Problems of Finality of Judgments for Purposes of Appeal in Missouri

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I. INTRODUCTION

In Missouri, an aggrieved party generally may appeal only from a final judgment of a trial court. This final judgment rule, which has been a prerequisite to appealability in Missouri since 1822, originated with the common law writs of error as a means of preserving the integrity of the record. Today, however, the rule is supported on the ground that by precluding piecemeal appeals it promotes judicial economy.

The Missouri General Assembly has never provided a definition of the term "final judgment." One must instead look to the cases, where it is usually stated that, "for a judgment to be final and appealable it must dispose of all the parties and all the issues and leave nothing for further

1. The requirement that a party be "aggrieved" before appealing is regularly enforced in Missouri. See Conrad v. Herndon, 572 S.W.2d 216, 219 (Mo. App., D.K.C. 1978); Morris v. Patterson, 549 S.W.2d 613, 615 (Mo. App., D.K.C. 1977); In re Marriage of Richardson, 540 S.W.2d 227, 228 (Mo. App., D. St. L. 1976); Pilat v. Kristoff, 494 S.W.2d 386, 387 (Mo. App., D. St. L. 1973).

2. RSMo § 512.020 (1978). This statute also provides for appellate review from (1) an order granting a new trial; (2) an order refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers, or dissolving an injunction; and (3) an interlocutory judgment in a partition suit which determines the rights of the parties. Interlocutory orders which are not included in § 512.020 are generally not appealable. See Household Fin. Corp. v. Siegel-Robert Plating Co., 483 S.W.2d 415 (Mo. App., D. St. L. 1972); Orf v. Computer Inst., 480 S.W.2d 73 (Mo. App., D. St. L. 1972); Hoevelman v. Reorganized School Dist. R-2, 430 S.W.2d 753 (Spr. Mo. App. 1968). However, some review is available through the use of extraordinary writs. See generally Tuchler, Discretionary Interlocutory Review in Missouri: Judicial Abuse of the Writ, 40 Mo. L. REV. 577 (1975).


6. The definition in the Missouri Rules of Civil Procedure is inadequate. Rule 74.01 states that "A judgment is the final determination of the rights of the parties in the action."
determination." Although this definition of a final judgment is seemingly a model of clarity, application of the rule has caused numerous problems for Missouri courts and practitioners as evidenced by the more than sixty published appellate decisions that have dealt with final judgments in the three year period from 1976 through 1978. Two issues in particular have caused the most difficulties: (1) finality of a partial decision in a case involving multiple claims; and (2) judgments which may not be final even though the trial court disposed of all the claims.

II. FINALITY OF PARTIAL DECISIONS

A. Introduction

In Missouri, when a judgment is rendered as to less than all the claims in a multiple claim lawsuit, that judgment ordinarily is unappealable because it lacks finality. It will remain non-final until the trial court has disposed of all the remaining claims. If a court dismisses one of several claims, or renders a judgment but neglects to include one of the claims or counterclaims in that judgment, there is usually no right to an immediate appeal. This is true even though in the case of a dismissal, the court's action has the effect of a final judgment as to the dismissed claim since it completely disposes of that issue or party for purposes of the present litigation.

The leading case in this area is Bolin v. Farmers Alliance Mutual Insurance Co., in which decedent's heirs and personal representative brought suit on an insurance policy against the insurer and the designated beneficiary. The trial court rendered summary judgment in favor of the insurance company but did not dismiss the beneficiary until four days later. Plaintiffs appealed from the summary judgment for the insurer, and

11. 549 S.W.2d 886 (Mo. En Banc 1977).
the appeal was dismissed by the Springfield District of the Court of Appeals. The case was then ordered transferred to the Missouri Supreme Court, which dismissed the appeal on the ground that since the trial court had not dealt with the claim against the beneficiary at the time it ruled for the insurance company, there was no final judgment in the action. In reaching this result the court did not accept plaintiffs’ arguments that the summary judgment for the insurance company was final since it rendered moot the claim against the beneficiary, or that the later dismissal of the beneficiary, which disposed of the remaining issues, transformed the summary judgment order into a final judgment:

We should not approve an approach which makes it necessary for the appellate court to decide whether a resolution of the case as to one defendant makes the case moot as to the other, or which makes it necessary for the appellate court to piece and tack together various parts of the record, none of which purport to be a final judgment, and conclude therefrom that collectively they amount to a final judgment.

Until the trial court issued an additional judgment which incorporated both the summary judgment and the dismissal, the summary judgment order as to the insurer remained non-final and therefore unappealable.

The Bolin decision emphasizes the respect Missouri appellate courts have for the final judgment rule. The supreme court in Bolin gave great weight to the fact that since there was no clear final judgment issued in the case, there was no way to be certain that the trial court had completed its adjudication of the claims. The supreme court could have simply allowed the appeal of the summary judgment to stand and ignored the claim against the beneficiary. Instead it chose to dismiss the appeal of a partial trial court decision. It would seem, therefore, that Missouri appellate courts in multiple claim suits are to postpone appeals until the entire case can be reviewed as a single unit.

This approach of waiting for a final adjudication of all claims, so there can be one appeal which consolidates all alleged errors, clearly minimizes the already heavy burden on Missouri appellate courts. Also it presumably gives the reviewing courts a heightened perspective in a multiple claim case instead of the limited overview afforded by numerous appeals. However, at times, this approach can cause hardship to the litigants. For example, the trial court in Bolin, after having rendered summary judgment for the defendant insurance company, might have proceeded to try alone the claim against the beneficiary. In this instance the rest of the trial would have been unfair to the remaining parties since the claims were dependent

12. Id. at 887.
13. Id. at 889.
15. 549 S.W.2d at 891. See also First Nat'l Bank & Trust Co. v. Pittcock, 572 S.W.2d 182, 184 (Mo. App., D. Spr. 1978).
on each other. If it were then determined on appeal, after the claim against the beneficiary had been litigated to judgment, that the summary judgment order was erroneous, the entire case would have had to have been retried. The increased costs and added delay of retrial, however, could have been lessened had there been prompt review. Application of the final judgment rule therefore can have a severe impact on some multiple claim suits.

B. **The Exceptions—Rule 81.06**

Missouri Supreme Court Rule 81.06\(^{16}\) mitigates somewhat the possible unfairness of postponing appeals of partial decisions until there is a final judgment. This rule lists several exceptions whereby judgments disposing of less than all the claims may be final for purposes of appeal.

Supreme Court Rule 81.06, which at first glance appears unwieldy and difficult to understand, can be broken down into three more comprehensible sections:\(^{17}\)

(1) When a separate trial of any claim is ordered in any case and a jury trial thereof is had, the separate judgment entered upon the verdict shall be deemed a final judgment for purposes of appeal.

(2) When a separate trial is had before the court without a jury of claims arising out of the same transactions, occurrences or subject matter as the other claims stated or joined in the case, the judgment entered shall not be deemed a final judgment for purposes of appeal unless specifically so designated by the court in the judgment entered.

(3) When a separate trial is had before the court without a jury of an entirely separate and independent claim unrelated to any other claims stated or joined in the case, the judgment entered shall be deemed a final judgment for purposes of appeal, unless the court orders it entered as an interlocutory judgment to be held in abeyance until other claims are determined.

The first section dealing with finality and separate jury trials of severable claims apparently has caused no difficulties for Missouri courts and practitioners. Nearly all the litigation has instead centered around the second and third sections, which concern separate trials of severable claims heard by a court without a jury.\(^{18}\)

To understand the second and third sections of Supreme Court Rule 81.06, the term "separate trial" must first be defined. Clearly, the term encompasses those situations where the trial judge, in a multiple issue suit, enters an order severing some of the claims for separate trial.\(^{19}\) However,

\(^{16}\) MO. R. CIV. P. 81.06.

\(^{17}\) Dalton v. Borger, 562 S.W.2d 802, 803 (Mo. App., D. St. L. 1978).


\(^{19}\) See New Age Fed. Sav. & Loan Ass'n, 461 S.W.2d 876, 879 (Mo. 1970);
"separate trial" has also been interpreted to encompass the frequent cases where all the claims in a non-jury case are tried together, but a hearing is held on a motion for summary judgment or dismissal of less than all of those claims. If such a motion is sustained after a hearing, the hearing, for purposes of rule 81.06, is a separate trial.20 If, however, the motion is overruled, the hearing is deemed non-separate, and the order of denial is merely interlocutory and therefore unappealable.21 This interpretation, which greatly broadens the scope of applicability of rule 81.06, is very important because, as long as the remaining criteria of the rule are fulfilled, a Missouri practitioner may immediately appeal any order of summary judgment or dismissal. The hardship, cost and time loss caused by waiting for the outcome of the remaining claims can thereby be avoided. However, as will be seen, the remaining criteria of rule 81.06 are often difficult to meet.

One way a partial decision rendered during a "separate trial" may be appealable is to ask the circuit judge to designate on the record22 that the judgment is final pursuant to the last clause of the second section of rule 81.06. If such a designation is made, there is a right of immediate appeal23 without the necessity of satisfying the criteria of section three of rule 81.06. In essence, the judge, by making the designation, is certifying that the trial as to the disposed claim or claims is complete and that there is no reason to delay appellate review. The only problem with this approach is that no elucidation of the "same transaction or occurrence" standard is provided in the rule to guide Missouri circuit judges in making these designations of finality.24 Such decisions have been left almost completely to the discretion of the trial courts.25 Therefore, this exception to the final judgment rule can be very unpredictable.

K.C. Power & Light Co. v. City of Kansas City, 426 S.W.2d 105, 107 (Mo. 1968); Hahn v. Hahn, 544 S.W.2d 89, 90 (Mo. App., D. St. L. 1976); Rakestraw v. Norris, 469 S.W.2d 759, 761 (Spr. Mo. App. 1971).
24. The relevant clause in rule 81.06 merely states that a judgment is not final "unless specifically so designated by the court in the judgment entered."
25. Rarely will a Missouri appellate court overturn a trial judge's designation of finality. But see State ex rel. State Highway Comm'n v. Armacost Motors, Inc., 502 S.W.2d 330, 332 (Mo. 1973) (Missouri Supreme Court held unappealable a judgment designated an "appealable proceeding"). This is true even though a great many appellate cases have begun by stating that it is the
When a Missouri circuit judge refuses to designate a dismissed claim as final, the practitioner is forced to rely on the test in section three of rule 81.06 if an immediate appeal is desired. In this situation, however, he is placed in an immediate quandary: Since both tests in rule 81.06 refer to non-jury cases involving separate trials of severable claims, must he show that the dismissed claim did not arise out of the "same transaction or occurrence" as the remaining claims, or that "separate and independent" claims are involved? Arguably these are different tests; the test in the second section is not just a restatement in the negative of the one in the third.26 Therefore, since the tests are not the same and the rule gives no further guidance as to which one should be argued on appeal, both tests seemingly must be fulfilled in order for a judgment to be final under rule 81.06.

Perhaps partially owing to this lack of clarity surrounding the applicability of the tests, Missouri appellate courts have been reluctant to permit an appeal of a partial decision in the absence of a judgment designated as final by the trial judge. The test in section three of rule 81.06 has rarely been met.27 In most of the cases, the courts only apply the test in reviewing court's duty to determine whether a judgment is actually final. See Dudeck v. Ellis, 376 S.W.2d 197, 204 (Mo. 1964); Dotson v. E.W. Bacharach, Inc., 325 S.W.2d 757, 758 (Mo. 1959); Deeds v. Foster, 255 S.W.2d 262, 265 (Mo. 1951); P.I.C. Leasing, Inc. v. Roy A. Scheperle Constr. Co., 489 S.W.2d 219, 221 (Mo. App., D.K.C. 1972); Beezley v. National Life & Accident Ins. Co., 464 S.W.2d 555, 536 (Spr. Mo. App. 1971).

26. Actually, it may be more difficult to establish that the dismissed claim is "separate and independent" from the remaining claims than to show merely that it does not arise out of the "same transaction or occurrence." The facts of State ex rel. Ashcroft v. Gibbar, 575 S.W.2d 924 (Mo. App., D. St. L. 1978), illustrate this contention. The State of Missouri brought an action against James and Paye Gibbar, owners of a subdivision, for dumping raw sewage into a sink hole running beneath Perry Plaza Shopping Center and eventually leaching into waters of the state. The Gibbars filed a third party petition stating two causes of action, one of which asked for money damages from Perry Plaza, Inc. for breach of an agreement between Perry and the Gibbars' predecessor in title to accept sewage into a system to be built on land owned by Perry. At trial, the circuit court dismissed the third party petition, but did not designate the order as final. Any appeal from this dismissal would fail under routine rule 81.06 analysis. The third party petition dealing with the prior agreement clearly did not arise out of the same transaction or occurrence as the remaining claim brought by the State. However, the appellate court could not recognize the dismissal as final since the claims are factually related, and therefore not separate and independent.

27. Only five cases have been found which have allowed immediate appeal of a partial judgment absent a designation of finality by the trial judge: Elliott v. Harris, 423 S.W.2d 831 (Mo. En Banc 1968) (summary judgment on buyer's claim in joint action to recover amounts paid for purchase of working interests in oil leases held appealable); State ex rel. Ashcroft v. Gibbar, 575 S.W.2d 924 (Mo. App., D. St. L. 1978) (see note 26 supra); Crenshaw v. Great Cent. Life Ins. Co., 527 S.W.2d 1 (Mo. App., D. St. L. 1975) (see text accompanying notes 30-32 infra); Hauser v. Hill, 210 S.W.2d 645 (Mo. App., D. St. L. 1946) (declaratory judgment on question of insurance liability in one count held appealable in
the second section and hold that if the dismissed claims arise out of the same transactions or occurrences as the remaining claims, they cannot be final. Since almost all counts in a multiple claim suit can be characterized in some way as arising out of the same transactions or occurrences, it is not hard to perceive why nearly all such appeals are dismissed in Missouri.

A few recent decisions, however, in an effort to permit more appeals of partial judgments and to thereby avoid the potential prejudice and expense of delaying appellate review, have adopted a more liberal approach in applying the tests in rule 81.06. In Crenshaw v. Great Central Insurance Co., a multiple claim suit was brought against an insurer to recover under an uninsured motorist policy for the death of the insured in an automobile accident. Count I sought wrongful death recovery, while counts II and III sought general recovery under the policy. At trial count I was dismissed because the statute of limitations period for wrongful death actions had run. This judgment was not designated as final. The St. Louis District of the Court of Appeals held that the dismissed claim was appealable under rule 81.06 even though all three claims arose out of the same subject matter, namely, the automobile accident. The court glossed over this apparent difficulty and pointed out that rule 81.06 instead "speaks to a situation where the several claims, counts, etc. are dependent upon each other." Since the disposition of the remaining claims in Crenshaw was not dependent in any respect on the outcome of the dismissed wrongful death count, the dismissal was a final judgment for purposes of appeal.

This "dependency" test, which apparently is a variation on the "separate and independent" language in the third section of rule 81.06, has been employed in only a few other cases. Its use greatly broadens the scope of applicability of the rule. The Missouri Supreme Court, however, has yet to speak on the test's propriety.

Rule 81.06 thus provides some limited exceptions to the final judgment rule in Missouri. While important, the rule has engendered far too

multiple count suit arising out of automobile accident): Brown v. Brown, 444 S.W.2d 1 (St. L. Mo. App. 1969) (wife's claim for annulment of marriage and custody of child held appealable even though husband's counterclaim had not been decided).

28. See Byous v. Lawshee, 475 S.W.2d 47 (Mo. 1972); Dotson v. E.W. Bacharach, Inc., 325 S.W.2d 737 (Mo. 1959); Schumacher v. Sheahan Inv. Co., 424 S.W.2d 84 (St. L. Mo. App. 1968); Ramatowski v. Ramatowski, 414 S.W.2d 827 (St. L. Mo. App. 1967).


30. 527 S.W.2d 1 (Mo. App., D. St. L. 1975).

31. Id. at 3.

32. Id. (emphasis added).

many difficulties for Missouri courts and practitioners. To eliminate some of these difficulties several aspects of this rule should be changed. First, that the term "separate trial" also encompasses hearings wherein motions for summary judgment or dismissal are sustained needs to be made clear. At present, the practitioner can discover this only by in-depth analysis of the cases. Second, the tests for finality in the second and third sections of the rule should be amended so that they clearly employ the same standard. The present scheme, wherein two tests may apply to the same situation, is too confusing. If these tests are not equalized, at the very least a further explanation needs to be added as to when each should be employed. Third, the rule arguably should be changed so as to give the appellate courts more discretion in recognizing partial decisions as final in those cases where the parties would be prejudiced by delayed review. At the present time, in such cases, if the trial judge refuses to certify the judgment as final, an appeal is almost foreclosed since the test in section three of rule 81.06 is generally so difficult to meet. These three amendments would clarify the language in rule 81.06 and at the same time lessen some of the unfairness caused by application of the final judgment rule to appeals of partial decisions.

Until these changes are made, the practitioner should keep the following five factors in mind if faced with a partial decision in a multiple claim case:

(1) If an immediate appeal is desired and the dismissal of one claim renders the remaining claims moot, request that the trial judge consolidate the other claims in the judgment so that the entire case is final;
(2) If number one is not possible, be aware that the hearing for summary judgment or dismissal should be treated as a separate trial so that Supreme Court Rule 81.06 may be applicable;
(3) If the partial decision is a "separate trial," request that the trial judge designate the judgment as final on the record for purposes of appeal;
(4) If the trial judge refuses to designate the partial decision as final, frame the appellate argument in terms of the "dependency" test, not the more difficult "same transactions or occurrences" test; and
(5) If an immediate appeal is not desired, request that the trial judge designate the dismissed claim as interlocutory. Otherwise

34. That many attorneys are unaware of the full definition of the term "separate trial" is shown by the fact that in a great many appeals of partial decisions, rule 81.06 is not even mentioned. For example, in Bolin v. Farmers Alliance Mut. Ins. Co., 549 S.W.2d 886 (Mo. En Banc 1977), neither party even cited rule 81.06 in their briefs before the supreme court.

35. The last clause of the third section of rule 81.06 provides that certain judgments are final "unless the court orders it entered as an interlocutory judgment to be held in abeyance until other claims, counterclaims or third-party claims are determined."
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it might later be determined, after the time for an appeal has run, that the partial judgment was final when entered.

If these things are kept in mind, rule 81.06 should present fewer problems.

III. THE MAKE-UP OF A FINAL JUDGMENT

The final judgment rule has also been employed on numerous occasions in Missouri to dismiss appeals for lack of finality, even though the trial court has apparently completed its activities and has disposed of all claims.36 By sending these cases back, the appellate courts are essentially saying that the trial court in some way either handled improperly or left out a required step in its adjudication. Since the trial court judgment is somehow inadequate, it cannot be final, and without a final judgment the appellate courts lack jurisdiction37 to review the decision.

Most of the appeals in this area were dismissed because the trial court failed to formally decree that the judgments were final.38 However, in a few special types of proceedings the judgments were held to be non-final because the trial court improperly disposed of the issues. For example, in an adoption proceeding, the judgment cannot merely grant custody of the child in question, it must also terminate the natural father's and mother's parental rights.39 Likewise in a declaratory judgment action, the trial court judgment, in order to be final, must include a declaration of the rights of the parties;40 merely dismissing the action is inadequate.

The most important of these special proceedings, though, has been the dissolution.

A. Finality of Dissolutions

Under section 452.305 of the Missouri Divorce Reform Act,41 a circuit court in a dissolution proceeding "shall" dissolve the marriage: (1) if the court has determined that the personal jurisdiction requirements have been met; (2) if the court has found that the marriage is irretrievably

36. See Marsch v. Williams, 575 S.W.2d 897 (Mo. App., D.K.C. 1978); Gray v. Bryant, 557 S.W.2d 489 (Mo. App., D. Spr. 1977); Corley v. McEachen, 555 S.W.2d 376 (Mo. App., D. Spr. 1977); Corder v. Corder, 546 S.W.2d 798 (Mo. App., D.K.C. 1977).

37. See Dampier v. Nichols, 570 S.W.2d 340, 341 (Mo. App., D. Spr. 1978); Gothard v. Spradling, 561 S.W.2d 448, 449 (Mo. App., D. Spr. 1978).

38. See Lawrence v. Steadley Co., 566 S.W.2d 518 (Mo. App., D. Spr. 1978); White v. Robertson-Drago Funeral Home, Inc., 552 S.W.2d 47 (Mo. App., D. Spr. 1977); Williams v. Williams, 480 S.W.2d 525 (Mo. App., D. Spr. 1972).

39: See Marsch v. Williams, 575 S.W.2d 897, 898 (Mo. App., D.K.C. 1978). See also In re Beste, 515 S.W.2d 530 (Mo. 1974); In re Adoption of LLV, 457 S.W.2d 2 (Spr. Mo. App. 1970).


41. RSMO §§ 452.300-.415 (1978).
broken; and (3) if the court, to the extent it has jurisdiction to do so, has considered, approved or made provision for child custody and support, maintenance of either spouse, and the disposition of property. Although this section only requires that a circuit court, as a minimum, "consider" the disposition of property, a number of recent decisions have held that if the circuit court, at the time of entering the decree of dissolution, does not actually divide the marital property or divides it improperly, there can be no final judgment in the proceeding.

A decision that such a judgment is not final has been reached by the courts through the application of the language of a separate section, 452.330.1, in place of section 452.305(3). Section 452.330.1, which suggests factors to be considered in the disposition of property, states inter alia: "In a proceeding . . . for dissolution of marriage . . . the court . . . shall divide the marital property in such proportions as the court deems just. . . ." This language, since it employs the word "shall," has been interpreted as imposing a mandatory requirement that a Missouri circuit court divide the marital property at the time the decree of dissolution is entered. Therefore, if a circuit court does not divide the property, the judgment lacks the requisite finality and the court retains jurisdiction of the cause since that court failed to meet the requirements of the Missouri Divorce Reform Act as interpreted by the courts of appeals.

42. RSMo § 452.305(3) (1978).
43. Marital property is defined for purposes of the Missouri Divorce Reform Act in RSMo § 452.350.2 (1978). If property is not defined as marital property, it is separate property and must be set aside to its owner by the court in a dissolution proceeding. Id. § 452.330.1.
44. See In re Marriage of Allen, 570 S.W.2d 352 (Mo. App., D. Spr. 1978); Anspach v. Anspach, 557 S.W.2d 3 (Mo. App., D. St. L. 1977); Corder v. Corder, 546 S.W.2d 798 (Mo. App., D.K.C. 1977).
45. RSMo § 452.330.1 (1978). The constitutionality of this section was upheld in Corder v. Corder, 546 S.W.2d 798 (Mo. App., D.K.C. 1977).
46. See Daffin v. Daffin, 567 S.W.2d 672, 680 (Mo. App., D.K.C. 1978); Corder v. Corder, 546 S.W.2d 798, 802 (Mo. App., D.K.C. 1977); L.F.H. v. R.L.H., 543 S.W.2d 520, 522 (Mo. App., D. St. L. 1976). The statement of the court in L.F.H. v. R.L.H. is typical: "By using the word 'shall,' the legislature has indicated that the trial court must specifically decree a division of the marital property upon dissolution of the marriage." 543 S.W.2d at 522. But see State ex rel. McTague v. McCellan, 532 S.W.2d 870, 872 (Mo. App., D. St. L. 1976); Waeckerle v. Board of Zoning Adjustment, 525 S.W.2d 351, 358 (Mo. App., D.K.C. 1975) (use of the word "shall" excludes discretion on the part of the trial court).
47. Although not raised in the cases, the Missouri Court of Appeals' interpretation of the Divorce Reform Act suggests an obvious question: If the Missouri General Assembly intended that the division of marital property be mandatory, why did it also include language in § 452.305.1(3) that a court need only "consider" the disposition of property? Perhaps another interpretation of these sections should therefore be considered: In a dissolution proceeding, a circuit court only has to "consider" the disposition of the marital property, but if it decides to make a division, it "must" divide the property in just proportions after considering all relevant factors, including those in § 452.330.1.
No explanation, however, has been given as to why the mandatory language of section 452.330.1 is to be read in place of section 452.305(3). The cases have not discussed it. There is also no published legislative history of the Missouri Divorce Reform Act to lend insight. The only clue is suggested by the fact that the property sections of the Missouri Act are very similar to those of the Uniform Marriage and Divorce Act, which was approved by the Commissioners on Uniform Laws in August, 1970. The intentions of the Commissioners therefore may have influenced the Missouri Act, and so could provide some guidance in its interpretation.

As has been pointed out by Professor Krauskopf, one of the reasons the Commissioners on Uniform Laws gave courts the power to divide marital property was to ensure that wives in a no-fault divorce system obtained their share of the marital property at dissolution. There was fear that if fault considerations, which have been considered by many members of the bar as frequently giving wives leverage in dictating a fair property settlement, were removed without giving the courts the power to divide marital assets, wives in many instances would not receive a fair portion of the property. The Commissioners' concern for the property interests of wives at dissolution can also be read into the recent Missouri cases in this area. In nearly all these decisions, the appellate court has sent the case back to the trial court in order that a distribution or redistribution of the marital property could be made which benefited the wife. If this common theme is an accurate representation of the policy of the Missouri Court of Appeals, it provides a plausible explanation as to why section 452.330.1 is being employed in place of section 452.305(3): Making the division of property mandatory rather than discretionary is a good way to look after dependent spouses' interests at dissolution.

Even though the basis for the Missouri courts' statutory interpretation is somewhat uncertain, the cases which have dealt with final judgments and the disposition of marital property have been consistent. To begin with, a Missouri circuit court in a dissolution proceeding must actually divide the marital property even where the court is not requested to do so.
by either husband or wife to ensure finality of the judgment.\textsuperscript{53} For example, in \textit{State ex rel. Brewer v. Sheehan},\textsuperscript{54} both parties had testified in the dissolution action that they had previously agreed to divide their assets equally. Therefore, the trial court, when it entered the decree of dissolution in 1975, made no order disposing of the property. Later, when the anticipated division by the parties failed to materialize, the wife brought a second suit for partition of their real estate. In 1978 the St. Louis District of the Court of Appeals ordered the second court to dismiss this partition suit. The court said that since the original court had not "fulfilled its statutory mandate" of actually dividing the property for the parties, it had not yet exhausted its jurisdiction.\textsuperscript{55} There was no final judgment, and the case was remanded to the circuit court for disposition of the real estate even though almost three years had passed since the decree had been entered.\textsuperscript{56}

A Missouri circuit court also cannot divide only some of the marital property; it must divide it all. If the dissolution decree fails to mention how every item of property is to be distributed, cases have held that there can be no final judgment in the action.\textsuperscript{57} For instance, in \textit{Anspach v. Anspach}\textsuperscript{58} the appeal was dismissed for lack of finality because the trial court neglected to decide the parties' interests in the husband's retirement fund.\textsuperscript{59} Similarly, in \textit{In re Marriage of Allen}\textsuperscript{60} the appeal was dismissed after review of the trial transcript showed that the parties each had some personal property which was not disposed of in the decree.\textsuperscript{61} In neither of


\textsuperscript{54} 565 S.W.2d 850 (Mo. App., D. St. L. 1978).

\textsuperscript{55} \textit{Id.} at 850. Judge Smith pointed out that there was no final judgment even though the original court's failure to divide the marital property was induced by the representatives of one of the parties rather than by the court's own error. 565 S.W.2d at 851.

\textsuperscript{56} The fact that neither husband nor wife in \textit{Brewer} had originally asked the court to divide the marital property was not a problem to the St. Louis District of the Court of Appeals. A year before, in 1977, the same court had held that a circuit court in such a case should merely treat both parties' pleadings as though amended by consent to request such action. These amendments are accomplished through application of Missouri Supreme Court Rule 55.33(b). \textit{Hulsey v. Hulsey}, 550 S.W.2d 902, 904 (Mo. App., D. St. L. 1977).

\textsuperscript{57} \textit{See, e.g., In re Marriage of Allen}, 570 S.W.2d 352 (Mo. App., D. Spr. 1978); \textit{Anspach v. Anspach}, 577 S.W.2d 3 (Mo. App., D. St. L. 1977); \textit{Hulsey v. Hulsey}, 550 S.W.2d 902 (Mo. App., D. St. L. 1977); \textit{L.F.H. v. R.L.H.}, 543 S.W.2d 520 (Mo. App., D. St. L. 1976).

\textsuperscript{58} 557 S.W.2d 3 (Mo. App., D. St. L. 1977).

\textsuperscript{59} \textit{Id.} at 6.

\textsuperscript{60} 570 S.W.2d 352 (Mo. App., D. Spr. 1978).

\textsuperscript{61} \textit{Id.} at 353. An alternative holding in this case was that the judgment was not final because the circuit court also had failed to vest custody of the child in either husband or wife. \textit{See also} \textit{Gadic v. Gadic}, 544 S.W.2d 605 (Mo. App., D.Spr. 1976).
these cases was there a finding that any of the undivided property was actually marital property, or the sole property of one of the parties. However, until that determination was made, and the property was dealt with by the court, there could be no final judgment.

Additionally, when a Missouri circuit court does dispose of the marital assets, it must dispose of them properly. An improper disposition is not a “division of marital property” for purposes of the Missouri Act.\(^\text{62}\) Therefore there can be no final judgment in such a case. For example, in \textit{Daffin v. Daffin},\(^\text{63}\) the Kansas City District of the Court of Appeals remanded the case after concluding that the trial court's award to the wife of $175 per month from the husband's $500 monthly military pension was not a proper disposition\(^\text{64}\) of that marital asset. In the court's words: “The award merely adjudges but does not separate the two disparate property interests accorded the wife in the pension benefit.”\(^\text{65}\) Merely separating the property interests of the parties in a particular marital asset, however, may not always ensure a proper disposition. In \textit{Corder v. Corder},\(^\text{66}\) the Kansas City District of the Court of Appeals held that there was no final judgment in a dissolution proceeding because the trial court had improperly made the parties tenants in common\(^\text{67}\) in what had formerly been marital real estate. The court pointed out that the legislature, in the interest of preventing further disputes and ill feelings between the spouses,\(^\text{68}\) intended that a

\begin{center}
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63. 567 S.W.2d 672 (Mo. App., D.K.C. 1978).  \\
64. Related to this issue of proper disposition of marital assets are two recent cases which hold that where one of the parties to the dissolution is unavailable and must be served by publication, the notice of publication must “describe” all of the marital property or the court cannot divide any of the property. \textit{In re Marriage of Breen}, 560 S.W.2d 558 (Mo. App., D.K.C. 1977); \textit{Duncan v. Duncan}, 550 S.W.2d 623 (Mo. App., D. St. L. 1977). The most thorough explanation is provided in \textit{Breen}, where the available party listed all the marital real estate in the notice of publication but neglected to mention the personal property, beyond reciting that the purpose of the dissolution proceeding \textit{inter alia} was “to dispose of all property rights under this marriage.” 560 S.W.2d at 364. The court, per Judge Shangler, held that this statement failed to meet the requirements of Missouri Supreme Court Rule 54.17 which strictly mandates that the notice of publication state “a description of any property to be affected” by the judgment. "This requirement for a published description of the property is more than mere etiquette, it is the means by which the res is brought to the control of the court and enables the tribunal to affect the property interest of the absent party even in her absence." 560 S.W.2d at 364. Since the requisite jurisdiction was lacking, the trial court should not have divided the marital property.  \\
65. 567 S.W.2d at 679.  \\
66. 546 S.W.2d 798 (Mo. App., D.K.C. 1977).  \\
67. \textit{Id.} at 800.  \\
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\end{center}
division of property "effect a complete severance of all unity of possession, as well as unity of title." Therefore, a division which leaves the parties as tenants in common should be reserved for the unusual situation where "the economics involved call for a division which stops short of severing the relationship." Since no "economics" could be found to justify a tenancy in common in Corder, the trial court’s disposition of the property was improper and did not amount to a division of marital property as mandated by section 452.330.1.

An important implication of these cases remains to be examined: If a dissolution case is remanded on the ground that no final order has been entered because the trial court did not divide the marital property, is it only the property disposition which is not final, or is the dissolution of marriage not final as well? Ordinarily when an appeal is dismissed because the judgment lacks finality, the entire matter, not just part, is still subject to the trial court’s jurisdiction. However, if this rule applies in dissolution cases, the divorce decree is void and the parties remain married.

The Missouri courts have dismissed these appeals without discussion of this question. Kentucky, though, with a divorce act very similar to Missouri’s, has squarely faced the issue. In Putnam v. Fanning, the Kentucky Court of Appeals held that a trial court can enter a final dissolution decree even though it reserves until later any determination of property disposition or maintenance. In Kentucky, therefore, the court’s failure to divide the marital property at the time the dissolution is granted has no effect on the finality of the divorce decree.

Support for following the Putnam decision in Missouri dissolution cases can be found in section 452.360.1 of the Missouri Revised Statutes. This section states that "[a] decree of dissolution of marriage . . . is final when entered, subject to the right of appeal." Since the language of this

69. 546 S.W.2d at 805.
70. Id. The Corder court never explained what "economics" would support granting a tenancy in common. It merely found that none were present in the Corder situation. 546 S.W.2d at 806.
71. 546 S.W.2d at 806.
72. Seeking a dissolution of marriage and disposition of marital property are not two separate claims; therefore, Missouri Supreme Court Rule 81.06, which speaks to multiple claim lawsuits, would have no applicability. See MO. R. CIV. P. 81.06, partially set out in text accompanying note 17 supra.
73. This conclusion is in line with the Missouri Court of Appeals’ supposed policy of protecting wives at dissolution: In most instances, husbands who are in favor of the divorce would be unlikely to secrete marital property if such action meant the dissolution was void.
74. See In re Marriage of Allen, 570 S.W.2d 352 (Mo. App., D. Spr. 1978); Anspach v. Anspach, 557 S.W.2d 3 (Mo. App., D. St. L. 1977); Pendleton v. Pendleton, 532 S.W.2d 905 (Mo. App., D. Spr. 1976).
75. KY. REV. STAT. §§ 408.140, .190 (Supp. 1978).
76. 495 S.W.2d 175 (Ky. 1973).
77. RSMO § 452.360.1 (1978). See State ex rel. Nilges v. Rush, 532 S.W.2d
statute leaves open little room for interpretation, it would appear that in Missouri, when a court fails to divide marital property at dissolution, only the property disposition aspect of the dissolution is not final.\textsuperscript{78} Interestingly, though, section 452.360.1 has never been mentioned in a Missouri decision in this area. For this reason the practitioner, if presented with such a case, would be well-advised to bring this statute to the court's attention so that on remand there may be no questions regarding the status of the marriage.

In summary, in order for a judgment in a dissolution proceeding to be final, the trial court must actually divide all of the marital assets whether or not the parties request it, and must divide those assets properly. If, however, a judgment is not final because one of these requirements is not met, only the division of marital property should be still subject to the trial court's jurisdiction; the marriage should remain dissolved.

B. The Judgment Entry

As noted earlier,\textsuperscript{79} most of the appeals that have been dismissed in Missouri even though the trial court disposed of all issues were sent back because the appellate court could not be certain that the judgment rendered below was final. This has particularly been a problem in the Springfield District of the Court of Appeals, where at least fifteen reported decisions were dismissed on this basis in the years 1977 and 1978.\textsuperscript{80} In Missouri, when a verdict is reached by a jury, or a judgment is rendered by a court without a jury, it is recorded by the court reporter for preservation in the trial transcript. Neither amounts to a final judgment at that time; both are findings that one of the parties is entitled to a judgment, rather than actual and absolute sentences of law.\textsuperscript{81} They remain

\textsuperscript{78} If this were not the case, and divorce decrees were not final as well, severe legal consequences could entail. For one thing, neither party to a dissolution would be able to remarry for fear of criminal liability for bigamy. Also, former marital real estate would be unmarketable since the title examiner could never be certain that the husband's and wife's tenancy by the entirety was actually severed by the dissolution.

\textsuperscript{79} See text accompanying note 37 supra.

\textsuperscript{80} E.g., Dampier v. Nichols, 570 S.W.2d 340 (Mo. App., D. Spr. 1978); Lawrence v. Steadley Co., 566 S.W.2d 518 (Mo. App., D. Spr. 1978); Corning Bank v. Hager, 560 S.W.2d 892 (Mo. App., D. Spr. 1978); \textit{In re} Purvis, 558 S.W.2d 413 (Mo. App., D. Spr. 1977); Corley v. McGaugh, 555 S.W.2d 376 (Mo. App., D. Spr. 1977); Matthews v. Turner, 549 S.W.2d 156 (Mo. App., D. Spr. 1977).

\textsuperscript{81} T. H. BLACK, JUDGMENTS § 3, at 8 (2d ed. 1902).
mere docket or record entries until they are transformed into judgment entries. This transformation requires three steps: the docket entry must be typed up by whomever is responsible, it must be supplemented by the requisite language such as "It is so ordered" or "Judgment in accordance with said verdict," and the document must be signed by the circuit judge. These judgment entries, which certify to interested parties that all litigation has been completed, are then recorded in the trial transcript, usually just below the original findings. The entries are dated back to when the findings were made; thirty days therefrom they become final and appealable.

An examination of the transcripts of a number of cases from the Springfield District of the Court of Appeals which were sent back for lack of finality reveals that in most instances the attorneys attempted to appeal from the trial court's docket entry. No judgment entry was even made up. Since, according to the Springfield court, a docket entry cannot be a final judgment, these appeals were dismissed. For example, in *Gray v. Bryant*, the court's docket entry read: "Judgment in favor of Plaintiff and against Defendants in the total sum of FOUR THOUSAND THREE HUNDRED THIRTY — THREE AND 27/100 DOLLARS in accordance with the jury verdict. Costs taxed against the Defendants." Although this

82. See *Gothard v. Spradling*, 561 S.W.2d 448, 449 (Mo. App., D. Spr. 1978); *Gray v. Bryant*, 557 S.W.2d 489, 489 (Mo. App., D. Spr. 1977); *First State Bank v. Brown*, 549 S.W.2d 369, 370 (Mo. App., D. Spr. 1977); *Cochran v. DeShazo*, 538 S.W.2d 598, 601 (Mo. App., D. Spr. 1976).


86. See, e.g., Transcript at 470-72, *Perry v. Briscoe*, 568 S.W.2d 283 (Mo. App., D. Spr. 1978).

87. Missouri Supreme Court Rule 78.04 provides, in part, that the entry of judgment on a jury verdict is entered as of the date of the verdict.

88. Mo.R. Civ. P. 81.05(a).

89. *Lawrence v. Steadley Co.*, 566 S.W.2d 518 (Mo. App., D. Spr. 1978); *Gothard v. Spradling*, 561 S.W.2d 448 (Mo. App., D. Spr. 1978); *Corning Bank v. Hager*, 560 S.W.2d 892 (Mo. App., D. Spr. 1978); *Gray v. Bryant*, 557 S.W.2d 489 (Mo. App., D. Spr. 1977); *Matthews v. Turner*, 549 S.W.2d 156 (Mo. App., D. Spr. 1977); *Coggburn v. Watts*, 540 S.W.2d 186 (Mo. App., D. Spr. 1976); *Phelps v. Parker*, 554 S.W.2d 278 (Mo. App., D. Spr. 1976).

90. See *In re Purvis*, 558 S.W.2d 413, 414 (Mo. App., D. Spr. 1977); *City of Sikeston v. Missouri Util. Co.*, 526 S.W.2d 401, 401 (Mo. App., D. Spr. 1975).

91. 557 S.W.2d 489 (Mo. App., D. Spr. 1977).

92. Transcript at 84, 557 S.W.2d at 489. Several reported opinions in dismissing the appeals reproduced the defective entries. See, e.g., *Gothard v. Spradling*, 561 S.W.2d 448, 449 (Mo. App., D. Spr. 1978); *In re Purvis*, 558 S.W.2d 413, 414 (Mo. App., D. Spr. 1977); *White v. Robertson-Drago Funeral Home, Inc.*, 552 S.W.2d 47, 49 (Mo. App., D. Spr. 1977); *Phelps v. Parker*, 534
docket entry disposed of all of the issues in the trial court, the appeal was
 dismissed because the Springfield court could not be certain whether this
 entry, recorded in the transcript, was a judgment entry and therefore
 final.\textsuperscript{93} Merely labeling the docket entry a final judgment in the transcript
 was inadequate.\textsuperscript{94} In order to be able to refile the appeal, the appellant
 was then forced to return to the trial court to get the judge’s signature on
 the judgment six months after the original entry.\textsuperscript{95}

 In some cases, this policy of rejecting appeals from a docket entry in
 which there is a finding that one of the parties is entitled to a judgment
 quite correctly protects the appellate courts from prematurely reviewing a
 decision. It is particularly appropriate for the reviewing court to require a
 judgment entry in a multiple claim suit since the findings may be contain-
ed in several different docket entries.\textsuperscript{96} However, in other instances, this
 policy can operate very unfairly. In \textit{Gray}, for example, the fact that no
 judgment entry was drawn up was probably an oversight on the part of the
 attorneys. All litigation in the trial court had been completed. In such a
 case, requiring a separate judgment entry with the judge’s signature is an
 unnecessary technicality.

 As an alternative to dismissal, Judge Flanigan, in his frequent dissents
 in these Springfield court decisions,\textsuperscript{97} would prefer to see more use made of
 Missouri Supreme Court Rule 81.12(c). This rule provides in part: “The
 appellate court may, if it seems necessary, order that a supplemental
 transcript on appeal shall be prepared and filed by either party or by the
 clerk of the trial court including any additional part of the record, pro-
ceding and evidence. . . .”\textsuperscript{98} According to Judge Flanigan, the appellate
 court could simply issue an order pursuant to this rule requesting that a
 judgment entry be prepared and filed in a supplemental transcript.\textsuperscript{99}

 S.W.2d 278, 279 (Mo. App., D. Spr. 1976); City of Sikeston v. Missouri Util. Co.,
 526 S.W.2d 401, 401 (Mo. App., D. Spr. 1975).
 93. 557 S.W.2d at 489.
 94. \textit{See} Corley v. McGaugh, 555 S.W.2d 376, 378 (Mo. App., D. Spr. 1977);
 White v. Robertson-Drago Funeral Home, Inc., 552 S.W.2d 47, 49 (Mo. App.,
 D. Spr. 1977); Williams v. Williams, 480 S.W.2d 525, 527 (Mo. App., D. Spr.
 1972).
 95. Supp. Transcript at 1-3, Gray v. Bryant, 557 S.W.2d 489 (Mo. App., D.
 Spr. 1977).
 96. However, in a multiple claim suit, if the trial judge, pursuant to the last
 clause of the second section of Supreme Court Rule 81.06, designates that a judg-
 ment on less than all of the claims is final, that designation need only be made in
 the docket entry. A separate judgment entry need not be drafted. \textit{See} Spires v.
 Edgar, 513 S.W.2d 372, 377 (Mo. En Banc, 1974); Feinstein v. Edward Liv-
ingston & Sons, Inc., 457 S.W.2d 789, 792 (Mo. 1970).
 97. \textit{See} Dampier v. Nichols, 570 S.W.2d 340, 341 (Mo. App., D. Spr. 1978)
 (Flanigan, C.J., dissenting); Gothard v. Spradling, 561 S.W.2d 448, 450 (Mo.
 App., D. Spr. 1978) (Flanigan, C.J., dissenting).
 98. \textit{Mo. R. Civ. P.} 81.12(c).
 99. Gothard v. Spradling, 561 S.W.2d 448, 450 (Mo. App., D. Spr. 1978)
 (Flanigan, C.J., dissenting). \textit{See also} Whealen v. St. Louis Soft Ball Ass’n, 356
Once this step is completed, the appellate court would have adequate jurisdiction for review, thereby obviating the need for dismissal and the concomitant expense and delay of refiling the appeal.

Another possible solution would be to require that in all judicial circuits within the Springfield District the court or circuit clerk draft the judgment entries. Presently, by precedent or rule, nearly all of these circuits require the attorney for the prevailing party to draw up the judgment. However, if the court or clerk had this responsibility, as they seemingly should, there would be less likelihood of an entry being defective or nonexistent.

At the present time, however, the Missouri practitioner, in order to ensure prompt review, should keep the following steps in mind, particularly if appealing to the Springfield District of the Court of Appeals:

1. Draw up a judgment entry with the requisite language, and have the circuit judge sign it as soon as possible after the finding is rendered;
2. Make certain that the court reporter includes this entry in the trial transcript; and
3. Have the entry labeled in the transcript as a final judgment and include it in the index.

If these steps are followed, it is very unlikely that a reviewing court will dismiss the appeal because it is unsure whether there is a final judgment.

IV. CONCLUSION

The final judgment rule has a substantial impact on appeals of circuit court decisions in Missouri. By restricting review, it prevents premature appeals in instances where the appellate court cannot be certain that all matters have been disposed of at the trial level. However, while the objectives of this rule appear sound, the requirement of finality in far too many

Mo. 622, 624, 202 S.W.2d 891, 893 (1947); Feigenbaum v. Van Raalte, 356 Mo. 67, 70, 201 S.W.2d 283, 284 (1947); Gibson v. Metropolitan Life Ins. Co., 204 S.W.2d 439, 440 (St. L. Mo. App. 1947).

100. Rule 6 of the 42nd Judicial Circuit of Missouri is typical: "Counsel for the prevailing party shall prepare and present to the court, for approval, the judgment, decree, or order to be entered in each case within fifteen (15) days after such judgment or decree or order is made."

101. There are no reported decisions dismissing appeals on this basis in the St. Louis or Kansas City Districts of the Court of Appeals. However, the potential for similar problems does exist in these districts. Apparently attorneys' oversights are being corrected by the issuance of an order to produce a judgment entry pursuant to Missouri Supreme Court Rule 81.12(c). See text accompanying notes 98-99 supra. Perhaps the courts are simply overlooking the problem. Should the magnitude of the problem increase, there is a possibility that the St. Louis District may adopt the approach of the Springfield court. Conversation with Robert Ruhland, Director of the Department of Judicial Administration, St. Louis County (April 20, 1979).
cases causes hardship for the parties. The rule therefore should be modified so that Missouri appellate courts have more discretion in whether to review non-final decisions. Such a change would increase the workload of this state's already overburdened court of appeals, but that factor must be weighed against considerations of fairness suggesting that a more equitable rule be applied.

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