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## OMITTED PROPERTY IN DISSOLUTION DECREES

### *Chrun v. Chrun*<sup>1</sup>

What procedure must a former spouse follow to have property which has been omitted from an original marital dissolution decree distributed in a subsequent court proceeding? Omitted property may include a pension plan, a vacation cabin, retirement benefits or other assets acquired during the marriage. The decree may have omitted the property as a result of perjured testimony, a false affidavit concerning an incomplete disclosure of marital property or simple inadvertence. In *Chrun v. Chrun*,<sup>2</sup> the Missouri Supreme Court definitively ruled that the proper procedure for dividing marital property not divided in an original dissolution decree was to bring an independent suit in equity.<sup>3</sup>

Problems involving undistributed property in dissolution decrees have arisen periodically in Missouri. Omitted property procedural problems arise when a former spouse discovers property not distributed by the divorce decree after the decree's time for appeal has run and the decree has thus become final.<sup>4</sup> Upon making this discovery, the former spouse wishes to reopen the decree and modify the original judgment.<sup>5</sup> The former spouse is confronted with the procedural problem of how to have the property distributed. A recent Missouri case involving property not divided in an original dissolution decree stated:

[T]here is rank confusion and disagreement regarding the status of property of the parties not disposed of by a dissolution court. . . . Our courts have indicated that there is no appealable judgment where the trial court fails to set-off all marital and separate property of the parties appearing on the face of the trial record.<sup>6</sup>

In the past, Missouri's western and eastern districts have disagreed over the proper procedure for dividing marital property not included in an

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1. *Chrun v. Chrun*, 751 S.W.2d 752 (Mo. 1988) (en banc).

2. *Id.*

3. *Id.* at 755.

4. Mo. SUP. CT. R. 81.05(a); State *ex rel.* McClintock v. Black, 608 S.W.2d 405, 406 (Mo. 1980) (en banc).

5. *McClintock*, 608 S.W.2d at 406.

6. *Id.* (citations omitted).

original dissolution decree.<sup>7</sup> In June, 1988, however, the Supreme Court of Missouri handed down a decision which resolved some of this confusion.<sup>8</sup> Yet, the decision nonetheless left considerable uncertainty in the area of property omitted from an original dissolution decree.

*Chrun v. Chrun*<sup>9</sup> resolved the conflict in favor of the traditional western district view.<sup>10</sup> This view held that the proper procedure for dividing marital property which had not been divided in an original dissolution decree was to bring an independent suit in equity.<sup>11</sup> In light of Missouri Supreme Court Rule 74.06, however, there may be another procedure for distributing the omitted property to obtain relief from the judgment.<sup>12</sup>

This Note will discuss Missouri cases concerning omitted property in dissolution decrees. It will analyze both the conflicting rationales which courts traditionally employ, and the current procedures for seeking a remedy as set forth in *Chrun*.<sup>13</sup> Finally, this Note will examine the anticipated effect of Rule 74.06 as a procedural device for obtaining relief from a dissolution decree which omits marital property.<sup>14</sup>

#### HISTORY OF CHRUN

The history of Missouri case law involving omitted property and similar issues provides a useful context for analyzing the Missouri Supreme Court's *Chrun* decision. Before *Chrun*, Missouri's definitive case on the subject was *State ex rel. McClintock v. Black*.<sup>15</sup> In *McClintock*, a former wife sought to vacate a dissolution decree when she realized that certain property had been omitted.<sup>16</sup> The omitted property included shares of stock in a closely held corporation and a retirement fund.<sup>17</sup> *McClintock* stated that the original decree was res judicata and the judgment from the original dissolution decree was final.<sup>18</sup> *McClintock*, noting the statutory void in the area of undistributed property, made a request for assistance from the legislature; "[w]e can reasonably anticipate that the General Assembly will fill in this patent gap in the Dissolution of Marriage Law."<sup>19</sup> In the absence

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7. *Chrun v. Chrun*, 751 S.W.2d 752, 754 (Mo. 1988) (en banc).

8. *Id.* at 752.

9. *Id.* at 755.

10. *Id.*

11. *Id.* at 754-55; *McClintock*, 608 S.W.2d at 407.

12. Mo. SUP. CT. R. 74.06; see *infra* note 117 and accompanying text.

13. *Chrun v. Chrun*, 751 S.W.2d 752, 755 (Mo. 1988) (en banc).

14. *Id.*

15. 608 S.W.2d 405 (Mo. 1980) (en banc).

16. *Id.* at 406.

17. *Id.*

18. *Id.*

19. *Id.* at 407.

of a statutory provision, *McClintock* suggested filing an independent suit in equity.<sup>20</sup>

Another case from the western district, *Gehm v. Gehm*,<sup>21</sup> followed *McClintock's* approach.<sup>22</sup> In *Gehm*, the trial court expressly changed an original dissolution decree to divide property which had been omitted from the decree.<sup>23</sup> The appellate court held that the trial court did not have jurisdiction to consider a modification or change of the original property settlement.<sup>24</sup> The court in *Gehm* noted, "[w]hen a trial court has made a partial distribution of property and the judgment is final, the court has no jurisdiction under a motion filed in the original case to determine the nature of omitted property or provide for its distribution."<sup>25</sup>

Similarly, in *Murphy v. Murphy*,<sup>26</sup> a former wife moved to modify a final dissolution decree so as to include her former husband's omitted military pension plan.<sup>27</sup> The trial court granted the motion and divided the property.<sup>28</sup> When the former husband appealed, the appellate court held that the trial court did not have jurisdiction to hear the case.<sup>29</sup> *Murphy* stated that a motion to modify the property division portion of the decree was ineffective in that the cause of action was beyond the jurisdiction of the court once the decree became final.<sup>30</sup>

Conversely, cases from the eastern district have generally held that the trial court retains jurisdiction where property is left undistributed in an original dissolution decree.<sup>31</sup> These cases have relied upon section 452.330

20. *Id.*

21. *Gehm v. Gehm*, 707 S.W.2d 491 (Mo. Ct. App. 1986).

22. *Id.*

23. *Id.* at 494.

24. *Id.* at 495.

25. *Id.*

26. *Murphy v. Murphy*, 716 S.W.2d 870 (Mo. Ct. App. 1986).

27. *Id.*

28. *Id.*

29. *Id.* at 871.

30. *Id.*

31. *Michael v. Michael*, 727 S.W.2d 424 (Mo. Ct. App. 1987) (marital property remained undistributed, thus the trial court had not exhausted its jurisdiction because it had not rendered a final judgment); *Frame v. Frame*, 696 S.W.2d 332 (Mo. Ct. App. 1985) (if dissolution decree does not dispose of all property the judgment is not final); *Hilton v. Hilton*, 676 S.W.2d 918 (Mo. Ct. App. 1984) (court failed to exhaust its jurisdiction and thus failed to render a final judgment); *Ploch v. Ploch*, 635 S.W.2d 70 (Mo. Ct. App. 1982) (trial court could dispose of property in post-dissolution decree proceeding); *Schulz v. Schulz*, 612 S.W.2d 380 (Mo. Ct. App. 1981) (court is required to divide marital property and until it has done so it has not exhausted its jurisdiction); *L. F. H. v. R. L. H.*, 543 S.W.2d 520 (Mo. Ct. App. 1976) (failure to dispose of property makes an order non-final; trial court has not exhausted its jurisdiction). *But see Kuntzman v. Kuntzman*, 724 S.W.2d 331 (Mo. Ct. App. 1987) (motion dismissed for lack of jurisdiction); *Stark v. Thierjung*, 714 S.W.2d 830 (Mo. Ct. App. 1986) (trial court lacked jurisdiction

of Missouri Revised Statutes to provide authority to enter a judgment disposing of the omitted property.<sup>32</sup> The section provides:

In a proceeding for dissolution of the marriage or legal separation or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property in such proportions as the court deems just after considering all relevant factors . . . .<sup>33</sup>

In *Ploch v. Ploch*,<sup>34</sup> a case from the eastern district, a former wife sought to reopen a dissolution decree to divide her husband's profit-sharing trust which had been omitted from the original decree.<sup>35</sup> *Ploch* held that section 452.330 allows post-decree proceedings,<sup>36</sup> and indicated that until the court has distributed all of the marital property, it has not rendered a final judgment.<sup>37</sup> The basis for this rationale is found in the language of section 452.330, which directs that a court "shall" divide all property.<sup>38</sup> *Ploch* held that the court has an affirmative obligation under the statute to divide all of the property.<sup>39</sup> Until it has done so, it has not exhausted its jurisdiction.<sup>40</sup> Accordingly, *Ploch* indicated that "the only issue germane to maintaining such a proceeding is whether property remains undisposed of, not why it remains so."<sup>41</sup>

*Ploch* glossed over section 452.330 and construed it as initiating "a special statutory proceeding contemplated by the statute so as to provide for modification of a decree."<sup>42</sup> However, nothing in the statute indicates that such a gloss is appropriate. *Ploch* relied on statutory authority which was merely contemplated; the court held that the language of the statute intended to grant the authority to modify the decree.<sup>43</sup> *Ploch* searched for a statutory provision which directs Missouri courts in cases where property had been omitted from an original dissolution decree. However, *McClintock*

to consider former wife's motion); *Henderson v. Henderson*, 622 S.W.2d 7 (Mo. Ct. App. 1981) (issue of undistributed marital property was not proper subject for motion to modify).

32. MO. REV. STAT. § 452.330.1 (Supp. 1986).

33. *Id.*

34. *Ploch v. Ploch*, 635 S.W.2d 70 (Mo. Ct. App. 1982).

35. *Id.*

36. *Id.* at 71.

37. *Id.* at 72. *See also* *Schulz v. Schulz*, 612 S.W.2d 380, 382 (Mo. Ct. App. 1981) (the obligation to distribute property is not dependent upon whether the dissolution is contested, uncontested or by default).

38. MO. REV. STAT. § 452.330 (Supp. 1986).

39. *Ploch v. Ploch*, 635 S.W.2d 70, 72 (Mo. Ct. App. 1982).

40. *Schulz*, 612 S.W.2d at 382. *See cases cited supra* note 31.

41. *Ploch*, 635 S.W.2d at 72.

42. *Id.* (citing *Chenoweth v. Chenoweth*, 575 S.W.2d 871, 875 (Mo. Ct. App. 1978)).

43. *Id.*

previously had noted this "patent gap" in the Dissolution of Marriage Laws. Thus, it was necessary for *Ploch* to disregard that gap and to impose a strained construction of section 452.330.<sup>44</sup> *Ploch* construed the statute to accommodate the problem of undistributed property.<sup>45</sup> It distinguished *McClintock* on the basis that in *McClintock* the former spouse sought to change a property division, whereas in *Ploch* the former spouse sought to reopen the dissolution decree.<sup>46</sup> Actually, the former spouse in *McClintock* filed a motion to vacate the decree because certain property had not been distributed.<sup>47</sup> The purpose of both actions was to distribute omitted property.

Subsequently, *Gehm* criticized<sup>48</sup> and *Chrun*<sup>49</sup> expressly overruled the use of section 452.330 as statutory authority to allow post-decree proceedings to distribute undistributed property. *Gehm* and *Chrun* construed the statute as applying *only* when the court is "without personal jurisdiction to distribute the property originally and such jurisdiction is subsequently acquired."<sup>50</sup>

Although *Chrun* did not discuss similar proceedings in the southern district, in *Edic v. Edic*,<sup>51</sup> the Southern District Court of Appeals followed the rationale set forth in *Ploch*.<sup>52</sup> *Edic* held that the trial court retained jurisdiction to distribute property left undistributed in an original dissolution decree.<sup>53</sup> The court stated alternatively that the decree "may not have been final."<sup>54</sup> The *Edic* court proposed that undistributed property was not part of the original proceeding, and thus a claim for the undistributed property was not *res judicata*.<sup>55</sup> *Edic* also relied on section 452.330 as statutory authority to reopen a dissolution decree which had omitted property.<sup>56</sup>

*Schulz v. Schulz*,<sup>57</sup> a similar case, held that the judgment should be final only as to property distributed by the decree.<sup>58</sup> *Schulz* stated that a trial court retained jurisdiction to distribute property in a subsequent proceeding because there was no basis on which to conclude that *res judicata*

44. State *ex rel.* *McClintock v. Black*, 608 S.W.2d 405, 407 (Mo. Ct. App. 1980) (en banc). See also *Sink v. Sink*, 669 S.W.2d 284 (Mo. Ct. App. 1984) (involved action to distribute former husband's retirement plan and rested on rationale in *Ploch*).

45. *Ploch*, 635 S.W.2d at 72.

46. *Id.* at 71.

47. *McClintock*, 608 S.W.2d at 406.

48. *Gehm v. Gehm*, 707 S.W.2d 491, 495 (Mo. Ct. App. 1986).

49. *Chrun v. Chrun*, 751 S.W.2d 752, 755 (Mo. 1988) (en banc).

50. *Gehm*, 707 S.W.2d at 495. See also *Chrun*, 751 S.W.2d at 755.

51. 729 S.W.2d 629 (Mo. Ct. App. 1987).

52. *Id.* at 631.

53. *Id.*

54. *Id.* at 631 n.2.

55. *Id.* at 631.

56. *Id.*

57. 612 S.W.2d 380, 382 (Mo. Ct. App. 1980).

58. *Id.*

would apply to property that had not been judicially acted upon.<sup>59</sup>

The rationales set forth in *Edic* and *Schulz* have met with little approval.<sup>60</sup> A claim to marital property is considered one cause of action; therefore, the judgment is *res judicata*.<sup>61</sup> There is not a separate claim for each item of property.<sup>62</sup> Yet, “[t]he [Missouri] statutes are silent as to how to deal with issues relating to property which remain unresolved after a decree of dissolution has become final.”<sup>63</sup> Missouri law does not allow the reopening of the property division provisions of a final dissolution decree.<sup>64</sup>

#### CHRUN V. CHRUN

In *Chrun*, a former wife brought an action to modify an original dissolution decree or, alternatively, to distribute undistributed assets.<sup>65</sup> Her former husband’s pension plan had not been included in the dissolution decree because at the time of the original decree the husband’s pension plan was not considered marital property.<sup>66</sup> Subsequent case law established that the pension plan was marital property, thus subject to division upon divorce.<sup>67</sup> Accordingly, the former wife sought to have the pension plan distributed.<sup>68</sup> The trial court, following *Ploch v. Ploch*,<sup>69</sup> decided the case on the merits and awarded the wife approximately one third of the husband’s current monthly pension payment.<sup>70</sup> On appeal, the Court of Appeals for the Eastern District reversed the case on the merits.<sup>71</sup> The appellate court certified the case to the Supreme Court of Missouri for a decision concerning the procedure for dividing marital property omitted from an original dissolution decree.<sup>72</sup>

The Missouri Supreme Court rejected the former wife’s claim on several grounds. First, the court held that a dissolution decree is *res judicata* and thus barred her claim.<sup>73</sup> *Res judicata* “generally applies to judgments of

59. *Id.*

60. *See* *Chrun v. Chrun*, 751 S.W.2d 752 (Mo. 1988) (en banc).

61. *Id.* at 755.

62. *Id.*

63. *Id.*

64. *Halbrook v. Halbrook*, 740 S.W.2d 687, 690 (Mo. Ct. App. 1987).

65. *Chrun v. Chrun*, 751 S.W.2d 752, 753 (Mo. 1988) (en banc).

66. *Id.* at 754.

67. *Id.*

68. *Id.*

69. 635 S.W.2d 70 (Mo. Ct. App. 1982).

70. *Chrun v. Chrun*, 751 S.W.2d 752, 754 (Mo. 1988) (en banc). The trial court noted the conflict between *Gehm* and *Ploch*, but considered itself bound by *Ploch*, an eastern district case. *Id.*

71. *Id.* at 753.

72. *Id.*

73. *Id.* at 754. *See also* *Leventhal v. Leventhal*, 629 S.W.2d 505 (Mo. Ct. App. 1981); *Hedgecorth v. Hedgecorth*, 463 S.W.2d 596 (Mo. Ct. App. 1971); *Ezell v. Ezell*, 348 S.W.2d 592 (Mo. Ct. App. 1961); *McKenzie v. McKenzie*, 306 S.W.2d 588 (Mo. Ct. App. 1957); 27C C.J.S. *Divorce* § 587 (1986).

divorce which settle property rights, . . . and [is] a bar to a subsequent action . . . ."<sup>74</sup> This would include judgments of divorce where the parties inadvertently forgot to request division of a specific piece of property.<sup>75</sup> Thus, the trial court lacked jurisdiction to consider the claim.<sup>76</sup>

The Supreme Court also held that if a party does not request the division of property, the judgment is still final as to all property claims that were or could have been litigated.<sup>77</sup> Third, the court held that to find the decree was not final would be to repeal section 452.360 of the Missouri Revised Statutes, which provides that a court order "as it affects distribution of marital property shall be a final order not subject to modification."<sup>78</sup> Moreover, parties may not attack judgments concerning divorce proceedings collaterally for irregularities.<sup>79</sup>

*Chrun* stated that the remedy for a party discovering omitted property was to file an independent suit in equity.<sup>80</sup> The procedure which *Chrun* recommended conformed with the western district decisions.<sup>81</sup> Thus, in *Chrun*, the Supreme Court of Missouri definitively ruled that a trial court does not retain jurisdiction over omitted property on the grounds that the omitted property was not a claim or issue litigated.<sup>82</sup> The court further ruled that section 452.330 did not provide statutory authority to reopen a dissolution decree after the decree had become final.<sup>83</sup> A previous case, *In re Marriage of Quintard*,<sup>84</sup> identified the problem in Missouri; "rather than providing a procedural mechanism by which a marital dissolution decree might be re-examined, Missouri law rigorously stresses the finality thereof."<sup>85</sup>

#### REMEDY FOR OMITTED PROPERTY SITUATIONS

What remedy is available to a former spouse discovering property omitted from an original dissolution decree? *Chrun* expressly confirmed

74. 27C C.J.S. *Divorce* § 587 (1986); see cases cited *supra* note 73.

75. *State ex rel. McClintock v. Black*, 608 S.W.2d 405 (Mo. 1980) (en banc).

76. *Chrun v. Chrun*, 751 S.W.2d 752, 753 (Mo. 1988) (en banc).

77. *Id.* at 754. See also *McKenzie*, 306 S.W.2d at 592.

78. *Chrun*, 751 S.W.2d at 754 (quoting *State ex rel. McClintock v. Black*, 608 S.W.2d 405, 407 (Mo. 1980) (en banc)); Mo. REV. STAT. § 452.360.2 (Supp. 1986). Subsection 2 provides: "The court's order as it affects distribution of marital property shall be a final order not subject to modification." *Id.*

79. 27C C.J.S. *Divorce* § 589 (1986).

80. *Chrun*, 751 S.W.2d at 755.

81. See *Murphy v. Murphy*, 716 S.W.2d 870 (Mo. Ct. App. 1986); *Gehm v. Gehm*, 707 S.W.2d 491 (Mo. Ct. App. 1986). The procedure is also in conformity with Missouri Supreme Court's decision in *State ex rel. McClintock v. Black*, 608 S.W.2d 405 (Mo. 1980) (en banc).

82. *Chrun v. Chrun*, 751 S.W.2d 752, 755 (Mo. 1988) (en banc).

83. *Id.*

84. *In re Marriage of Quintard*, 691 S.W.2d 950 (Mo. Ct. App. 1985).

85. *Id.* at 953.



previous cases from the western district which required an independent suit in equity.<sup>86</sup> This remedy sounds promising. In reality, however, the remedy is misleading in that there are extremely limited grounds for which a court will hear a claim for an independent suit in equity.

The grounds for equitable relief set forth in *Chrun* are extrinsic fraud, accident or mistake.<sup>87</sup> Extrinsic fraud is difficult to prove; “[f]raud extrinsic to the judgment is shown when proof of facts is made which if known to the trial court would have caused the trial court to *not* enter the judgment . . . .”<sup>88</sup> Facts which would have caused the court to enter a different judgment do not constitute a basis for extrinsic fraud.<sup>89</sup> For instance, false statements or allegations in a divorce petition concerning disclosure of property, false statements in an affidavit or even false testimony do not constitute extrinsic fraud.<sup>90</sup> These facts usually show only that the court would have entered a different judgment, not that the court would *not* have entered the judgment.<sup>91</sup> Therefore, it may be difficult or impossible to prove extrinsic fraud where one party or both parties have merely neglected to include property, or even where one party has intentionally omitted property. In such cases, the court would have entered the judgment, notwithstanding the fact that the court would have entered a *different* judgment.

Additionally, extrinsic fraud relates “not to the propriety of the judgment itself, but to the manner in which the judgment was obtained.”<sup>92</sup> A party seeking to set aside a prior judgment obtained by extrinsic fraud must establish fraud by strong, clear, cogent and convincing evidence.<sup>93</sup> There must be no neglect, fault or inattention on his part.<sup>94</sup> For example, conduct which could constitute extrinsic fraud includes a husband’s representation that his lawyer would look out for his wife’s estate in divorce proceedings or a representation that the wife would not need her own lawyer.<sup>95</sup>

86. *Chrun*, 751 S.W.2d at 755.

87. *Id.*

88. *Harrison v. Harrison*, 734 S.W.2d 934, 939 (Mo. Ct. App. 1987) (citing *Gehm v. Gehm*, 707 S.W.2d 491, 494 (Mo. Ct. App. 1986)) (emphasis in original). See also *Vinson v. Vinson*, 725 S.W.2d 121 (Mo. Ct. App. 1987); *Daffin v. Daffin*, 567 S.W.2d 672 (Mo. Ct. App. 1978).

89. *In re Marriage of Brown*, 703 S.W.2d 59, 61 (Mo. Ct. App. 1985); *F\_\_\_\_\_ v. F\_\_\_\_\_*, 333 S.W.2d 320, 323 (Mo. Ct. App. 1960).

90. *F\_\_\_\_\_*, 333 S.W.2d at 323.

91. *Harrison*, 734 S.W.2d at 939.

92. *Jones v. Jones*, 254 S.W.2d 260, 261 (Mo. Ct. App. 1953). *Jones* also indicated that “relief is limited to those instances where the fraud was of such a character as to have forestalled an opportunity for the fair submission of the controversy.” *Id.*

93. *F\_\_\_\_\_*, 333 S.W.2d at 323-25.

94. *Id.*

95. *Vinson v. Vinson*, 725 S.W.2d 121, 124 (Mo. Ct. App. 1987); *Daffin v. Daffin*, 567 S.W.2d 672, 678 (Mo. Ct. App. 1978).

More particularly, in *Harrison v. Harrison*,<sup>96</sup> the husband, an attorney filing for divorce, told his wife that she was “entitled to no portion of the law firm . . . .”<sup>97</sup> He threatened that if she hired a certain attorney of which he did not approve he would drag the divorce out forever,<sup>98</sup> and that she must go through with the divorce according to his terms.<sup>99</sup> He also told her that as an attorney, he knew how judges react and what courts would allow in dissolution and thus she had no other choice than to sign the agreement.<sup>100</sup> Finally, he informed her that one of his partners would draft all of the legal papers and handle all of the legal work on behalf of both of them and she was not to consult with another attorney.<sup>101</sup> The court held that this claim could constitute extrinsic fraud,<sup>102</sup> because it appeared that the wife had been denied her day in court. However, it seems that a false affidavit or perjury could also be so harmful as to deny a former spouse his or her day in court.<sup>103</sup>

The two other grounds for an independent suit in equity set forth in *Chrun* are accident and mistake.<sup>104</sup> Accident and mistake are grounds which encompass a surprisingly narrow range of circumstances. An accident is generally thought to be something which could not have been foreseen, *i.e.*, something which happens without the negligence of a party.<sup>105</sup> Similarly, a mistake is “an erroneous mental condition which results in some act or omission by one or both parties to a transaction, but without its erroneous character being intended or known at the time.”<sup>106</sup>

There are few, if any, Missouri cases brought for the distribution of omitted property on the grounds of accident or mistake. Suits in equity are more often brought on the ground of extrinsic fraud.<sup>107</sup> By comparison, default cases demonstrate the difficulty of proving an action based on accident or mistake. For instance, “if a court clerk makes a mistake by not properly recording a motion, . . . [a] default judgment can be set aside . . . .”<sup>108</sup> Similarly, if a “defendant and his attorney are prevented by illness from filing an answer, a separate suit in equity has been used to

96. *Harrison v. Harrison*, 734 S.W.2d 934 (Mo. Ct. App. 1987).

97. *Id.* at 937.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 941.

103. *See Laughrey, Default Judgments in Missouri*, 50 Mo. L. REV. 841, 856 (1985).

104. *Chrun v. Chrun*, 751 S.W.2d 752, 755 (Mo. 1988) (en banc).

105. BLACK'S LAW DICTIONARY 14 (5th ed. 1979).

106. 2 POMEROY'S EQUITY JURISPRUDENCE § 839 (1905).

107. *See Harrison v. Harrison*, 734 S.W.2d 934 (Mo. Ct. App. 1987); *Daffin v. Daffin*, 567 S.W.2d 672 (Mo. Ct. App. 1978).

108. *See Laughrey, supra* note 103, at 855 (citing *Krashin v. Grizzard*, 326 Mo. 606, 31 S.W.2d 984 (1930)).

set the default aside on the grounds of accident."<sup>109</sup> It makes little sense to say that a court will set aside a judgment for mistake when a party and his attorney are prevented from filing an answer, but not when a party's opponent 'merely' commits perjury, which is intrinsic fraud. Surely a former spouse claiming omitted property has essentially been denied his day in court.<sup>110</sup>

Furthermore, to prove mistake, the mistake must be free from any negligence on the part of the party seeking relief.<sup>111</sup> "Equity will not relieve against a mistake when the party complaining had within his reach means of ascertaining the true state of facts, and, without being induced thereto by the other party, neglected to avail himself of his opportunities of information."<sup>112</sup> Thus, any inadvertence in failing to present evidence of omitted property is not a ground for modification.<sup>113</sup> Unfortunately, there is no extrinsic fraud, accident or mistake when property is omitted by the inadvertence or negligence of a party who had the means of ascertaining which property should have been divided.<sup>114</sup>

Prior case law in the area of omitted property suggests that there have been few successful actions for an independent suit in equity.<sup>115</sup> As a practical matter, a former spouse discovering omitted property may be without a remedy. Lack of redress is surely contrary to a former spouse's expectations of fairness and can operate as a windfall to the other spouse in whose favor the property has been inadvertently or intentionally omitted. A separate suit in equity does not seem to be a practical or viable means of redress. Therefore, there should be another remedy available to a former spouse claiming omitted property.

#### MISSOURI SUPREME COURT RULE 74.06

According to *Chrun*, there may be another potential means of obtaining redress.<sup>116</sup> In May, 1987 the Missouri Supreme Court adopted Rule 74.06.<sup>117</sup>

109. *Id.* at 855 (citing *Jackson v. Chestnut*, 151 Mo. App. 275, 131 S.W. 747 (1910)).

110. *Id.* at 856.

111. *Falcon Enter., Inc. v. Precise Forms, Inc.*, 509 S.W.2d 170, 174 (Mo. Ct. App. 1974); *Hamm v. Hamm*, 437 S.W.2d 449, 452 (Mo. Ct. App. 1969).

112. *Barret, Fitch, North & Co. v. Hudson*, 403 S.W.2d 944, 947 (Mo. Ct. App. 1966) (citing *Brown v. Fagan*, 71 Mo. 563 (1880)).

113. *See State ex rel. Gary Realty Co. v. Hall*, 322 Mo. 1118, 1127, 17 S.W.2d 935, 938 (1928) (en banc).

114. *Id.*

115. *See Harrison v. Harrison*, 734 S.W.2d 934 (Mo. Ct. App. 1987).

116. *Chrun v. Chrun*, 751 S.W.2d 752, 755 (Mo. 1988) (en banc).

117. Mo. SUP. CT. R. 74.06. The rule provides:

(a) Clerical Mistakes-Procedure. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or

The Rule went into effect on January 1, 1988, and provides for relief from judgments or orders.<sup>118</sup> The official comment notes: “[t]he Rule provides a single rule for all of the procedures required to set aside a final judgment when the judgment is by default or as a result of trial.”<sup>119</sup> *Chrun*,<sup>120</sup> and a more recent case *Born v. Born*,<sup>121</sup> have indicated that the Rule may apply to afford relief from a dissolution decree which omitted marital property.<sup>122</sup> However, a motion under the Rule must be made “not

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omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.

(b) Excusable Neglect-Fraud-Irregular, Void, or Satisfied Judgment. 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.

(c) Motion Under Subdivision (b)—Affect on Judgment - Time for Filing-Notice of Hearing-Service. A motion under subdivision (b) does not affect the finality of a judgment or suspend its operation. The motion shall be made within a reasonable time and for reasons (1) and (2) and (3) of subdivision (b) not more than one year after the judgment or order was entered. The motion and a notice of a time and place for hearing on the motion shall be served upon the parties to the judgment pursuant to Rule 54.

(d) Power of Court to Entertain Independent Action-Certain Writs Abolished. This Rule 74.06 does not limit the power of the court to entertain an independent action to relieve a party from a judgment or order or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.

118. *Id.*

119. Mo. SUP. CT. R. 74.06 comment on 1988 amendment.

120. *Chrun*, 751 S.W.2d at 755 n.1.

121. *Born v. Born*, 753 S.W.2d 121, 122 n.1 (Mo. Ct. App. 1988) states: Rule 74.06 (effective January 1, 1988) is not applicable in this case. Rule 74.06 allows a post-final judgment motion in enumerated circumstances. Such a motion must be filed within one year of entry of the judgment. Thereafter, an independent suit in equity is required. Because wife filed her motion nearly five years after the dissolution decree was entered, even if Rule 74.06 applied, she would have been required to file an independent suit inequity.

*Id.* (citation omitted).

122. *Id.*

more than one year after the judgment or order was entered.<sup>123</sup> Thus, there is a fairly narrow time restriction for obtaining relief. In *Chrun and Born*, Rule 74.06 did not apply because the suits were brought more than one year after the judgment was entered.<sup>124</sup>

To date, Missouri Supreme Court Rule 74.06 has not been applied to a case involving omitted property in a dissolution decree.<sup>125</sup> Given that the Rule has been expressly noted in two recent cases, it appears courts anticipate that the Rule will apply to omitted property cases when the action is brought within one year after the judgment has been entered.<sup>126</sup>

The Rule is not likely to open a floodgate of relief from judgment motions in omitted property situations. The one year provision requires that a party, unaware of omitted property at the time the dissolution decree was entered, become aware of the omitted property and act within one year to utilize the Rule.<sup>127</sup> If the party does not discover the property until after one year, the proper procedure for seeking a remedy would be to file an independent suit in equity.<sup>128</sup> Thus, Rule 74.06 does not eliminate the separate suit in equity.<sup>129</sup> Unfortunately, a former spouse often is not aware of omitted property until several years after the decree was entered.<sup>130</sup> The Rule reflects a limited exception to the finality of judgments and may afford some assistance to parties who exercise particular care in discovering what property should have been distributed in the original decree.<sup>131</sup>

Although Rule 74.06 may not have a great impact on the now established remedy of an independent suit in equity, the Rule is of somewhat greater significance in that it provides a much broader range of grounds for relief than the grounds applicable to an independent suit in equity.<sup>132</sup> The additional grounds result in mixed consequences. *Chrun* stated that the grounds for an independent suit in equity were accident, mistake, or extrinsic fraud.<sup>133</sup> Under Rule 74.06 the grounds for relief include mistake, surprise, inadvertence, excusable neglect, intrinsic or extrinsic fraud, misrepresentation,

123. Mo. SUP. CT. R. 74.06, *supra* note 117.

124. *Chrun v. Chrun*, 751 S.W.2d 752, 755 n.1 (Mo. 1988) (en banc); *Born*, 753 S.W.2d 121, 122 n.1 (Mo. Ct. App. 1988).

125. *Chrun*, 751 S.W.2d at 755.

126. *Id.* See also *Born*, 753 S.W.2d at 122 n.1.

127. Mo. SUP. CT. R. 74.06(c), *supra* note 117.

128. Mo. SUP. CT. R. 74.06(d), *supra* note 117.

129. *Id.*

130. *Chrun v. Chrun*, 751 S.W.2d 752 (Mo. 1988) (en banc) (11 years); *Born v. Born*, 753 S.W.2d 121 (Mo. Ct. App. 1988) (5 years); *Harrison v. Harrison*, 734 S.W.2d 934 (Mo. Ct. App. 1987) (4 years); *Kuntzman v. Kuntzman*, 724 S.W.2d 331 (Mo. Ct. App. 1987) (13 years); *Murphy v. Murphy*, 716 S.W.2d 870 (Mo. Ct. App. 1986) (3 years); *Ploch v. Ploch*, 635 S.W.2d 70 (Mo. Ct. App. 1982) (2 years); *Schulz v. Schulz*, 612 S.W.2d 380 (Mo. Ct. App. 1980) (2 years).

131. Mo. SUP. CT. R. 74.06(b), *supra* note 117.

132. *Id.*

133. *Chrun*, 751 S.W.2d at 755.

or an irregular judgment.<sup>134</sup> If a party discovers omitted property and takes action within one year of the judgment, that party will have more grounds upon which to move for relief from the original dissolution decree.<sup>135</sup> However, after a year from the final judgment has passed, the grounds are restricted to those set forth in *Chrun*.<sup>136</sup>

One of the most important aspects of the Rule is that when a motion is made within one year, intrinsic fraud will be a ground upon which relief may be granted.<sup>137</sup> Intrinsic fraud includes "knowing use of perjured testimony or otherwise fabricated evidence."<sup>138</sup> Intrinsic fraud will generally be easier to prove than extrinsic fraud, and the inclusion of intrinsic fraud makes good policy sense. Previously, a party could not obtain relief even when it was clear that the other party had produced false affidavits or had lied on the stand.<sup>139</sup> Thus, under Rule 74.06, the court may look into the propriety of the judgment in such circumstances.

Unfortunately, the practicality of the broader range of grounds for relief under Rule 74.06 is not consistent with the grounds for relief set forth in *Chrun*.<sup>140</sup> For example, while Rule 74.06 will grant relief for intrinsic fraud, *Chrun* will grant relief only for extrinsic fraud.<sup>141</sup> Combined, Rule 74.06 and the equitable grounds for relief in *Chrun* could result in a potentially unfair situation. For instance, suppose a former spouse can prove intrinsic fraud but not extrinsic fraud. If the former spouse brings a motion for relief under Rule 74.06 exactly one year after the final judgment, the former spouse could be granted relief.<sup>142</sup> Conversely, if the former spouse brings the motion for relief exactly one year and a day after the final dissolution decree, the former spouse will not be able to obtain relief because of Rule 74.06's time limitation.<sup>143</sup> This result appears inherently unjust.

#### NEED FOR A STATUTORY PROVISION DEALING WITH OMITTED PROPERTY

The legislature should act in the area of omitted property to avoid the potentially inconsistent and unfair consequences of the application of Rule 74.06 coupled with the remedy of an independent suit in equity set forth

134. Mo. SUP. CT. R. 74.06(b), *supra* note 117.

135. *Id.*

136. *Chrun v. Chrun*, 751 S.W.2d 752, 755 (Mo. 1988) (en banc).

137. Mo. SUP. CT. R. 74.06(b), *supra* note 117.

138. *May Dep't Stores Co. v. Adworks, Inc.*, 740 S.W.2d 383, 385 (Mo. Ct. App. 1987).

139. *See supra* note 90 and accompanying text.

140. *Id.*

141. *Id.*

142. Mo. SUP. CT. R. 74.06, *supra* note 117.

143. *See id.*

in *Chrun*.<sup>144</sup> *McClintock* previously suggested an independent suit in equity *in lieu* of a provision by the legislature; the independent suit in equity was to serve as a remedy until the legislature acted and was not considered the definitive procedural device for omitted property cases.<sup>145</sup> Furthermore, Rule 74.06 is a general procedural rule providing relief from all applicable judgments; it was not created specifically for omitted property situations.<sup>146</sup> Legislative action would reduce confusion and promote fairness in omitted property cases. Furthermore, a statutory provision would provide clear guidelines for practitioners dealing with such problems.

Additionally, claims to distribute omitted property perhaps call for different procedural treatment than general rules relating to the finality of judgments. Prior case law from the eastern district suggests an underlying policy of allowing a party, under one procedural device or another, to reopen a decree to provide for distribution of omitted property.<sup>147</sup> The special context of divorce and the need for a fair resolution of property distribution calls for a provision apart from Rule 74.06 and the remedy, or lack thereof, of an independent suit in equity.

Furthermore, Rule 74.06 and the independent suit in equity are intended to set aside the final judgment and completely redistribute the property. A legislative provision could prevent setting aside the entire original division of property. It would be more practical to have a statutory provision specifically addressing omitted property. Such a provision is simply missing from Missouri's Dissolution of Marriage Laws. Unfortunately, eight years after *McClintock* first requested the legislature to fill this "patent gap" in the Dissolution of Marriage Laws, the "patent gap" still exists.<sup>148</sup>

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144. See *State ex rel. McClintock v. Black*, 608 S.W.2d 405, 407 (Mo. 1980) (en banc).

145. Mo. SUP. CT. R. 74.06, *supra* note 117.

146. *Id.*

147. See *Sink v. Sink*, 669 S.W.2d 284 (Mo. Ct. App. 1984); *Ploch v. Ploch*, 635 S.W.2d 70 (Mo. Ct. App. 1982); *Schulz v. Schulz*, 612 S.W.2d 380 (Mo. Ct. App. 1980).

148. *State ex rel. McClintock v. Black*, 608 S.W.2d 405, 407 (Mo. 1980) (en banc).