WD84011

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JENNIFER SCHUTTER,

Respondent,

vs.

PAUL SEIBOLD,

Appellant.

On Appeal from the Circuit Court of Platte County
Honorable Abe Shafer V, Circuit Judge
Case No. 12AE-CV00757-07

BRIEF OF THE APPELLANT

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Platte County dismissing a domestic proceeding and citing the Uniform Child Custody Jurisdiction and Enforcement Act as authority for doing so.

This case does not involve the validity of a Missouri statute or constitutional provision or a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Platte County. Under § 477.070, R.S.Mo., venue lies in the Western District.

Statement of Facts

A. Overview

Father and Mother were married and had Son, a special needs child (D10 p. 2). In the judgment dissolving their marriage, Father was ordered to pay Mother $2,620 per month in child support, plus an arrearage of $31,410 (D2 pp. 19, 22), $182,555.75 as part of the property division (D13 p. 32), and $25,000 in attorney fees (D1 p. 115). Besides garnishing Father's wages through the Family Support Center for the child support, Mother then levied five more garnishments seeking the other amounts (D5; D8; D14; D18; D21).

Years after the dissolution, Mother was allowed to relocate to Texas with Son (D1 p. 158). The court also modified custody of Son so that Mother has sole legal custody, but the parties have joint physical custody, with Father receiving parenting time in both Missouri and Texas and the right to Son's medical and school records (D27 pp. 6-7, 10-13; App. A93-94, A97-100).

Alleging Mother refused to allow him any parenting time with Son, Father then brought a family access motion and a new motion to modify custody and support (D29; D32). He also moved to quash the garnishments of his wages, alleging they exceeded the 25% of his wages that Mother legally was allowed to obtain through garnishments (D38).

Mother moved to dismiss Father's actions, arguing that Texas now had exclusive continuing jurisdiction over Son's custody and support or was a more convenient forum (D42). The court agreed and dismissed all proceedings before it: not just Father's motion to modify, but also the family access motion and garnishment challenge (D44; D54). Father appeals (D59).

B. Background and prior litigation

1. Dissolution of marriage, appeal, and proceedings on remand

Paul Seibold ("Father") and Jennifer Schutter ("Mother") were married in 2002 (D10 p. 2).[1] They had one son, born in July 2009, who "is a special needs child who requires extensive medical and therapy care and 24-hour assistance and supervision" (D10 p. 2). Father is employed as an information technology sales specialist with Cisco Systems (D10 p. 2; D23 p. 1; Tr. 20).

In 2012, Mother filed a petition for dissolution of marriage (D10 p. 2). A trial was held in 2013, and in March 2014 the court entered a judgment dissolving the marriage, awarding Mother sole legal custody of Son and the parties joint physical custody (D10 p. 2; D2; App. A3). Father was ordered to pay Mother $2,620 per month in child support, plus an arrearage of $31,410 (D2 pp. 19, 22; App. A21, A24).

In June 2014, the court sustained Mother's post-trial motion to reopen the evidence, setting aside the March 2014 judgment only as to property and debt division and attorney fees and expenses (D10 p. 4). In September 2014, on Mother's motion and later with Father's agreement, the court also issued a preliminary injunction restraining Father from exercising unsupervised parenting time with Son until further order (D10 pp. 4-5; D3; App. A47).

In May 2016, after hearing further evidence, the trial court issued a new judgment only as to the property, debt, and fee issues, which stated that all orders regarding Son were contained in the March 2014 judgment and the

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[1] D10 is the slip copy of this Court's prior decision in *Schutter v. Seibold*, 540 S.W.3d 494 (Mo. App. 2018), which this Court transmitted to the trial court along with its mandate (D9).

September 2014 preliminary injunction (D10 pp. 5-6; D4 pp. 4-5; App. A54-55). In the judgment, the court ordered Father to pay Mother a cash equalization payment of $156,098 (D4 p. 30; App. A80).

Father appealed to this Court, challenging aspects of the property division and other orders the trial court made (D10). The Court agreed with him that the trial court had misclassified a non-marital retirement account of his as marital property and reversed the trial court's judgment and remanded the case for a re-division of the marital estate, but otherwise affirmed the trial court's judgment (D10 p. 11, 22). In November 2016, pending Father's appeal, the trial court also awarded Mother $25,000 in appellate attorney fees (D1 p. 115).

On remand, in April 2018 the trial court entered a new judgment again only as to the property, debt, and fee issues, which again stated that all orders regarding Son were contained in the March 2014 amended judgment and the September 2014 preliminary injunction (D13 pp. 5-6). Its re-division of the marital estate again resulted in an order for Father to pay Mother a cash equalization payment of $156,098, plus another $26,457.75 "to offset the Remand of [Father]'s Pre-Marital [retirement account] which had previously been awarded to" Mother (D13 p. 32). As to the $156,098, it awarded Mother another retirement account of Father's "to satisfy the equalization/Judgment amount," but granted Mother judgment against Father "[t]o the extent the Cisco 401k account is not sufficient to satisfy" (D13 p. 32).

2. Garnishments

Beginning in 2017, while Father's prior appeal was pending before this Court, Mother filed garnishment applications on Father's wages with Cisco Systems. The following table lists all the "original amounts of judgment" for which the garnishment applications stated they were sought, as well as the corresponding amount that Cisco stated in its garnishment interrogatory responses that it withheld from Father's wages:

Date	Length	Judgment	Withheld
August 2017 (D5)	Continuous	$25,000	$268.57 (D7)
March 2018 (D8)	180 days	$25,000	"varies, support order takes priority" (D12)
September 2018 (D14)	Continuous	$25,000	"varies, support order takes priority" (D16)
January 2019 (D18)	180 days	$207,555.75	"$0; varies, support order takes priority (D20 p. 2)
November 2019 (D21)	Continuous	"$5,000.00 & $26,547.75"	$0 (D25)

In May 2020, Mother filed a "Statement of Judgment Balance Remaining Due," in which she reported among other things: (1) having received $0 from Cisco during any previous reporting periods and $10,393.56 from Cisco in the previous six months, (2) that the total due to her from the garnishment was $61,491.95, and (3) that the "Total Unsatisfied Judgment Balance Remaining Due" was $53,638.20 (D26 pp. 1-2).

3. Modification

In 2016, over Father's objection, the trial court entered a temporary order allowing Mother to relocate with Son to Texas (D1 p. 158). In January 2019, it then entered a judgment approving the relocation and modifying custody and child support on the parties' competing motions (D1 p. 218). Weeks later, the court set aside the modification portion of that judgment on its own motion pending a further hearing (D1 p. 219). At some point, Mother registered several of the Missouri judgments between the parties in Tarrant County, Texas (Tr. 45, 109).

In March 2019, the court entered an amended judgment of modification (D27; A88). It awarded Mother sole legal custody of son but again gave the parties joint physical custody of Son, ordered Father to pay Mother $3,000 per month in child support, made a parenting time schedule for Father in both Kansas City and Texas, and gave both parties complete access to Son's medical and school records (D27 pp. 6-7, 10-13; App. A93-94, 97-100).

C. Proceedings below

1. Father's filings

In November 2019, Father, *pro se*, filed a motion to modify, alleging that since the March 2019 modification judgment, Mother had refused him any contact with Son, and that this was a substantial and continuing change of circumstance that justified modifying the previous decree (D28 pp. 5-10). He argued that under the UCCJA and UCCJEA, Missouri should retain jurisdiction over the case (D28 pp. 1-5). In an amended motion, he also alleged Mother was improperly medicating Son and preventing him from

having access to Son's medical records (D32 pp. 2-3). In December 2019, Father also filed a motion for a family access order, alleging that Mother was violating the March 2019 modification judgment by preventing him from having any contact with Son (D29).

At a hearing in March 2020, Father argued Mother had been served with both the motion to modify and the family access motion, she had not responded, she was given notice of the hearing date, and that under the family access statute the court should grant it (Tr. 5-6, 15). Mother sent a letter stating she could not be there and had not been given sufficient notice, so the trial court continued the hearing on those matters until April 2 (Tr. 6-7, 19-20). The trial court also appointed a guardian ad litem (Tr. 18; D34).

Before a further hearing could be held, however, the Supreme Court of Missouri closed the courts in response to the COVID-19 Pandemic, causing the trial court to cancel the April 2 hearing (D1 p. 242). Meanwhile, Father sought temporary custody orders (D37).

Father also moved to quash the garnishment of his wages as being in excess of Missouri and federal law (D38). Later, at a hearing, he argued this was because the maximum amount of his wages that could be garnished was 25%, and Mother was garnishing more than that (Tr. 40). He argued she was garnishing 45 to 55% of his income (Tr. 91).

2. Hearing

Ultimately, the case was continued until July 20, 2020 (D1 p. 243; Tr. 29). In the meantime, Mother, also *pro se*, opposed Father's request for temporary orders (D41), and also moved to dismiss the case, arguing that

Texas had proper jurisdiction of the proceedings or, alternatively, that Missouri was an inconvenient forum (D42).

The hearing on July 20 began at 8:57 a.m. as a videoconference via WebEx (Tr. 29), though there were some technical difficulties at the beginning (Tr. 31-32), and no testimony begins until 18 pages into the transcript (Tr. 47). At 9:01 a.m., the clerk received from Father a motion for findings of fact under Rule 73.01(c), which he stated was made before the start of the hearing (D45 p. 1; App. A107). He requested findings on 49 issues, including among other things:

- "What medical professionals indicate that [Father] is unable to care for [Son]?" (D45 p. 3; App. A109).
- "What evidence exists that any alcohol use by [Father] has occurred in the past 1 year? In the past 5 years?" (D45 p. 3; App. A109).
- "What medical evidence exists that there is any reason to restrict visitation between [Father] and [Son]?" (D45 p. 3; App. A109).
- "Where are [Son's] medical records kept?" (D45 p. 5; App. A111).
- "Who keeps those medical records and how can [F]ather access those records?" (D45 p. 5; App. A111).
- "What evidence exists that phone calls from [Son] to [F]ather are harmful to [Son]?" (D45 p. 5; App. A111).
- "What is the interaction and interrelationship of [Son] with parents, siblings, and grandparents, nieces and nephews, and any other person who may affect [Son]'s best interest been maintained or increased by the move to Texas?" (D45 p. 6; App. A112).

- "Does [F]ather and members of [Son]'s family [*sic*] reside in Missouri?" (D45 p. 8; App. A114).
- "Does [Son] have significant connection to the state of Missouri?" (D45 p. 8; App. A114).

Though the clerk's e-mail stated she received Father's motion for findings of fact and conclusions of law at 9:01 a.m. on July 20, 2020, it was not file-stamped until July 22 (D45 p. 1; App. A107).

At the hearing, Mother, still *pro se*, took up her motion to dismiss (Tr. 35-36). Father, also still *pro se*, took up his request for temporary orders, his motion to quash the garnishment, and his motion to modify (Tr. 38-40).

The court heard testimony and argument from Mother and Father, as well as argument by the guardian ad litem (Tr. 47-110). Father opposed Mother's motion to dismiss, arguing that the court had continuing jurisdiction over the case (Tr. 93-100). He argued that the registration of some previous judgment in Texas did not change this (Tr. 105). The guardian ad litem argued that Texas was a more appropriate forum for the case, because it was hard for her to do her job with Son in Texas (Tr. 102-03). At the end of the hearing, the court stated it would "consider the jurisdictional and forum issues before we do anything else," and depending on how it ruled on that, "we'll decide how best to proceed" (Tr. 111).

3. Judgment

The next day, the trial court entered an order in the main Case No. 12AE-CV00757 "and all sub-cases," titled, "Order Declining Jurisdiction and Order Staying Proceedings" (D44; App. A104). It held it "does not have

exclusive and continuing jurisdiction" under § 452.745.1(1), R.S.Mo. (D44 p. 1; App. A104), but that even if it does, Texas still was a more appropriate forum under § 452.770, R.S.Mo. (D44 p. 2; App. A105). It stayed the case for 30 days so that the parties could register or file whatever they wanted to in Texas, at the end of which "all pending matters here in Missouri should be dismissed" (D44 p. 2; App. A105). It ordered a copy of the order sent to the District Court of Tarrant County, Texas (D44 p. 3; App. A106).

Counsel then entered for Father (D1 p. 247). As the order declining jurisdiction might be considered a judgment, through counsel Father filed a motion to amend the order, as well as a motion to re-denominate it a "judgment" (D49; D53).

On August 19, 2020, the court entered in the main case and all sub-cases a "Judgment of Dismissal," which echoed the order declining jurisdiction and found that Missouri lacked exclusive or continuing jurisdiction under § 452.745.1(1), but even if Missouri did have jurisdiction it was an inconvenient forum under § 452.770, R.S.Mo., and Tarrant County, Texas was a more appropriate forum (D54 pp. 1-2; App. A1-2). It stated that therefore, "this matter, and all motions now pending by and between the parties in this case, or any sub-case are hereby dismissed" (D54 p. 2; App. A2). It also stated,

> Prior to the hearing held on July 20th, 2020, neither party made a timely or proper request for findings under Rule 73.01. Therefore, the Court has not stated all of its findings and it has made additional findings on the statutory factors (and non-statutory) that this Court must consider that relate to the issues in this case, whether or not the findings are specifically stated.

> The additional findings that are not specifically stated in this order are consistent with the orders made herein.

(D54 p. 2; App. A2).

Father timely moved to amend the judgment (D55). Among other things, he argued:

- He timely and properly requested the court under Rule 73.01(c) to make findings on disputed fact issues, and the court erred in holding otherwise and failing to make those findings (D55 pp. 2-3).
- A lack of jurisdiction under the UCCJEA only goes to Father's motion to modify custody, not his family access motion or his motion to quash Mother's garnishment, which are not proceedings subject to the UCCJEA, and of which the trial court retained jurisdiction and authority to decide regardless (D55 pp. 4-6).

When the trial court denied Father's motion to amend (D1 p. 248), he timely appealed to this Court (D59).

Points Relied On

I. The trial court erred in not making findings of fact on the issues that Father requested *because* this misapplied the law, as under Rule 73.01(c), if before the introduction of evidence at trial in a judge-tried case a party moves on the record for findings on specific fact issues that are material, the trial court is required to make those findings, a material issue is any that might affect the outcome of the suit under the governing law, and under Rule 43.02(b) a motion is deemed "filed" when the clerk of the court receives it, not when it is file-stamped *in that* before the introduction of evidence at the July 20, 2020 evidentiary hearing below, Father filed a written motion with the clerk requesting findings of fact on a number of issues that might affect the outcome of even just Mother's UCCJEA motion to dismiss, including what the evidence and records were that would be at issue in Father's motion to modify and for temporary orders and where they were located, as well as what Son's relationship to Missouri was.

In re Marriage of Goldstein, 420 S.W.3d 612 (Mo. App. 2013)
Jenkins v. Jenkins, 368 S.W.3d 363 (Mo. App. 2012)
Orton v. Dir. of Revenue, 131 S.W.3d 827 (Mo. App. 2004)
In re Marriage of Flud, 926 S.W.2d 201 (Mo. App. 1996)

II. The trial court erred in dismissing Father's family access motion and his motion to quash Mother's garnishment of his wages *because* this misapplied the law, as §§ 452.745 and 452.770, R.S.Mo. only govern whether Missouri has jurisdiction to make initial child custody determinations or determine child custody modifications, and do not govern any other proceeding, including family access motions, child support proceedings, or collection proceedings such as challenges to wage garnishments, all of which a Missouri court retains authority over even if it dismisses a child custody determination matter under §§ 452.745 or 452.770 *in that* while Father filed a motion to modify custody and a motion for temporary custody, he also filed a family access motion and a motion to quash Mother's garnishment of his wages, but the trial court dismissed all proceedings before it under §§ 452.745 and 452.770.

Al-Hawarey v. Al-Hawarey, 388 S.W.3d 237 (Mo. App. 2012)
State ex rel. Ferrara v. Neill, 165 S.W.3d 539 (Mo. App. 2005)
In re Marriage of Osborne, 895 S.W.2d 285 (Mo. App. 1995)
J&M Securities v. Mees, 519 S.W.3d 465 (Mo. App. 2017)

Argument

Standard of Review as to All Points

In a judge-tried case, the standard of review from *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), applies. *In re Marriage of Woodson*, 92 S.W.3d 780, 785 (Mo. banc 2003).

The trial court's judgment will be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy*, 536 S.W.2d at 32. This Court will "view the evidence and the reasonable inferences drawn from the evidence in the light most favorable to the judgment, disregard all evidence and inferences contrary to the judgment, and defer to the trial court's superior position to make credibility determinations." *Houston v. Crider*, 317 S.W.3d 178, 186 (Mo. App. 2001).

"A claim that the trial court erroneously declared or applied the law is reviewed *de novo*." *Estate of Briggs*, 449 S.W.3d 421, 425 (Mo. App. 2014). "Statutory interpretation is an issue of law that this Court reviews *de novo*." *State v. Johnson*, 524 S.W.3d 505, 510 (Mo. banc 2017) (citation omitted).

I. The trial court erred in not making findings of fact on the issues that Father requested *because* this misapplied the law, as under Rule 73.01(c), if before the introduction of evidence at trial in a judge-tried case a party moves on the record for findings on specific fact issues that are material, the trial court is required to make those findings, a material issue is any that might affect the outcome of the suit under the governing law, and under Rule 43.02(b) a motion is deemed "filed" when the clerk of the court receives it, not when it is file-stamped *in that* before the introduction of evidence at the July 20, 2020 evidentiary hearing below, Father filed a written motion with the clerk requesting findings of fact on a number of issues that might affect the outcome of even just Mother's UCCJEA motion to dismiss, including what the evidence and records were that would be at issue in Father's motion to modify and for temporary orders and where they were located, as well as what Son's relationship to Missouri was.

Preservation Statement

Father made the argument in this point in his motion to amend the trial court's judgment (D55 pp. 2-3). Therefore, this point is preserved for appellate review. *See* Rule 78.07(c).

* * *

Under Rule 73.01(c), if in a judge-tried case a party requests findings of fact on specific material fact issues on the record before the introduction of evidence at trial, the trial court is bound to make those findings and errs if it does not. Here, before the introduction of evidence at the hearing below on

all the parties' motions, Father requested in writing findings of fact on 49 fact issues, many of which might have affected the outcome of Mother's UCCJEA motion to dismiss. Nonetheless, the trial court held Father had not properly requested findings of fact and refused to make any of them. This was error, requiring reversal and remand for entry of those findings.

A. When a party requests findings of fact on specific material fact issues on the record before the presentation of evidence, the trial court must issue those findings, and the failure to do so is error, which is reversible if it affects the merits of the action or interferes with appellate review.

Rule 73.01(c) provides in relevant part that in a judge-tried case:

> [t]he court … if requested by a party **shall**, include in the opinion findings on the controverted material fact issues specified by the party. Any request for an opinion or findings of fact shall be made on the record before the introduction of evidence at trial or at such later time as the court may allow.

(Emphasis added).

"The provisions of Rule 73.01 are mandatory where a party properly requests findings of specific fact issues." *Plager v. Plager*, 426 S.W.3d 689, 692 (Mo. App. 2014). "Hence, a trial court is required to make requested findings upon a party's timely request and failure to do so is error." *Hagler v. Dir. of Revenue*, 223 S.W.3d 907, 910 (Mo. App. 2007). This Court "must reverse the court's judgment where it fails to include specific findings of fact as requested by the parties when such failure materially affects the merits of the action or interferes with appellate review." *Pittman v. Hendricks*, 399 S.W.3d 918, 920 (Mo. App. 2013).

So, when (1) a party has requested findings of fact under Rule 73.01(c) in writing before the presentation of evidence, (2) identified the specific controverted fact issues on which he requests findings, and (3) those issues were material, but (4) the trial court failed to issue those findings, this Court routinely has reversed the judgment and remanded the case with instructions for the trial court to enter those requested findings. *See, e.g.*:

- *In re Marriage of Goldstein*, 420 S.W.3d 612, 615-16 (Mo. App. 2013) (in dissolution of marriage case, failure to make wife's requested findings on the amounts the trial court felt wife squandered versus any amounts that were her legitimate and reasonable expenditures was reversible error, as otherwise it was impossible to know trial court's reasons for weighing the division of marital assets as it did and whether they were supported by evidence);
- *Lara v. Dir. of Revenue*, 411 S.W.3d 347, 351-52 (Mo. App. 2013) (in driver's license revocation case, failure to make Director's requested findings about the credibility of the evidence on indicia of intoxication was reversible error, as otherwise it was impossible to know why trial court reinstated license);
- *Pittman*, 399 S.W.3d at 910 (in adverse possession case, failure to make parties' requested findings on the elements of adverse possession was reversible error, as otherwise it was impossible to know why trial court felt "the evidence is not sufficiently persuasive to establish all elements of adverse possession");

- *Jenkins v. Jenkins*, 368 S.W.3d 363, 369 (Mo. App. 2012) (in dissolution of marriage case, failure to make wife's requested finding about why an unequal division of marital property was necessary was reversible error, as otherwise it was impossible to know why the trial court made the unequal division of property it did);
- *Gipson v. Fox*, 248 S.W.3d 641, 644 (Mo. App. 2008) (in paternity case, failure to make mother's requested findings regarding financial awards was reversible error);
- *Hagler*, 233 S.W.3d at 910-11 (in driver's license revocation case, failure to make driver's requested findings about his behavior and the validity of the sobriety field tests was reversible error, as otherwise it was impossible to know why the trial court had concluded the arresting officer had reasonable grounds to believe the driver was driving while intoxicated);
- *Orton v. Dir. of Revenue*, 131 S.W.3d 827, 830-31 (Mo. App. 2004) (in driver's license revocation case, failure to make driver's requested findings about accuracy of breath test results and equipment was reversible error, because these were material issues and otherwise it was impossible to know "the factual underpinnings of the trial court's determination regarding" the reliability of the breath test results);
- *In re Marriage of Flud*, 926 S.W.2d 201, 205-06 (Mo. App. 1996) (in dissolution of marriage case, failure to make husband's requested findings regarding apportionment of marital property was reversible

error, as otherwise it was impossible to know why the court apportioned the property as it did);

- *Lattier v. Lattier*, 857 S.W.2d 548, 548-49 (Mo. App. 1993) (in dissolution of marriage case, failure to make husband's requested findings on income and needs for maintenance was reversible error, as otherwise it was impossible to know why the court made the maintenance order it did).

B. The trial court committed reversible error in refusing to make findings of fact that Father timely and properly requested.

As in all these cases, the trial court here committed reversible error in refusing to make any of Father's requested findings on material issues, which he timely and properly made. This Court should reverse the trial court's judgment and remand this case with instructions to make Father's requested findings.

In its judgment, the Court stated that "Prior to the hearing held on July 20, 2020, neither party made a timely or proper request for findings under Rule 73.01" (D54 p. 2; App. A2). It stated that, "Therefore, the Court has not stated all of its findings and has made additional findings … that relate to the issues in this case, whether or not the findings are specifically stated" (D54 p. 2; App. A2).

This was incorrect. Father timely and properly filed a written request for findings of fact on 49 specific issues. Therefore, the Court had to enter any of them in its decision that were material to it. *Hagler*, 223 S.W.3d at 910.

1. Father's request for findings of fact was timely.

First, Father's request was timely: he made a "request for an opinion or findings of fact … on the record before the introduction of evidence at trial." Rule 73.01(c). It was filed with the clerk's office at 9:01 a.m. on July 20, before the court began hearing evidence at the hearing (D45 p. 1).

The hearing on all the parties' motions, including Mother's UCCJEA motion to dismiss, which is what the court ultimately decided, was scheduled for 9:00 a.m. on July 20, 2020 via WebEx videoconference (D1 p. 243). The transcript of the hearing states that the WebEx session began at 8:57 a.m. (Tr. 29). But there were some technical difficulties at the beginning of the hearing (Tr. 31-32), and no testimony begins until 18 pages into the transcript (Tr. 47).

In the meantime, at 9:01 a.m., the clerk received from Father by e-mail a Rule 73.01(c) request for findings of fact on 49 issues (D45 p. 1). While the clerk did not file-stamp the request or enter it into the record until July 22, her e-mail header clearly shows the court received it at this date and time: "07/20/2020 09:01 AM" (D45 p. 1).

The law of Missouri therefore is that Father's motion was "filed" effective 9:01 a.m. on July 20, regardless of the file stamp:

> Rule 43.02(b) provides that filings "shall be made by filing them with the clerk of the court." A motion is considered filed when "delivered to the proper officer and lodged in his office." *Ely v. Parsons*, 399 S.W.2d 613, 619 (Mo. App. 1966). Therefore, **the critical date is the date the motion is delivered, and the document's disposition by the clerk's office is not the responsibility of the person filing the document**. *Euge v.*

> *Golden*, 551 S.W.2d 928, 931 (Mo. App. 1977); *see also Stephan v. World Wide Sports, Inc.*, 502 S.W.2d 264, 269 (Mo. 1973).

Freeman v. Leader Nat'l Ins. Co., 58 S.W.3d 590, 595 (Mo. App. 2001) (emphasis added) (voluntary dismissal received by cashier for circuit clerk's office constituted filing, regardless of when it was delivered to the clerk and file-stamped); *see also In re Idella M. Fee Revocable Trust*, 142 S.W.3d 837, 840 (Mo. App. 2004) (motion delivered to clerk's office in March 2003 but not file-stamped by clerk until June 2003 was "filed" as of March 2003).

Therefore, Father made a timely request for findings of fact.

2. Father's request for findings of fact properly specified the controverted fact issues on which he requested the court make findings, many of which were material to Mother's UCCJEA motion to dismiss.

Second, Father's request was proper: it specified the "controverted material fact issues" on which he requested the trial court make findings. Rule 73.01(c). A "material" issue is any that "might affect the outcome of the suit under the governing law." *Stiens v. Mo. Dept. of Agriculture*, 587 S.W.3d 666, 670 (Mo. App. 2019).

Father's request plainly included material issues, even just to whether the trial court should grant Mother's motion to dismiss. In § 452.745.1, R.S.Mo., the statute on which the trial court relied in its judgment to hold Missouri no longer has exclusive continuing jurisdiction over Son's custody (D54 pp. 1-2; App. A1-2), the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), provides in relevant part that Missouri retains jurisdiction over a child custody proceeding until

> [a] court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent

> **have a significant connection with this state, *and* that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships.**

(App. A116) (emphasis added).

And § 452.770.2, R.S.Mo., the statute on which trial court relied to hold Tarrant Count, Texas was a more convenient forum (D54 p. 2; App. A2), provides a series of factors a court must consider in determining whether it is an inconvenient forum:

> (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) The length of time the child has resided outside this state;
>
> (3) The distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (4) The relative financial circumstances of the parties;
>
> (5) Any agreement of the parties as to which state should assume jurisdiction;
>
> **(6) The nature and location of the evidence required to resolve the pending litigation, including the testimony of the child;**
>
> (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) The familiarity of the court of each state with the facts and issues of the pending litigation.

(App. A117) (emphasis added).

Under these standards, many of the issues on which Father sought findings were material to Mother's motion to dismiss. Some concerned the nature and location of the evidence required to resolve the pending litigation

on Father's motion to modify, motion for temporary orders, and family access motion:

- "What medical professionals indicate that [Father] is unable to care for [Son]?" (D45 p. 3).
- "What evidence exists that any alcohol use by [Father] has occurred in the past 1 year? In the past 5 years?" (D45 p. 3).
- "What medical evidence exists that there is any reason to restrict visitation between [Father] and [Son]?" (D45 p. 3).
- "Where are [Son's] medical records kept?" (D45 p. 5).
- "Who keeps those medical records and how can [F]ather access those records?" (D45 p. 5).
- "What evidence exists that phone calls from [Son] to [F]ather are harmful to [Son]?" (D45 p. 5).

Others concerned Son's connection to Missouri:

- "What is the interaction and interrelationship of [Son] with parents, siblings, and grandparents, nieces and nephews, and any other person who may affect [Son]'s best interest been maintained or increased by the move to Texas?" (D45 p. 6).
- "Does [F]ather and members of [Son]'s family [*sic*] reside in Missouri?" (D45 p. 8).
- "Does [Son] have significant connection to the state of Missouri?" (D45 p. 8).

Therefore, all of these issues were material, even just to the trial court's ultimate decision on Mother's motion to dismiss.

3. The trial court's failure to make Father's requested findings materially affected the merits of the case and impedes appellate review of the decision granting Mother's motion to dismiss Father's child custody proceedings.

As in the decisions above in which this Court reversed the failure to make findings, the trial court's erroneous failure here is equally reversible. Its failure to make Father's requested findings on material issues precludes appellate review of the trial court's determination that Missouri lacks jurisdiction and is an inconvenient forum, as without these findings it is impossible to know exactly what evidence the trial court thought supported or did not support these factors. Father would like to question the sufficiency and weight of the evidence, but without knowing why the trial court found as it did, he cannot. *Cf. Orton*, 131 S.W.3d at 830-31.

As to the § 452.745, the trial court found Son and Mother "no longer have a significant connection with this state; and that substantial evidence is no longer available in this state concerning the care, protection, and personal relationships of" Son (D54 p. 1; App. A1). And as to § 452.770, it found that "based upon the factors set forth in" it, "Tarrant County, Texas would be a more appropriate forum" (D54 p. 2; App. A2).

But *why* this was so and *why* these factors supported these conclusions are what Father timely and properly requested the trial court to make findings on. Its failure to do so violated Rule 73.01(c) and precludes Father's ability to seek meaningful appellate review of its decision. Therefore, its error is reversible.

This Court should remand this case with instructions to make findings of fact as Father timely and properly requested under Rule 73.01(c).

II. The trial court erred in dismissing Father's family access motion and his motion to quash Mother's garnishment of his wages *because* this misapplied the law, as §§ 452.745 and 452.770, R.S.Mo. only govern whether Missouri has jurisdiction to make initial child custody determinations or determine child custody modifications, and do not govern any other proceeding, including family access motions, child support proceedings, or collection proceedings such as challenges to wage garnishments, all of which a Missouri court retains authority over even if it dismisses a child custody determination matter under §§ 452.745 or 452.770 *in that* while Father filed a motion to modify custody and a motion for temporary custody, he also filed a family access motion and a motion to quash Mother's garnishment of his wages, but the trial court dismissed all proceedings before it under §§ 452.745 and 452.770.

Preservation Statement

Father made the argument in this point in his motion to amend the trial court's judgment (D55 pp. 4-6). Therefore, this point is preserved for appellate review. *See* Rule 78.07(c).

* * *

The UCCJEA governs whether an initial child custody determination or a proceeding to modify child custody should be heard in Missouri or another state. But it does not concern other proceedings between the parties, such as those over child support, judgment collections, contempt, or family access. Here, on Mother's motion, the trial court dismissed Father's motions

to modify custody of Son and for temporary custody of Son under the UCCJEA, holding that Texas, rather than Missouri, now had exclusive continuing jurisdiction, and Missouri was an inconvenient forum as compared to Texas. But along with that, it also dismissed Father's family access motion and motion to quash Mother's garnishment of his wages to collect prior judgments between the parties. This was error. The UCCJEA did not govern or affect the trial court's authority to hear Father's family access motion or his challenge to the garnishment.

A. Besides his motions to modify custody and for temporary custody, at the time of the hearing below Father also had a pending family access motion and a motion to quash Mother's garnishment of his wages, which the trial court dismissed along with the custody-related proceedings.

At the time of the July 20, 2020 hearing below, Father had pending: (1) a family access motion (D29); (2) a motion to modify custody for this reason (D32); (3) a motion for temporary custody of Son (D37); and (4) a motion to quash Mother's garnishment of his wages to collect the parties' prior judgments from the dissolution of marriage, alleging she was garnishing more than the law allowed (D38). At the hearing, Father took up all of these except his family access motion (Tr. 38-40). Mother only took up her motion to dismiss, which argued under the UCCJEA that Texas now had proper jurisdiction of the determination of Son's custody or that Missouri was an inconvenient forum for that determination (D42; Tr. 35-36).

In its judgment, the trial court granted Mother's motion, holding that Missouri "does not have exclusive and continuing jurisdiction" under § 452.745.1(1), R.S.Mo., but that even if Missouri does have jurisdiction, under

§ 452.770, R.S.Mo. Texas is still a more appropriate forum (D54 pp. 1-2; App. A1-2). But rather than just dismissing Father's motion to modify custody and motion for temporary custody, it stated that therefore, "this matter, and *all motions now pending by and between the parties in this case, or any sub-case*, are hereby dismissed" (D54 p. 2; App. A2) (emphasis added).

This was error. The statutes the Court cited, which are part of Missouri's version of the UCCJEA, only go to determinations of child custody, meaning initial custody determinations and custody modifications. They do not affect a court's authority to hear any other proceedings, including proceedings over child support, family access proceedings, or wage garnishments on dissolution of marriage judgments.

Here, the *only* proceedings before the trial court requiring a determination of child custody, which the UCCJEA allowed it to dismiss, were Father's motion to modify and motion for temporary custody. Conversely, his family access motion and his motion to quash a garnishment were independent proceedings the UCCJEA *does not* govern, and which the trial court could not dismiss under the UCCJEA. Therefore, even if under the UCCJEA the trial court lacked jurisdiction[2] over his motion to modify or

[2] Despite using the term "jurisdiction," the UCCJEA really means the Court's authority to act. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009); *see also Hightower v. Myers*, 304 S.W.3d 727, 733 (Mo. banc 2010). This is because Mo. Const. art. V, § 14, grants "original jurisdiction over all cases and matters, civil and criminal" to the circuit courts. *Webb*, 275 S.W.3d at 253. So, as a child custody dispute is a civil case, the trial court has constitutionally vested subject matter jurisdiction over it. *Id.*; *see also Hightower*, 304 S.W.3d at 733. Whether it has statutory authority to act is a

motion for temporary custody, it retained jurisdiction over the family access motion and motion to quash the garnishment. It misapplied the law in dismissing those other proceedings.

B. The UCCJEA did not govern Father's family access motion or his motion to quash Mother's garnishment of his wages, which the trial court had to retain even if it dismissed the custody-related proceedings under the UCCJEA.

1. The UCCJEA only governs initial child custody determinations and modifications of child custody, and does not allow a court to dismiss any proceeding besides those.

The UCCJEA governs only "[w]hether Missouri has jurisdiction to determine custody" of a child. *Blanchette v. Blanchette*, 476 S.W.3d 273, 277–78 (Mo. banc 2015). It does this at two different stages.

First, § 452.740, R.S.Mo., governs a trial court's "jurisdiction to make an initial child custody determination." This means the first determination of the child's custody by a court, such as in a dissolution of marriage or a paternity proceeding. *Al-Hawarey v. Al-Hawarey*, 388 S.W.3d 237, 243 (Mo. App. 2012).

Second, § 452.745, the statute the trial court cited in its judgment in holding it had lost exclusive continuing jurisdiction (D54 p. 1; App. A1), governs whether "a court of this state that has made a child custody determination consistent with section 452.740 … has exclusive continuing jurisdiction over the determination" (App. A116). This means that a state

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different question, and this is what the UCCJEA really means by use of the term "jurisdiction." *Id.*

that issued the initial child custody determination has exclusive, continuing jurisdiction of any modification of that determination unless and until the provisions of § 452.745 are met. *State ex rel. Ferrara v. Neill*, 165 S.W.3d 539, 542 (Mo. App. 2005).

And § 452.770, the statute the trial court cited in its judgment in holding Missouri was an inconvenient forum, provides that "[a] court of this state that has *jurisdiction under sections 452.700 to 452.930 to make a child custody determination* may decline to exercise its jurisdiction at any time if the court determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum" (App. A117) (emphasis added). So, this still only concerns "jurisdiction … to make a child custody determination," *id.*, either initially under § 452.740 or continuing under § 452.745.

But the UCCJEA does not affect any *other* proceedings besides initial custody determinations and custody modifications. Indeed, it provides that any other pending proceedings being heard along with a "child custody determination" remain in the Missouri trial court: "A court of this state may decline to exercise its jurisdiction under sections 452.700 to 452.930 if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding." § 452.770.4 (App. A118).

To the contrary, the UCCJEA specifically defines "child custody determination" as "a judgment, decree, or other order of a court **providing for the legal custody, physical custody, or visitation with respect to a**

child" and "includes a permanent, temporary, initial, or modification order," but "**shall not include an order relating to child support or other monetary obligation of an individual** …." § 452.705(3), R.S.Mo. (emphasis added).

2. The UCCJEA did not allow the trial court to dismiss Father's family access motion or his motion to quash Mother's garnishment of his wages.

Therefore, the UCCJEA does not govern either Father's family access motion or his motion to quash Mother's garnishment, both of which are their own independent proceedings. Even if the trial court lacked exclusive continuing jurisdiction for a child custody determination under § 452.745 or was an inconvenient forum for a child custody determination under § 452.770, this did not divest its authority over the family access motion or the motion to quash the garnishment.

First, Father's family access motion was not a "child custody determination" subject to the UCCJEA. A family access motion is a proceeding to remedy a violation of *an existing* child custody determination, but it does not seek its own child custody determination. § 452.400.3, R.S.Mo. Modification of custody is not even a prescribed remedy if the movant is successful. *Id.* at .6. A family access motion is an independent proceeding, and an order granting or denying it is a final judgment subject to appeal on its own. *Morgan v. Gaeth*, 273 S.W.3d 55, 58-60 (Mo. App. 2008) (affirming grant of family access motion by itself).

Second, Father's motion to quash Mother's garnishment of his wages, which she had levied to collect the dissolution of marriage judgment's

property division and attorney-fee awards, certainly was not a "child custody determination" subject to the UCCJEA.

A motion to quash a garnishment is an equally independent proceeding under Rule 76.25, the result of which is a final judgment subject to appeal on its own. Section 512.020(5), R.S.Mo., permits an appeal from a "[f]inal judgment in the case or from any special order after final judgment …." An order quashing a writ of garnishment is a special order that is appealable under this provision. *In re Marriage of Osborne*, 895 S.W.2d 285, 286 (Mo. App. 1995). So is an order denying a motion to quash a garnishment. *J&M Securities v. Mees*, 519 S.W.3d 465, 468 (Mo. App. 2017).

Father lives in Missouri. His employer is served in Missouri (D5). The garnishments Father challenged were Mother seeking to collect her attorney-fee and property division judgment from the parties' Missouri dissolution of marriage judgment (D5; D8; D14; D18; D21). The amounts they stated either corresponded to the attorney-fee award of $25,000 (D5; D8; D14; D21), or that attorney-fee award plus the property division award of $182,555.75 (D18). This had nothing to do with child custody at all.

Indeed, a wage garnishment is subject exclusively to the procedure and control of the court where the debtor lives. To collect a judgment, the judgment must be registered where that person or his assets. *First Nat'l Bank of Colorado Springs v. Mark IV Co.*, 591 S.W.2d 63, 68 (Mo. App. 1979). If Father moved to Kansas and took up employment in Kansas, then regardless of where Mother lived or where her judgment was, execution on

Father would be by registering the judgment in Kansas and garnishing his Kansas employer's wage in Kansas state court under Kansas law. *Id.*

In fact, it would be particularly strange to require Father to litigate the propriety of Mother's wage garnishments in Texas, as not only does he not live in Texas, nor is he employed in Texas, but the Texas Constitution famously prohibits wage garnishments for money judgments at all. *See* Tex. Const. art. 16, § 28. Perhaps this is why the UCCJEA provides that a "child custody determination" under it "shall not include an order relating to child support or other monetary obligation of an individual …." § 452.705(3). Those questions are subject to ordinary collections law, not the UCCJEA.

The trial court's authority under the UCCJEA (or lack of it) to hear a child custody determination does not affect its authority to decide either Father's family access motion or his challenge to Mother's wage garnishment, neither of which is a child custody determination at all, let alone an initial custody determination or a subsequent custody determination. They will not result in an order providing for legal or physical custody or visitation.

Accordingly, even if the trial court were correct that it lacked jurisdiction over Father's motion to modify custody and motion for temporary custody, it erred in holding that this meant it could dismiss either his family access motion or his motion to quash the garnishment. This Court should reverse the trial court's judgment and remand this case for further proceedings on Father's family access motion and his challenge to the garnishment.

Conclusion

The Court should reverse the trial court's judgment and remand this case with instructions to make findings of fact as Father requested, and in any case for further proceedings on Father's family access motion and challenge to Mother's garnishment of his wages.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 7,976 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on November 20, 2020, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, and that I both and e-mailed and mailed a true and accurate copy of the foregoing and it's appendix to the following:

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