NOTE

When Efficiency Arguments Fail: The Counter-Intuitive Effects of Amended Rule 78.07(c)


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I. INTRODUCTION

Fairness and efficiency are often upheld as dual goals of the judicial system. Yet often these goals seem to conflict, and courts are left balancing justice for the parties with judicial efficiency. In _Crow v. Crow_ the outcome was far from fair. A father asked a court to reduce his child support obligation when one of his children was emancipated. Not only did the mother agree that the child support should be reduced, the procedure for determining child support in Missouri indicated a reduction was appropriate. However, the circuit court refused the modification. On appeal, the court declined to hear the case and cited to the requirements of Missouri Rule of Civil Procedure 78.07(c) on preserving allegations of error, a rule that had never before been applied to this area of law. In refusing to hear the case, instead of searching for fairness for the parties, the court relied on the efficiency argument used to justify the amendment of Rule 78.07(c).

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1. See, e.g., _Fed. R. Civ. P. 1_ (“These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).


4. Appellant’s Brief at 6, _Crow_, 300 S.W.3d 561 (No. ED 92412), 2009 WL 1857044.

5. _Crow_, 300 S.W.3d at 563.

6. _Id._ at 565; _see also_ Mo. Sup. Ct. R. 78.07(c) (“In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review.”).

7. _Crow_, 300 S.W.3d at 566.
In light of the court’s miscarriage of justice in Crow v. Crow, this Note will focus on analyzing the supposed efficiency of amended Rule 78.07(c). This Note will begin by explaining the history leading up to Crow v. Crow and then analyzing the decision itself. With the background established, this Note will examine the effect that amended rule 78.07(c) had on the Crow court and the lingering influence it has on the judiciary at large. First, the intended outcome of the rule will be compared and contrasted with several potential outcomes in order to determine whether the amendment actually results in the intended increase in efficiency. This will include an examination of the obvious effects that occurred since the passage of the rule and the potential effects that may be unnoticed. Second, the amended rule will be analyzed to see if, even assuming it does create some judicial efficiency, it nonetheless creates a risk of unfairness beyond what was intended and what should be acceptable. Finally, some suggestions will be provided for alternative methods that could allow the court to attain the desired efficiency without any of the risks to fairness that the amended rule presents. Without a further amendment to rule 78.07(c), Crow v. Crow will be only the first case decided unjustly because of the faulty reasoning behind the current structure of rule 78.07(c).

II. FACTS AND HOLDING

In May 2006, the Circuit Court of Monroe County entered the divorce decree that dissolved the marriage of David Alan Crow (Father) and Judy Lynette Crow (Mother). At the time of the dissolution, Father and Mother had five children. The court emancipated the parties’ oldest child. The court then granted the parties joint legal custody of the four remaining children, with Mother having sole physical custody. Father was required to pay $1,010 in monthly child support for the four unemancipated children.

Father filed a motion to modify his child support obligation in October 2007. Father alleged that the oldest of the children covered by the support obligation, K.C., had become legally emancipated. As of October 1, 2007, K.C. was twenty years old, had graduated from high school in December 2006, and was not enrolled in a post-secondary institution. Father sought modification of his child support so that he would no longer pay for the

8. Id. at 563.
9. Appellant’s Brief, supra note 4, at 4 (The five children were A.C., K.C., H.C., D.C., and J.C.).
10. Id.
11. Id.
12. Crow, 300 S.W.3d at 563.
13. Id.
14. Id.
15. Id.
emancipated child and requested reimbursement for support involuntarily overpaid following the emancipation of K.C.\textsuperscript{16}

The trial court held a bench trial in July 2008.\textsuperscript{17} Both parties stipulated that K.C. was legally emancipated effective October 1, 2007 and that any modification of Father’s child support obligation should be retroactive to the date of K.C.’s emancipation.\textsuperscript{18} Mother filed Civil Procedure Form 14 (Form 14),\textsuperscript{19} which indicated the presumed correct child support for the three remaining unemancipated children should be $926 per month.\textsuperscript{20}

In the modification judgment, the judge found that K.C. was legally emancipated as of October 1, 2007.\textsuperscript{21} However, the trial court ordered that Father’s child support obligation remain $1,010 per month.\textsuperscript{22} The court reached this amount without providing any findings, and it did not file its own Form 14.\textsuperscript{23} Father appealed the decision, but he did not file a post-trial motion to amend the judgment.\textsuperscript{24}

On appeal, the Missouri Court of Appeals, Eastern District, considered upon its own motion whether Father had preserved his allegations of error for appellate review.\textsuperscript{25} The court first determined that the trial court failed to follow the procedure required by law.\textsuperscript{26} Missouri Supreme Court Rule 88.01 requires making findings on the record whenever a court deviates from the presumed correct child support calculated with Form 14.\textsuperscript{27} The trial court had both deviated from Form 14 and failed to make the required findings.\textsuperscript{28} The appellate court then held that such failures are encompassed under the modified Rule 78.07(c), which requires filing a motion to amend a judgment in

\begin{itemize}
\item \textsuperscript{16} Id. Additionally, Father requested that the court provide for future automatic incremental adjustments to his support obligation as each child becomes emancipated, so as to avoid recurrent motions to modify. Appellant’s Brief, \textit{supra} note 4, at 5.
\item \textsuperscript{17} Crow, 300 S.W.3d at 563.
\item \textsuperscript{18} Id. The parties also stipulated that the court create a stair-stepping method for automatic adjustments to Father’s child support obligation as each child becomes emancipated. Appellant’s Brief, \textit{supra} note 4, at 6.
\item \textsuperscript{19} Civil Procedure Form 14 is a form used to calculate the presumed correct amount of child support. Mo. Sup. Ct. R. Form 14; see also Mo. Sup. Ct. R. 88.01(b). Its use is mandatory. Woolridge v. Woolridge, 915 S.W.2d 372, 378 (Mo. App. W.D. 1996) (citing Hamilton v. Hamilton, 866 S.W.2d 711, 716 (Mo. App. W.D. 1994)).
\item \textsuperscript{20} Appellant’s Brief, \textit{supra} note 4, at 6. Mother also admitted a Form 14 that reflected that the presumed support for two children would be $829 per month and the presumed support for one child would be $619 per month. Id.
\item \textsuperscript{21} Crow, 300 S.W.3d at 563.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id. at 563-64.
\item \textsuperscript{24} Id. at 563.
\item \textsuperscript{25} Id. at 564.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Mo. Sup. Ct. R. 88.01.
\item \textsuperscript{28} Crow, 300 S.W.3d at 563.
\end{itemize}
order to preserve allegations relating to the form or language of a judgment. Therefore, because Father failed to file a post-judgment motion raising the trial court’s failure to follow the required scheme, he had not preserved the issue for appeal, and his appeal was dismissed.

III. LEGAL BACKGROUND

A. Child Support Modification

Missouri child support law is an amalgam of statutes, case law, and Missouri Supreme Court Rules. The basic child support obligation is contained in statutes: “In a proceeding for dissolution of marriage, legal separation, or child support, the court may order either or both parents . . . to pay an amount reasonable or necessary for the support of the child.” In most situations the obligation to support a child extends until the child turns eighteen, unless the child is either incapable of supporting himself due to disability or enrolled in a secondary school.

To determine the appropriate amount of child support, the legislature included several factors the court should consider in Missouri Revised Statutes section 452.340.1. Along with these factors, the legislature included a mandate for the Supreme Court of Missouri to establish guidelines for determining the amount of child support. In response to the requirement of creating “specific, descriptive and numeric criteria” for computation of child

29. Id. at 566.
30. Id. at 567.
32. Id. Technically, the court may order support from a parent “owing a duty of support,” see id., but Missouri case law has made it clear that both parents have a statutory duty to support their children. See, e.g., Gerlach v. Adair, 211 S.W.3d 663, 669 (Mo. App. W.D. 2007).
33. Mo. Rev. Stat. § 452.340.3(5). The obligation will also stop if the child dies, marries, enters active duty in the military, or becomes self-supporting and the custodial parent has relinquished control. Id. § 452.340.3(1)-(4).
34. Section 452.340.1 provides that the court must consider “all relevant factors including:”
(1) The financial needs and resources of the child;
(2) The financial resources and needs of the parents;
(3) The standard of living the child would have enjoyed had the marriage not been dissolved;
(4) The physical and emotional condition of the child, and the child’s educational needs;
(5) The child’s physical and legal custody arrangements . . . ; and
(6) The reasonable work-related child care expenses of each parent.
Id. § 452.340.1.
35. Id. § 452.340.8.
support, the Supreme Court of Missouri created Rule 88.01, which requires the use of Form 14. Form 14 is a worksheet used to calculate the amount of child support. The amount calculated after filling out Form 14 is the amount of required child support unless a court finds the amount is unjust or inappropriate. In order to determine that the amount is unjust, the court must include written or specific findings on the record that consideration of all relevant factors demonstrates the amount is unjust.

Once the appropriate amount of child support is set by the court, it only can be changed "upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable." Any change of circumstances that would result in a change of twenty percent or more in the support obligation is prima facie evidence of sufficiently changed circumstances. However, even where the change would be less than twenty percent, a party can independently show that the change in circumstances is substantial and continuing. This is particularly true when the change is obviously long term, such as moving out of state or discontinuing tuition payments. Once sufficient change is demonstrated, the court must use the same procedure for setting the new support amount as for setting the original amount.

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36. Id.
38. See MO. SUP. CT. R. FORM 14; see also MO. SUP. CT. R. 88.01(b) ("There is a rebuttable presumption that the amount of child support calculated pursuant to . . . Form No. 14 is the correct amount of child support to be awarded . . . .") Form 14 compares the relative salaries of both parents to determine the proportionate share of income. MO. SUP. CT. R. FORM 14. From the total income, the basic support amount is determined from the Schedule of Basic Child Support Obligation, and each parent’s proportionate share is calculated. Id. Each parent is then able to subtract child-rearing expenses, such as health care costs, and the final support obligation is found by subtracting the lesser modified proportionate share from the greater. Id.
39. MO. SUP. CT. R. 88.01.
40. See id.
41. MO. REV. STAT. § 452.370.1.
42. Id.
43. See, e.g., McMickle v. McMickle, 862 S.W.2d 477, 481-82 (Mo. App. W.D. 1993) (finding that incorrect calculation of change in income was irrelevant, as emancipation of child and reduction in expenses due to emancipation was sufficient).
44. See, e.g., Runez v. Runez, 68 S.W.3d 608, 611 (Mo. App. S.D. 2002) (holding the wife’s out-of-state move and resulting increase in cost of living combined with the husband’s increase in income was sufficient to establish substantial and continuing change).
45. See, e.g., Margolin v. Margolin, 796 S.W.2d 38, 43-44 (Mo. App. W.D. 1990) (finding the decision of the grandparents to discontinue tuition payment for grandchildren’s private school constituted a sufficient change of circumstances).
46. MO. REV. STAT. § 452.370.2 ("When the party seeking modification has met the burden of proof set forth in subsection 1 of this section, the child support shall be
In essence, Missouri law requires a two-step procedure for calculating child support. First, the court must use Form 14 to find the correct child support amount. Second, if after considering all of the relevant factors the court later decides the child support amount is unjust and inappropriate, then it must make findings in the record to rebut the amount. A Form 14 is always mandatory, even when the court decides not to allow the modification. Therefore, all cases prior to Crow in which the court failed to follow the procedure were reversed and remanded for the trial court to follow this mandatory two-step procedure.

B. Preservation of Error on Appeal

Rule 78.07 sets forth the requirements for preserving issues for appellate review. Prior to 2005, Rule 78.07 only required the filing of a post-trial motion in jury cases. If a party failed to file a motion for a new trial then any allegations of error were waived. However, the Supreme Court of Missouri amended the rule, effective January 2005, to allow parties to litigate some issues in a bench case, even if they were not preserved for a new trial.

Amended Rule 78.07(c) requires that “in all cases, allegations of error relating to the form or language of the judgment” be raised in a post-trial motion. The Missouri Court of Appeals, Western District, explained that the purpose of the amendment is “to reduce and discourage appeals and subsequent technical reversals for errors in the form of judgments that could easily be corrected by bringing them to the attention of the trial judge.” The court noted that very few second appeals are filed after the findings are made determined in conformity with criteria set forth in section 452.340 and applicable supreme court rules.”; see supra text accompanying notes 34-40.

48. Id.
49. Id.
51. Id. at 565 (citing Neal v. Neal, 941 S.W.2d 501, 504 (Mo. 1997); Reis v. Reis, 105 S.W.3d 514, 516 (Mo. App. E.D. 2003); Alred v. Alred, 291 S.W.3d 328, 336 (Mo. App. S.D. 2009); Luckeroth v. Weng, 53 S.W.3d 603, 607 (Mo. App. W.D. 2001)).
52. MO. SUP. CT. R. 78.07.
54. See id. There are exceptions for allegations relating to lack of subject matter jurisdiction, insufficiency of pleadings, and motions for directed verdict granted at trial which are not relevant to the action in Crow. MO. SUP. CT. R. 78.07.
55. Wilson-Trice, 191 S.W.3d at 72.
56. MO. SUP. CT. R. 78.07(c).
57. Wilson-Trice, 191 S.W.3d at 72.
on remand, even though the substance of the order often changes little.\textsuperscript{58} Therefore, the Western District claimed that allowing parties to appeal errors in the form and language of the judgment directly to the appellate court was “a substantial waste of judicial time and even more importantly a waste of emotional and financial resources of the parties.”\textsuperscript{59}

Since the amendment, courts have applied the rule to a trial court’s failure to make various types of findings: findings regarding one’s ability to pay a contempt judgment,\textsuperscript{60} the denial of a request for reimbursement of necessities,\textsuperscript{61} and the best interests of children in a custody determination.\textsuperscript{62} Therefore, any allegations of error regarding a failure to make statutorily required findings in a bench case are waived unless raised in a post-trial motion to amend the judgment.\textsuperscript{63}

If a party fails to file a post-trial motion, it still can request plain-error review.\textsuperscript{64} Under plain-error review, an appellate court may consider an error if that error affects a party’s substantial rights and “manifest injustice or a miscarriage of justice has resulted” from the error.\textsuperscript{65} This review is reserved for errors that are “evident, obvious, and clear,”\textsuperscript{66} and the Supreme Court of Missouri has cautioned that it “should be used sparingly.”

\section*{IV. Instant Decision}

The Missouri Court of Appeals, Eastern District, began its discussion in \textit{Crow} by analyzing whether the trial court made the statutorily required findings.\textsuperscript{68} The Eastern District then noted the multiple failings of the trial court judgment: the judgment “[d[id not disclose that the trial court used or referenced Form 14 in calculating Father’s child support obligation,” “the trial

\begin{footnotesize}
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\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} See, e.g., Stuart v. Ford, 292 S.W.3d 508, 514, 517 (Mo. App. S.D. 2009).
\item \textsuperscript{61} See, e.g., G.J.R.B. ex rel. R.J.K. v. J.K.B., 269 S.W.3d. 546, 555 n.3 (Mo. App. S.D. 2008).
\item \textsuperscript{62} Wood v. Wood, 262 S.W.3d 267, 276 (Mo. App. S.D. 2008).
\item \textsuperscript{63} Crow v. Crow, 300 S.W.3d 561, 565 (Mo. App. E.D. 2009) (citing Stuart, 292 S.W.3d at 517). However, the court did note that the contents of the post-trial motion, rather than its title, determine whether the error is sufficiently preserved. \textit{Id.} at 565 n.4. Therefore, so long as the error is sufficiently pled, it may be contained in a motion to clarify, motion to reconsider, motion for nunc pro tunc order, and/or a motion for a new trial. \textit{Id.} (citing Gipson v. Fox, 248 S.W.3d 641, 644 (Mo. App. E.D. 2008)).
\item \textsuperscript{64} Mo. Sup. Ct. R. 84.13(c).
\item \textsuperscript{65} Id.
\item \textsuperscript{67} State v. Valentine, 646 S.W.2d 729, 731 (Mo. 1983) (citing State v. Davis, 566 S.W.2d 437, 447 (Mo. 1978) (en banc)).
\item \textsuperscript{68} Crow, 300 S.W.3d at 564.
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\end{footnotesize}
court did not attach any Form 14 to the judgment,” and the trial “court did not provide any findings as to how it arrived at the amount of Father’s child support obligation.” The appellate court determined that instead the trial court merely made a conclusory statement that Father’s child support obligation would remain the same. Therefore, the court held that because the trial judge failed to use a Form 14 or provide findings as to why he deviated from the submitted Form 14, he failed to set out the findings required by Missouri law in his opinion.

After laying out the errors in the trial court judgment, the appellate court went on to examine whether Father had preserved such errors for review. The appellate court raised this issue on its own motion. The court noted that failure to utilize a Form 14 made it impossible to determine the correct amount of support or to decide whether the set amount was inappropriate or unsupported by evidence. The court then noted that modified Rule 78.07(c) requires a filing of a motion to amend the judgment in cases where the judge failed to make statutorily required findings.

After determining that allegations of failure to make statutory findings must be contained in a post-trial motion, the court considered whether the findings required by Rule 88.01 fall under Rule 78.07(c). First, the appellate court noted that Rule 88.01 mandates that the “trial court determine and find for the record the presumed correct child support amount pursuant to Form 14.” According to the appellate court, Rule 88.01 was adopted to comply with the legislative mandate in section 452.340 of the Missouri Revised Statutes, which requires that the Supreme Court of Missouri establish child support guidelines. Therefore, because Rule 88.01 was passed according to legislative mandate, the court held that the findings therein are statutorily required findings that fall under Rule 78.07(c).

Finally, the court considered the form of Father’s appeal. Because the findings required in Rule 88.01 fall under Rule 78.07(c), allegations of error...
relating to those findings are waived unless raised in a post-trial motion.\textsuperscript{81} Father argued on appeal that the trial court’s judgment was erroneous because it lacked support and was against the weight of the evidence.\textsuperscript{82} Without the statutory findings, the appellate court found it was impossible to determine the weight of the evidence; therefore, an allegation of failure to make the required findings was required for the appellate court to determine the merits of Father’s appeal.\textsuperscript{83} The court ultimately determined that because Father failed to file a post-trial motion, any allegation of failure to make required findings was waived; consequently, the appellate court dismissed his appeal.\textsuperscript{84}

V. COMMENT

A. Judicial Efficiency

The goal of judicial efficiency should drive procedural changes to the court system, as it has previously led to modifications to the rules of summary judgment,\textsuperscript{85} interlocutory injunctions,\textsuperscript{86} and judgment liens.\textsuperscript{87} However, the push to efficiency can have unpredictable, and at times paradoxical, results. The response of the American court system to asbestos litigation in the 1980s and 1990s is a perfect example of the inefficient results that can occur from changes made to increase judicial efficiency.\textsuperscript{88}

Beginning in the 1980s, courts were faced with dockets full of asbestos cases without the ability, at least in federal court, to create mass settlements.\textsuperscript{89} Judges, therefore, began dealing with individual cases as fast as possible.\textsuperscript{90} The ultimate goal of this rush to resolution was to finish all asbestos-related

\begin{itemize}
\item \textsuperscript{81} Id. at 566.
\item \textsuperscript{82} Id. at 566-67.
\item \textsuperscript{83} Id. at 567.
\item \textsuperscript{84} Id.
\item \textsuperscript{86} See Robert J.C. Deane, \textit{Varying the Plaintiff’s Burden: An Efficient Approach to Interlocutory Injunctions to Preserve Future Money Judgements}, 49 U. Toronto L.J. 1, 21 (1999).
\item \textsuperscript{89} Id. (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)).
\item \textsuperscript{90} Id. at 248-49.
\end{itemize}
litigation, thereby clearing the docket for other matters.\textsuperscript{91} However, rather than reducing the number of cases on the docket, the numbers increased, more than doubling from 1993 to 1999.\textsuperscript{92} Plaintiffs’ lawyers saw that courts dealing with asbestos matters were far more interested in the quantity of cases dealt with than with the quality of the resolution and believed that they could win with even the weakest of cases.\textsuperscript{93} The push to efficiency ended up swamping the courts with the exact problem they sought to avoid.

While the dangers raised by amended Rule 78.07(c) do not rise to the national epidemic of asbestos litigation, they do present possibilities for similarly paradoxical inefficiencies. Even though the court in \textit{Crow} focused on the efficiency gains of the appellate court,\textsuperscript{94} the entire Missouri judicial system must be examined to truly analyze the effect.\textsuperscript{95}

First and foremost, it is obvious that attorneys and trial courts will not have less work. The change in Rule 78.07(c) guarantees that attorneys will be filing more motions to amend the judgment.\textsuperscript{96} Hopefully many of these motions will be valid for fixing technical errors in the judgment, but attorneys likely will file a great number automatically, though perhaps overzealously, to preserve all possible issues for appeal. The danger of removing an issue from appellate review almost certainly will guarantee that lawyers will err on the side of filing too many motions, rather than too few.

For the appellate level, the court in \textit{Crow} relied on the “observation” that few second appeals are filed after findings are entered on remand.\textsuperscript{97} Implicitly, the court relied on the presumed motion to amend the judgment to force the trial judge to enter findings that would end the litigation,\textsuperscript{98} but this assumption is wrong on two levels. First, the court assumed that a motion to amend would sufficiently induce the trial judge to enter the statutorily required findings, but why should it? At this point, the trial court has flouted the legislative mandate to include findings, even in the face of an almost guaranteed rebuke by the appellate court. In fact, the very problem seems to be that appellate court reversal is not a sufficient motivator to ensure trial court adherence to state law, therefore necessitating an amendment to the rule. Why would parties wield greater influence over the trial courts than the appellate courts? Unlike an appellate court that continually reviews trial

\textsuperscript{91} \textit{Id.} at 249.
\textsuperscript{92} \textit{Id.} at 248.
\textsuperscript{93} \textit{Id.} at 249-50.
\textsuperscript{94} \textit{Crow} v. \textit{Crow}, 300 S.W.3d 561, 566 (Mo. App. E.D. 2009) (“The amendment was intended to reduce and discourage appeals and subsequent technical reversals . . . . ” (quoting \textit{Wilson-Trice} v. \textit{Trice}, 191 S.W.3d 70, 72 (Mo. App. W.D. 2006)).
\textsuperscript{95} \textit{See} \textit{Woodward}, \textit{supra} note 87, at 3 (“[O]nce’s normative judgments – even when ‘efficiency’ is the standard for judging – can depend on the level of generality within which one looks at legal change.”).
\textsuperscript{96} \textit{See} Mo. Sup. Ct. R. 78.07(c); \textit{see also supra} text accompanying notes 53-55.
\textsuperscript{97} \textit{Crow}, 300 S.W.3d at 566.
\textsuperscript{98} \textit{See id.} at 566-67.
courts, parties are usually one-time players who, once litigation is completed, will never interact with that judge again.\footnote{99}

The second mistaken assumption that the court relied on in \textit{Crow} is that the motion to amend the judgment will end the litigation. If the motion is denied, then an appeal likely will follow. Yet even if the motion is granted, an appeal is not precluded. Even in \textit{Crow}, Father did not complain of a failure to include statutorily required findings.\footnote{100} Rather, he argued that the decision of the trial court “was not supported by the evidence and was against the weight of the evidence.”\footnote{101} Therefore, the motion required by Rule 78.07(c) would form just one more procedural hurdle that attorneys and trial courts must jump through on the way to an appeal.

The court tossed out a final consideration, perhaps without realizing its true import: “Observation has shown that there have been very few second appeals after the findings are made on remand.”\footnote{102} While the court implied that its role in monitoring trial court adherence is mechanical,\footnote{103} it neglected to recognize the efficacy of the previous procedure. Previously, parties faced with a judge who did not follow statutory mandates were assured of an appellate court hearing and the possibility of a remand that would force the judge to enter the required findings.\footnote{104} Although the appellate court may have had concerns about the system, it nevertheless provided a certain and fair safety net for disadvantaged parties. Therefore, when considering whether the supposed change in efficiency is worthwhile, the analysis must work from a basis of abandoning a working procedure.

Taken together, it is difficult to argue that amended Rule 78.07(c) will increase efficiency. At the trial level, judges and attorneys are sure to see increased workloads created by the new procedural requirement. At the appellate level, the question is at the very least unclear, without an obvious increase to judicial efficiency. Unfortunately, the effect of the modified rule impacts not only the efficiency levels of the court, but it may also inflict injustice on parties.

\footnote{99. For a potential solution to this problem, see \textit{infra} Part V.C.}
\footnote{100. \textit{Crow}, 300 S.W.3d at 563.}
\footnote{101. \textit{Id.}}
\footnote{103. \textit{See id.} at 566-67.}
\footnote{104. \textit{See id.} at 565 (“Prior to this change no post-trial motion was required to preserve an issue for appeal in a court-tried case.” (quoting \textit{Wilson-Trice}, 191 S.W.3d at 72)).}
B. Fairness

The most obvious victims of the unfairness of the amended rule are those in the cases where the rule is applied to a new set of statutory factors for the first time, of which Crow is the most recent. For instance, the trial judge in Crow failed to make findings required by law, and the parties lacked the ability to question the judgment because of the novel application of Rule 78.07(c). It is particularly troubling that in each of these cases, Rule 78.07(c) was applied to a new body of statutorily required factors. Even the most diligent attorney researching in these areas of law would not have stumbled across the small, though crucial, change in Rule 78.07(c). Therefore, in order to create a procedure to ensure both fairness and efficiency, the court should choose a method that will not trap careful but unfortunate individuals.

While one might argue that the parties were only denied the right to have the judge enter statutory factors, the Crow decision demonstrates that more can be lost. In Crow, Father did not object to the court’s failure to enter the mandated factors; rather, his claim was that the continuation of his child support obligation at the previous level was against the weight of the evidence. On its own motion, the appellate court addressed the failure of the trial court to follow the statutory factors. The appellate court then dismissed Father's claim because he failed to file a motion on an issue that he was not appealing. Therefore, the effects of a failure to file a 78.07(c) motion to amend the judgment can reach far beyond mere questions of statutory factors.

All of these cases involve individuals singularly prejudiced by the change in Rule 78.07(c), and Crow will not be the last case with this outcome. There are still areas where statutory factors are required, and no case


106. Crow, 300 S.W.3d at 566; Stuart, 292 S.W.3d at 517; Wood, 262 S.W.3d at 276; G.J.R.B., 269 S.W.3d at 555.

107. Crow applied Rule 78.07 to the factors for child support listed in Rule 88.01. Crow, 300 S.W.3d at 565. Stuart was found unable to pay child support. Stuart, 292 S.W.3d at 517. Wood challenged a child custody arrangement subject to Missouri Revised Statutes section 452.375.6. Wood, 262 S.W.3d at 276. G.J.R.B. was denied reimbursement for necessaries in a paternity hearing. G.J.R.B., 269 S.W.3d at 555.

108. Crow, 300 S.W.3d at 563.

109. Id. at 564 (“[W]e must first determine, sua sponte, whether Father’s allegations of error are preserved for appellate review.”).

110. Id. at 567.
like *Crow* has yet occurred. 111 Indeed, the legislature will continue to make new statutes that require consideration of enumerated factors, virtually guaranteeing repeat performances of *Crow*.

Alongside these specific instances of unfairness, greater structural unfairness is created by the amended rule. Even if one assumes that the rule would create some minor efficiency for the court, the effect on parties is to reallocate the burden of errors to those least able to handle them—the parties. Allocation of risk originates in business and contract law, 112 but it also affects a wider audience. 113 In essence, when parties contract because one party is particularly concerned about a certain result or is in a better position to prevent a negative outcome, the contract may put the risk of the result or outcome on that party. In the absence of a contract, the law can create a default to determine which party should carry the burden. For example, in building a house, the homeowner may have a particular desire to see the home completed by a certain date, and he may structure the contract to provide a bonus for timely completion. This contract thereby allocates the risk of failure to the builder; if the builder fails to complete the project on time, he loses the additional money. Alternatively, the builder is responsible for choosing the materials, and if he chooses shoddy materials, he likely will be responsible even if the contract is silent on that issue because he has the ability to avoid the harm.

Applying this theory to the modified rule, it shifts the risk of error in the judgment onto the parties. Previously, if the judge failed to include statutorily required findings, the party could appeal directly to the appellate court. 114

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111. For example, statutes require a court to provide for spousal maintenance when certain factors are present. Mo. Rev. Stat. § 452.335.2 (2000).
114. The other provisions of rule 78.07 only require specific motions to preserve error in jury-tried cases. See Mo. Sup. Ct. R. 78.07.
Effectively, the appellate court was responsible for fixing the error of the trial court. Now the new modification requires parties to fix trial court errors, and parties have a number of disadvantages that prevent them from appropriately bearing this risk.

First, parties usually are not repeat players, particularly in the area of family law where a number of statutes require courts to make specific findings. A one-time participant would have almost no effect on the actions of a judge and in fact may not even be aware that the judge repeatedly ignores the statutory requirements. A judge who repeatedly fails to include statutory factors need hardly fear seeing the same party again, so even a few isolated motions to amend would not compel the judge to change. Furthermore, the judge now has greater isolation from appellate review because of the intermediary step of the motion to amend the judgment. Therefore, a single judge could repeatedly fail to include mandated factors, likely ignoring them altogether in his or her judgment, and face no repercussion, leaving the parties to deal with an unfair result.

Second, parties are unable to protect themselves from the harm before it occurs and have little incentive or ability to attempt to correct a judge’s action once the litigation concludes. Before a trial begins, a party can only protect itself from a judge with a bad reputation by filing a request for a change in judge. After the trial and appellate process, the parties likely want to move on, even if they are unhappy with the final judgment. Appellate courts, on the other hand, are intimately connected to the trial courts and have a number of tools to rectify judicial behavior. The most obvious tool is reversal, but appellate courts also can recognize patterns in judicial decisions and attempt to rectify them; indeed, this appears to be the entire impetus for amending Rule 78.07. Therefore, because Rule 78.07(c) removes the appellate court’s direct oversight over the trial court, it places an unfair burden on the parties.

Finally, one must consider the purpose of legislatively mandated factors in state statutes. Presumably, the legislature included these factors in order to highlight to judges the most important aspects of a fair and just decision. Otherwise the court has no reason to spend time mandating factors for deter-

115. See id. at R. 78.07(c).
116. See, e.g., Mo. Rev. Stat. § 452.340.1 (2000) (mandating the factors the court must consider in determining the amount of child support); id. § 452.335.2 (mandating the factors the court must consider in determining amount of spousal maintenance); id. § 452.375.2 (mandating the factors the court must consider in determining custody of children).
117. See Mo. Sup. Ct. R. 78.07(c).
118. See Mo. Sup. Ct. R. 51.05 (outlining the procedure for applying for a change of judge).
119. See Wilson-Trice v. Trice, 191 S.W.3d 70, 72 (Mo. App. W.D. 2006) (“Observation has shown that there have been very few second appeals after the findings are made on remand despite what experience tells us are probably few changes on the merits in the new order.”).
mining child custody,\textsuperscript{120} child support,\textsuperscript{121} disposition of property at marriage dissolution,\textsuperscript{122} and other issues involved in family legal matters.\textsuperscript{123} However, the Crow court implied that the mandated factors are merely words that must be given lip service for an order to be sufficient: “Observation has shown that there have been very few second appeals after the findings are made on remand despite what experience tells us are probably few changes on the merits in the new order.”\textsuperscript{124} Therefore, a judge who makes an order without consulting any of the statutory mandates can protect the order merely by tacking on some empty words at the end. This obviously is not the legislature’s intent, and its effects inure to the detriment of the parties.

\textbf{C. The Next Steps}

Seeing that the amendment to Rule 78.07(c) provides little, if any, increase in efficiency and that even a modest increase in efficiency might be outweighed by the potential unfairness created by the rule, the next step is to research the effects of the amended rule. Because the impact of the rule is more apparent now that the rule is in effect but the court was unhappy with the old procedure, it is best to keep the rule in place and attempt to find a solution that works better than both the old procedure and the amended rule. However, in order to understand the systemic effects of the amendment, more needs to be done than just citing the “experience” of the court.\textsuperscript{125} The Supreme Court of Missouri needs to create a framework for analyzing the effects of 78.07(c)\textsuperscript{126} and for determining the best way to efficiently and fairly respond to judges who fail to follow statutory factors.

Since Missouri faces large budget deficits,\textsuperscript{127} creating a framework for analyzing the impact of amended 78.07(c) would be particularly beneficial. First, research would likely be relatively inexpensive. The state already has a division of the Office of State Courts Administrator focused on providing research and statistical analysis.\textsuperscript{128} Because courts already send the Office of State Courts Administrator statistical information, it would only require a

\begin{itemize}
  \item \textsuperscript{120} MO. REV. STAT. § 452.375.2.
  \item \textsuperscript{121} Id. § 452.340.1.
  \item \textsuperscript{122} Id. § 452.330.1.
  \item \textsuperscript{123} See, \textit{e.g.}, id. § 452.335.2 (spousal maintenance).
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} For an example of a framework of analysis dealing with motions for summary judgment, see Rave, supra note 85, at 887-98.
  \item \textsuperscript{128} See \textit{Your Missouri Courts}, Office of State Courts Administrator, http://www.courts.mo.gov/page.jsp?id=233 (last visited Dec. 21, 2010).
\end{itemize}
small expenditure of effort by trial courts to report the information relevant to 78.07(c). Second, while an efficient procedure would likely pay for itself in the long term, the upfront costs may be prohibitive due to current budget constraints. Therefore, researching the effects of 78.07(c) and structuring a framework for analysis would be a prudent first step.

Such a framework could begin by examining the number and cost of the motions to amend the judgment and the ratio of granted motions to denied motions. While the importance of learning the cost of 78.07(c) is self-explanatory, the ratio of granted to denied motions would indicate whether attorneys were filing unnecessary motions. Through this information, a picture of the effect on trial courts would emerge. Next, the framework would consider the number of cases appealed where either a 78.07(c) motion is filed, regardless of whether it is granted or denied, or where a 78.07(c) motion is not filed but should have been. From this information, the appellate court costs of the rule would become apparent for both individuals who follow the rule and those who do not. In the end, a framework of this nature would show the full costs of the amended rule and, if the result is unsatisfactory, provide strong inducement to enact other methods of dealing with judges who do not follow statutory mandates.

Differentiated case-management structure (DCMS) offers one potential solution. In a DCMS, cases are categorized, divided, and scheduled separately based on the issues in the case. In this manner, all cases requiring consideration of statutory factors could be segregated from the mass of other cases. Courts could then either create a special docket for those cases or specific judges could specialize in those cases. This separation would reduce or eliminate cases where the judge fails to include statutory factors either because the judge accidentally forgets to include the factors or the judge is unaware that such factors are required. Faced with a docket composed only of cases requiring statutory factors, judges would be sure to address the required factors in each and every case. A DCMS would acknowledge the inherent differences between cases involving statutory factors and more general tort or contract cases. It would also provide an efficient structural change encouraging fidelity to the legislatively mandated factors.

In order to create a solution to judicial inefficiency that goes beyond cases only involving statutory factors, Missouri could create standards-based

129. See id.
130. Cases where a 78.07(c) motion are not filed but should have been will not be as hard to determine because the appellate court would just note the issue was not preserved and dismiss the case, providing an easily countable number of cases.
132. Id. at 941.
133. Id.
evaluations and gather feedback from judges. In creating guidelines for judicial evaluation, the American Bar Association stated that oversight by appellate judges is not sufficient to optimize judicial performance. Judges need constructive commentary divorced from personal feelings or professional oversight. A number of states created statewide performance measurement programs to analyze the efficiency of the judicial system. New Jersey, for example, sends an anonymous survey every nine months both to every attorney who appeared before a judge and also to every appellate judge who heard an appeal. In this way, judges are evaluated not only for the efficiency and demeanor with which they handle cases, but also for the accuracy of their decisions. Accountability for judicial behavior will both create greater confidence in the judicial system and give an incentive for judges to excel. If a problem area arises, then the judge can be targeted for increased education or provided with a mentor judge for guidance.

VI. CONCLUSION

Efficiency is an important goal for the judicial system. However, efficiency is often achieved by sacrificing fairness. Therefore, before the court makes changes to encourage efficiency, certain questions should be raised concerning the process and the proposed amendments. First and foremost, is there sufficient research to know that the change is needed? Without dedicating a reasonable amount of time and resources to studying the supposed problem and the proposed solution, any change risks sacrificing fairness for a specter of efficiency that may never materialize. Second, will the proposed change create efficiencies for the entire judicial system? This requires considering not only the parts of the judicial system directly affected by the changes, but also looking for unintended consequences that may create inefficiencies larger than those the changes proposed to fix. Third, assuming increases in efficiency occur, are the attendant decreases in fairness worth the sacrifice? The meager savings of a proposed change may not outweigh the injustice to individuals using the judicial system.

The amendment to Rule 78.07(c) and its resultant unfairness in Crow demonstrate the hallmarks of a change made without sufficient consideration. The court was unable to point to a well-researched analysis created by a research committee that justified the changes made to Rule 78.07(c). Instead, it

134. Id. at 939.
136. See id. at Guideline 5-1 & Commentary.
138. Douthat, supra note 131, at 945.
139. See id. at 945-46.
was only able to rely on one court’s accumulation of anecdotes of inefficiency – anecdotes that focused only on the appellate court without considering the possible consequences for parties and the lower courts. Finally, the changes modify who is responsible for bearing the burden of trial court mistakes, breeding unfairness far beyond the efficiencies that the amended rule was intended to create. Beyond these specific cases, the modified burden risks creating unseen harms that work to the parties’ detriment. As a result, the Supreme Court of Missouri needs to return to Rule 78.07(c) and analyze the purpose of the rule modification. It is possible to accomplish efficiency in this area, but it will take more than merely modifying a rule and crossing one’s fingers.