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May 8, 2017

Via first class mail and email
Thomson Reuters
Attn: Rebecca Matzek
Copyright Services
610 Opperman Drive
Eagan, MN 55123

Re: Second Request for Reconsideration for Refusal to Register Michigan Appeals Reports; Correspondence ID: 1-1USAPP0

Dear Ms. Matzek:

The Review Board of the United States Copyright Office ("Board") has considered your second request for reconsideration of the Registration Program's refusal to register a text claim in the work titled "Michigan Appeals Reports (Volume 307)" ("Work"). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board finds that the Work exhibits copyrightable authorship and thus may be registered.

The Work is a single-volume work containing the decisions of all the cases decided in the Michigan Court of Appeals from September 25, 2014 to November 6, 2014. The Work includes editorial enhancements, including analyses, summaries, and headnotes for each case. A reproduction of two samples from the Work is included as Appendix A. The Board's finding is based on the "minimal degree of creativity" required by the U.S. Supreme Court in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). The combination of these editorial enhancements meets the creativity threshold articulated in *Feist*. *See also Callaghan v. Myers*, 128 U.S. 617 (1888) (finding annotations in a legal reporter copyrightable by the publisher); *Code Revision Comm'n et al. v. Public.Resource.Org, Inc.*, 2017 WL 1228539, 15 Civ. 2594 (N.D. Ga. March 23, 2017).

For the reasons stated herein, the Review Board of the United States Copyright Office reverses the refusal to register the copyright claim in the Work. Accordingly, the Board's decision will be referred to the Office's registration Program so that the application for the Work can be registered.

BY:
Regan A. Smith
Copyright Office Review Board

APPENDIX A

Sample 1

HENDERSON v DEPARTMENT OF TREASURY

Docket No. 312859. Submitted February 11, 2014, at Lansing. Decided September 25, 2014, at 9:00 a.m.

Paul A. Henderson filed a petition in the Tax Tribunal challenging an assessment against him by the Michigan Department of Treasury for the 2007 tax year. The department alleged that Henderson was liable under MCL 205.27a(5) as a corporate officer of Jefferson Beach Properties, LLC, for taxes and interest totaling $72,286.39. Henderson argued that the tax liability had been discharged by the United States Bankruptcy Court for the Southern District of Florida when that court discharged him from bankruptcy under 11 USC 1141. The department moved for summary disposition, asserting that the tax liability had not been discharged because the liability was for taxes due under Michigan's former Single Business Tax Act (SBTA). The department asserted that the SBTA imposed excise taxes and that, under 11 USC 523(a)(1)(A), a bankruptcy discharge under 11 USC 1141 does not discharge debt for excise taxes. A hearing referee granted summary disposition in favor of the department in a proposed opinion and order. Henderson filed exceptions to the proposed order, but the tribunal affirmed and adopted the proposed order in its final opinion and judgment. Henderson appealed.

The Court of Appeals *held*:

1. Under MCR 2.116(I)(5), the tribunal had to provide Henderson the opportunity to amend his pleadings. Under MCR 2.118(A)(1), Henderson's right to amend his pleadings became discretionary 14 days after he was served with a responsive pleading. Leave to amend pleadings should be denied only for particularized reasons, such as undue delay, bad faith, dilatory motive on the movant's part, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or the futility of amendment. Henderson asserted that the tribunal denied him the right to amend his pleadings, but the assertion was not supported by the record. The tribunal did not err when it indicated that Henderson had failed to demonstrate that amendment would be justified.

2. In the tribunal's order granting the department's motion to abey discovery until the tribunal issued its decision to adopt or

vacate the hearing officer's proposed order, the tribunal indicated that if it entered an order vacating the proposed order, Henderson would have the opportunity for discovery. Contrary to Henderson's assertion, the order did not promise him an opportunity for discovery. Because the tribunal ultimately chose to adopt the proposed order, no discovery was needed. There is no constitutional right to discovery in any judicial or quasi-judicial proceeding, including an administrative proceeding.

3. 11 USC 523 states that a bankruptcy discharge under 11 USC 1141 does not discharge an individual debtor from any debt for a tax of the kind and for the periods specified in 11 USC 507(a)(8). Section 507(a)(8) refers to unsecured claims of governmental units, including certain excise taxes. 11 USC 507(a)(8)(E)(i) specifically refers to excise taxes on a transaction. Under federal bankruptcy law, an excise tax is a tax on the enjoyment of a privilege or the carrying on of an occupation or activity. The SBTA was enacted to provide for a tax on financial activities. A tax on financial activities is a tax on transactions. Under former MCL 208.31(3), the SBTA provided that the tax levied and imposed under the act was imposed on the privilege of doing business in Michigan. Because the tax imposed under the SBTA possessed the characteristics commonly attributed to excise taxes—in that it was a tax on the enjoyment of a privilege or the carrying on of an occupation or activity—and it was imposed on certain financial activities, the SBTA imposed an excise tax on a transaction within the meaning of 11 USC 507(a)(8)(E)(i).

4. MCL 205.27a(5), as amended by 2003 PA 23, stated that if a limited liability company liable for taxes administered under Michigan's revenue collection act, MCL 205.1 *et seq.*, failed to pay the taxes due, its officers were personally liable for the failure. Henderson's assertion that because his liability under former MCL 205.27a(5) was derivative, it did not arise from an excise tax and, therefore, was discharged in bankruptcy, was without merit. The plain language of former MCL 205.27a(5) indicated that liability under the statute was for taxes. Because the tax imposed on Henderson was an excise tax on a transaction that was not discharged in the bankruptcy proceedings, the tribunal properly granted summary disposition in favor of the department.

5. MCL 205.27a was amended by 2014 PA 3. In *Shotwell v Dep't of Treasury*, 305 Mich App 360 (2014), the Court of Appeals held that 2014 PA 3 be given retroactive effect. Contrary to Henderson's argument, remand was not necessary in this case to address the amended statutory language given that the issues before the Court of Appeals and the tribunal concerned only the

nature of Henderson's liability, which was not affected by the amendment of the statute.

Affirmed.

TAXATION — BANKRUPTCY — DISCHARGE OF DEBT — EXCISE TAXES.

Under 11 USC 523, a bankruptcy discharge under 11 USC 1141 does not discharge an individual debtor from any debt for a tax of the kind and for the periods specified in 11 USC 507(a)(8), including excise taxes on a transaction; under federal bankruptcy law, an excise tax is a tax on the enjoyment of a privilege or the carrying on of an occupation or activity; Michigan's former Single Business Tax Act imposed an excise tax on a transaction within the meaning of 11 USC 507(a)(8)(E)(i).

Miller, Canfield, Paddock & Stone, PLC (by *Jack Van Coevering*, *Gregory A. Nowak*, and *Colleen M. Healy*), for Paul A. Henderson.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Nate Gambill*, Assistant Attorney General, for the Department of Treasury.

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

STEPHENS, J. Petitioner, a resident of the state of Florida, appeals by right the final opinion and judgment of the Michigan Tax Tribunal (MTT) granting respondent summary disposition and holding petitioner responsible for taxes under Michigan's former Single Business Tax Act, former MCL 208.1 *et seq.*[1] For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

A bill for taxes due, also referred to as the notice of intent to assess (the Notice), was issued by respondent

[1] All references to MCL 208.1 *et seq.* are to sections that were in effect for the 2007 tax year unless otherwise noted.

Sample 2

DIEZ v DAVEY

Docket No. 318910. Submitted September 4, 2014, at Detroit. Decided October 23, 2014, at 9:05 a.m.

Robert A. Diez brought an action in the Macomb Circuit Court against Marie-Jesusa C. Davey, seeking sole legal and physical custody of the parties' three minor children. The court, Kathryn A. George, J., awarded the parties joint legal and physical custody. The court ordered plaintiff to pay defendant $7,062 per month for child support and also ordered plaintiff to pay $118,000 for defendant's attorney fees. Plaintiff appealed.

The Court of Appeals *held*:

1. Unless application of the Michigan Child Support Formula would be unjust or inappropriate, a parent's child support obligation is determined by application of the formula. Under the formula, the first step in calculating each parent's support obligation involves determining the parents' individual incomes, including earnings generated from a business. With regard to corporate income, the formula, 2013 MCSF 2.01(E)(4)(a), requires inclusion of distributed profits as income to a parent. And, under 2013 MCSF 2.01(E)(4)(d)(i), the formula requires consideration of undistributed profits when there has been a substantial reduction in the percentage of profits distributed to a parent as compared to historical distribution patterns. In this case, plaintiff was the president and sole shareholder of an S corporation, Supreme Gear Company (SGC). The trial court relied on the opinion of an expert, who asserted that 60 to 65% of SGC's undistributed earnings constituted excess working capital that could have been distributed, and that those undistributed corporate earnings were, therefore, available as income to plaintiff for child support purposes. The formula, however, does not mandate the pursuit of one reasonable business model over another, and it does not necessitate the revamping of a parent's reasonable and historical business practices in favor of alternative methods in which a corporation could theoretically be run in order to make additional funds available. Generally, the management of a corporation involves some exercise of business judgment. Nothing in the formula can be read to limit a parent's freedom to make business decisions or to

require the attribution of greater income to a parent who makes relatively conservative business decisions. Provided that the operation of a parent's business is in keeping with historical practices, that those practices can be described as the reasonable exercise of business judgment, and that there is no evidence of an improper effort to make funds unavailable for child support, nothing in the formula mandates that the reality of how a parent operates a business, and has historically operated a business, should be dismissed in favor of an alternative method in which the business could be conducted. The trial court erred by adopting the opinion of an expert who evaluated plaintiff's income not on the basis of how plaintiff historically ran the business but on the basis of the substitution of the expert's business judgment for that of plaintiff's business judgment.

2. When a corporation elects S-corporation status, income taxes are paid by the shareholders, but the corporation owns the profits on which the taxes are paid and the corporation is not required to distribute that income. The corporation may, however, choose to distribute funds to shareholders for the payment of the tax liability arising from the corporation's earnings. Funds distributed for payment of taxes on earnings retained by the corporation are not an indication of what the parent has, or should have, available for child support. The formula acknowledges the unique taxation rules involved with business ownership and recognizes, under 2013 MCSF 2.01(C)(2)(a), that money may be passed to a parent not as income but as a tax strategy. It is apparent that funds distributed for the payment of taxes arising from earnings retained by an S corporation are not available to the parent for payment of child support. Rather, those funds are applied to pay a necessary business expense and are properly excluded from the parent's net income. On remand, the trial court must determine what corporate distributions to plaintiff, if any, were used by plaintiff to pay taxes on corporate earnings retained by SGC. Any distributions used to offset plaintiff's tax liability attributable to SGC shall not be included in the determination of plaintiff's income.

3. It is the best interests of the children that control the determination of a parenting-time schedule. An award of joint custody does not necessitate a 50/50 split of the children's time between each parent. Under MCL 722.26a(7)(a), "joint custody," in terms of physical custody, is defined as an order of the court in which it is specified that the child shall reside alternately for specific periods with each of the parents. Under MCL 722.27a, parenting time must generally be granted in a frequency, duration,

and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. In this case, the parenting-time schedule, under which the children reside alternatively for specific periods with each of the parents, plainly constituted an award of joint custody of the type contemplated by the Legislature and provided ample time for plaintiff to promote a strong relationship with his children. The trial court was not required to provide a perfect division of parenting time, and the trial court did not abuse its discretion in adopting the schedule at issue. To the extent plaintiff challenged the trial court's assessment of the best-interest factors under MCL 722.23, he failed to show that the court's findings were against the great weight of the evidence.

4. Under MCR 3.206(C)(1), a party to a domestic relations action may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a postjudgment proceeding. A party who requests attorney fees and expenses must allege facts sufficient to show that (1) the party is unable to bear the expense of the action and the other party is able to pay, or (2) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply. The rule has been interpreted to require an award of attorney fees to the extent necessary to enable a party to prosecute or defend a suit. A party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees. In this case, defendant had an annual income of less than $8,000 per year and incurred legal fees in excess of $118,000. Therefore, the trial court did not clearly err by finding that defendant could not afford her attorney fees. Plaintiff, in contrast, was the sole shareholder of a profitable corporation, earning, by his own admission, a salary of $183,000 a year; he also had funds in savings; and he could have withdrawn funds from SGC. Although plaintiff's father had loaned defendant the money to pay her attorney fees, the evidence showed that defendant had agreed to repay the loan. The trial court did not abuse its discretion by awarding defendant attorney fees. And, insofar as plaintiff challenged the necessity of some of the expenses, plaintiff failed to show that the trial court abused its discretion in determining the amount of fees awarded.

Affirmed in part, vacated in part, and remanded for reconsideration of plaintiff's income for the purpose of determining plaintiff's child support obligation.

FORT HOOD, J., concurring in part and dissenting in part, agreed with the majority regarding the child custody and parenting-time issues, but dissented from the majority's opinion with regard to child support and would have affirmed the trial court decision in its entirety. The purpose of the formula is to determine the amount of income available for child support. A case-by-case, factual inquiry—one that is not limited to situations in which there is evidence of a reduction in distributions compared to historical practices—is required to determine what portion of an S corporation's profits are necessary to fund the corporation and what portion may be considered income under the formula. This inquiry is necessary to balance the needs of the corporation against the concern that the corporation might be used to shield income in a child support dispute. The trial court in this case undertook the appropriate analysis. With regard to the funds distributed to plaintiff for the payment of taxes arising from SGC's earnings, plaintiff stipulated the inclusion of those funds in his income calculation and, therefore, he should have been precluded on appeal from disputing the inclusion of those funds in his income.

1. PARENT AND CHILD — CHILD SUPPORT FORMULA — DETERMINATION OF INCOME — INCOME FROM A BUSINESS — HISTORICAL PRACTICE.

Unless application of the Michigan Child Support Formula would be unjust or inappropriate, a parent's child support obligation is determined by application of the formula; provided that the operation of a parent's business is in keeping with historical practices, that those practices can be described as the reasonable exercise of business judgment, and that there is no evidence of an improper effort to make funds unavailable for child support, nothing in the formula mandates that the reality of how a parent operates a business, and has historically operated a business, should be dismissed in favor of an alternative method in which the business could be conducted in order to make more income available for child support.

2. PARENT AND CHILD — CHILD SUPPORT FORMULA — INCOME — S CORPORATIONS — DISTRIBUTIONS FOR THE PAYMENT OF TAXES.

Funds distributed by an S corporation for the payment of taxes on earnings retained by the corporation are not an indication of what the parent has, or should have, available for child support, and any distributions used to offset a parent's tax liability attributable to an S corporation shall not be included in the determination of the party's income.

3. PARENT AND CHILD — PHYSICAL CUSTODY — PARENTING-TIME.

It is the best interests of the children that control the determination of a parenting-time schedule; an award of joint custody does not necessitate a 50/50 split of the children's time between each parent.

Judith A. Curtis for plaintiff.

Plunkett Cooney (by *Hilary A. Ballentine* and *Karen E. Beach*) for defendant.

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

HOEKSTRA, P.J. In this child custody dispute, plaintiff/counter-defendant, Robert A. Diez (plaintiff), appeals as of right a trial court order that resolved issues involving child custody and parenting time, child support, and attorney fees. Because the trial court's award of custody and parenting time was not an abuse of discretion and the trial court did not abuse its discretion in awarding attorney fees to defendant/counter-plaintiff, Maria-Jesusa Cloma Davey (defendant), we affirm those portions of the trial court's judgment. However, for the reasons explained in this opinion, we vacate the trial court's award of child support and remand for reconsideration of plaintiff's income under the Michigan Child Support Formula (MCSF).

I. BACKGROUND

Plaintiff is the president and sole shareholder of Supreme Gear Company (SGC), a manufacturer of precision gears used in the aerospace industry. SGC is organized as a corporation and it has elected to be an S corporation for tax purposes under 26 USC 1362(a)(1). The parties in this case met in 1994 and became