Missouri. The return of service on the summons indicated that Mother was served by a Phelps County Sheriff's deputy at the address for the Phelps County Jail. The circuit court held a hearing on September 1, 2021, and found that Mother failed to appear. It also appears that Mother's appointed counsel from her prior abuse and neglect case did not appear. Another hearing was held on October 13, 2021, and again Mother failed to appear. Mother contends that she was never notified of the October 13 hearing. On October 13, 2021, the circuit court found that Mother again failed to appear and, having filed no answer or response to the petition, Mother was in default. A hearing on the petition was held October 21, 2021, Mother contends that she received no notice of the hearing. On November 2, 2021, the court entered a judgment terminating Mother's parental rights. On December 13, 2021, Mother filed a motion to set aside the judgment arguing that the judgment was void because she did not receive proper notice and there was no requirement that she file an answer to the petition. The circuit court denied the motion and this appeal followed.

Appellant's points on appeal:

1. The trial court erred in denying Mother's motion to set aside the judgment terminating her parental rights for being in default by not having filed an answer to the petition because the court did not have authority to declare her in default in that per Missouri Supreme Court Rule 113.03 she was not required to file an answer to the petition.
2. The trial court erred in denying Mother's motion to set aside the judgment the court entered which terminated her parental rights without prior notice to her of the trial setting therefor due to her being in default because the judgment terminating her parental rights is void as being violative of her due-process right to notice in that per Missouri Supreme Court Rule 113.03 she was not required to file an answer to the petition such that she was not in default and was entitled to notice as a matter of law.
3. The trial court erred in denying Mother's motion to set aside the judgment terminating her parental rights because that judgment is irregular in that Mother was effectively denied the right to counsel where the TPR and abuse/neglect cases were brought in the same court by the same opponent, the same judge presided over both cases, and the parties and the issues were the same in both cases, yet there is no indication that Mother affirmatively waived the right to counsel or that the trial court or anyone else ever notified Mother that the appointed counsel she had in the abuse/neglect case was not also her counsel in the TPR case such that it reasonably could be presumed that she understood that she was already represented by appointed counsel in the TPR case and reasonably would not have perceived a need to make another request for counsel.

WD85388

Glenda Kirkendoll, Appellant,

vs.

Auto Owners Insurance Company, Respondent.

Glenda Kirkendoll appeals the judgment of the Randolph County Circuit Court entering summary judgment in favor of Auto Owners Insurance Company ("Auto Owners"). On December 21, 2018, Robert Wayne Jones was driving his vehicle, and Ms. Kirkendoll was in the passenger seat. While stopped and attempting to make a right turn, Mr. Jones's vehicle was rear ended by a vehicle driven by Mason Rogers. Mr. Rogers' vehicle was insured by Farm Bureau Town & County Insurance Company of Missouri ("Farm Bureau"). Farm Bureau, on behalf of Mr. Rogers, offered to pay to Ms. Kirkendoll full policy limits of \$50,000, and Ms. Kirkendoll accepted. Mr. Jones' vehicle was insured by Auto Owners. The policy contained an underinsured motor vehicle coverage provision. Ms. Kirkendoll made a claim against Auto Owners pursuant to that provision. Auto Owners denied coverage. Ms. Kirkendoll filed suit against Auto Owners alleging that it breached its policy in denying coverage. Auto Owners filed a motion for summary judgment asserting that the policy does not provide underinsured motor

vehicle coverage to Ms. Kirkendoll. The circuit court entered summary judgment in favor of Auto Owners. This appeal followed.

Appellant's points on appeal:

1. The trial court erred in entering its Judgment for Respondent on Respondent's Motion for Summary Judgment, because Rule 74.04 does not permit the trial court to enter a judgment for Respondent when Respondent was not entitled to a judgment as a matter of law, in that Respondent's policy does not provide at least two times the limits for bodily injury or death required by section 303.020 RSMo and, therefore, pursuant to section 379.204 RSMo, the trial court was required to construe Respondent's policy as providing excess underinsured motor vehicle coverage to Appellant.
2. The trial court erred in entering its Judgment for Respondent on Respondent's Motion for Summary Judgment, because Rule 74.04 does not permit the trial court to enter a judgment for Respondent when Respondent is not entitled to a judgment as a matter of law, in that Respondent's policy, when construed as a whole, is ambiguous as to the amount and availability of underinsured motor vehicle coverage and, therefore, must be construed to provide excess underinsured motor vehicle coverage to Appellant.