IN THE MISSOURI SUPREME COURT

ANDREA R. DIETRICH

Appellant,

v.

STEVEN L. TOMEY

Respondent.

APPEAL NO. SC85879

APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 37
Honorable John R. Essner

SUBSTITUTE REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Standard of Review

In Appellant's Substitute Brief she stated that where the law has been erroneously applied or the evidence is uncontroverted, no deference is due the trial court's judgment. Bremen Bank and Trust Company of St. Louis v. Muskopf, 817 S.W.2d 602, 604 (Mo. App. E.D. 1991), *citing* Southgate Bank and Trust Co. v. May, 696 S.W.2d 515, 519 (Mo.App.W.D. 1985).

Respondent's Substitute Brief challenges the application of Bremen to this case, but only because he claims there was sufficient evidence to support the judgment. Should this Court find the evidence to be uncontroverted Bremen should apply.

II. Respondent's Statement of Facts fails to comply with M.R.C.P. 84.04(c) in that it is argumentative, conclusory, inflammatory, misleading, includes misquoted information and omits essential facts.

M.R.C.P. 84.04(c) provides in pertinent part: "The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented without argument."

Respondent's Statement of Facts is argumentative, conclusory, omits essential facts, parses quoted testimony in his favor, ignores relevant evidence and makes statements which are not supported by the record. He misquotes and misstates the trial court's judgment and attempts to mislead this Court. Rather than filing a motion to strike Respondent's brief Appellant urges this Court to read the record especially with respect to testimony in the transcript from the motion to set aside. The following issues are not

exhaustive; however, they show a pattern of Respondent's attempt to use his Statement of Facts to mislead this Court.

Respondent makes several incorrect assertions as to the evidence in the case. These as well as the other erroneous statements regarding the evidence are discussed further in Point III below:

1. Respondent first states the he received Notice on April 17, 2001. Respondent did in fact receive a copy of the Notice on April 17, 2001; however, Respondent conveniently omits the fact that he first received the Notice at the end of March, 2001.
2. Respondent states that the only certified letter he received from the Appellant was on April 19, 2001; however, the record is replete with uncontroverted evidence which proves that the Notice was sent on March 27, 2001, via certified mail, return-receipt requested and that it was received by Respondent in the Month of March.
3. Respondent incorrectly states: "The only evidence relative to the date upon which the letter was received by father was the letter for which Father signed on April 19, 2001."

Respondent's Statement of Facts states that the Notice was incorrectly addressed. The Notice was properly addressed to Lindbergh High School, Respondent's place of employment and Respondent did in fact receive the Notice at his place of employment. The address has since been confirmed as being correct and there is no mention of an incorrect address anywhere on the record or off the record.

Respondent implies that the trial court found that the proposed relocation would be **contrary** to the Minor Child's best interest, whereas the trial court ruled that Appellant failed to meet her burden that the relocation was in the Minor Child's best interest and that the evidence indicated the proposed relocation was "not necessary" for the child's best interest.

III. Respondent erroneously states that he filed his objections to Petitioner's proposed relocation within the thirty-day deadline as required by Section §452.377 R.S.Mo. (2000) (hereinafter the "Relocation Statute").

Respondent's brief consistently contradicts itself as to the facts; however, the trial court record is clear that Respondent received the Notice at the end of March 2001. Respondent's factual contradictions are many: some areas of his brief he claims the only notice he received was on April 19, 2001. In other portions of his brief, he claims he received the Notice sent on March 27, 2001; however, he claims it should be ignored because he could not remember the specific date when received it. He also argues that he did receive the Notice sent on March 27, 2001; however, he claims it was defective because he did not personally sign the return receipt. Respondent's brief may be confusing, but the trial court record is not.

Both parties in this matter agree that §452.377 R.S.Mo. (2000) (hereinafter the "Relocation Statute") provides that a nonrelocating party must file his or her verified objections within thirty (30) days after **receiving** notice of the relocation.

Webster's Third New International Dictionary defines "receive" as "to take possession or delivery of"[1]. In the case before this Court, the evidence clearly shows that Respondent received the Notice prior to the end of March 2001, and that he failed file timely objections to the proposed relocation.

In reviewing the record there is no evidence whatsoever to dispute the fact that Respondent received notice at the end of March 2001. In his testimony, Respondent admitted to having received and taken possession of the Notice at the end of March. The only contradictions to such evidence are unsupported allegations first asserted in Respondent's appellate brief and quotes from testimony taken out of context and parsed in an attempt to mislead this Court.

In his brief Respondent made statements which imply that he did not receive the Notice sent on March 27, 2001; however, the record shows that he never contested receiving the letter sent March 27, 2001.

A. Respondent's verified objections supports the fact that Respondent received Notice prior to the end of March 2001.

Respondent's Verified Objections, filed May 3, 2001, state the following:

> On March 23, 2001, Respondent received notification from Petitioner that Petitioner is requesting to relocate the residence of the minor child from St. Louis to Henderson, Nevada.

[1] Webster's definition of the word "receive" is more extensive; however, the remainder of the definition relate to other uses of the word not applicable to this case.

[LF 7, ¶3]

Respondent's objections are verified and are an admission that he received the Notice in March of 2001.

B. Petitioner's testimony supports the fact that Respondent received Notice prior to the end of March 2001.

In both the trial on January 30, 2002, and at the hearing on March 19, 2003, on her motion to set aside the trial court's judgment Appellant testified under oath that she mailed the Notice via certified mail, return-receipt requested on March 27, 2001. She also testified that she received the date-stamped return-receipt indicating that the Notice was in fact delivered to Respondent's place of employment on March 29, 2001.

Q. I'm going to hand you what's been marked as Petitioner's Exhibit No. 4.

[Ms. Hais interrupted questioning to ask that a witness leave the court. The court agreed]

Q. Are those the certified letter, the receipts?

A. They are the receipts.

Q. Okay, when was the first one?

A. The first one looks like it was mailed on March 27th –well, it was received – no, mailed March 27th, received March 29th.

Q. Are you able to identify who signed on that document?

A. No, not really.

Q. When was the second one sent?

A. April 16th was sent, received April 19th.

Direct Examination of Petitioner by Attorney Keefe [Tr.1[2] p. 244, ln. 21]

Exhibit 4, a copy of the certified mail receipts and the date-stamped return-receipts for both mailings was entered into evidence at the trial on January 30, 2002, and refiled with the trial court's permission via a filing memorandum just after the hearing on Appellant's Motion to Set Aside. A copy of Exhibit 4 is included in the Appendix to Appellant's Substitute Brief, p. A-8.

At the hearing on her Motion to Set Aside, Appellant also testified that she sent the Notice via certified mail, return-receipt requested:

> Q. So, I mean, this is no great surprise to you, you know that you sent one letter apparently on March 23rd, 2001 and you didn't send it certified, right?
>
> A. I sent it certified, yes, and I have receipts to show that, and the Court does reflect that.
>
> Q. Well, then, why would you then send Mr. Tomey another letter certified receipt?
>
> A. Because during that time we had verbal conversations and he never made mention that he received it, and I thought that unusual. So to be sure, I sent a second identical letter to his home as well.

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[2] Tr.1 refers to the transcript of the hearing on January 30, 2002, wherein the trial court heard testimony on Respondent's Verified Objections.

Cross-Examination of Petitioner by attorney Hais [Tr.2 p. 31, ln. 5][3]

Respondent improperly infers from the above statement that Appellant sent the copy of the notice because she thought the Notice sent March 27, 2001, was somehow defective. Respondent uses that incorrect inference throughout his brief as a premise for several of his arguments. What Appellant thought about her notice sent and received pursuant to the statute is irrelevant. Respondent has no legal basis for attacking the notice, so he bootstraps an argument about what Appellant may have thought speculating that she thought her own notice was defective. There is nothing in the Relocation Statute that says that a properly sent notice is vitiated or superseded if a copy is thereafter sent to a secondary address at a later time. The statue is clearly written, and allowing a factual determination as to the mindset of the sender is clearly not contemplated by the legislature. Further, at no time did Appellant ever think that the Notice was defective in any respect, nor does her testimony imply such. The Notice was not in fact defective. Appellant followed the letter of the Relocation Statute in drafting and delivering the Notice on March 27, 2001.

C. Respondent's own testimony clearly supports the fact that Respondent received Notice prior to the end of March 2001.

Respondent's substitute brief includes parsed excerpts from Respondent's testimony at the hearing on Appellant's motion to set aside on March 19, 2003. We

[3] Tr.2 refers to the transcript of the hearing on March 19, 2003, wherein the trial court heard testimony on Appellant's motion to set aside.

invite the Court to read his complete testimony as it pertains to receipt of the Notice. Nowhere in any of Respondent's pleadings, testimony or documentary evidence does Respondent ever deny receiving the Notice at his place of employment prior to the end of March 2001.

Respondent's own testimony clearly supports Appellant's assertion that Respondent did in fact receive and take possession of the Notice at the end of March 2001. There can be no better evidence than admissions of the recipient as to whether and when he received the Notice.

> Q. And Mr. Tomey, are you stating in this document that you received notice of request to relocate on March 23rd, 2001? I know it's sort of dark.
>
> A. Yes, I received a letter.
>
> Q. Okay. And that is the date that you received the letter, March 23rd, 2001, is that correct?
>
> A. Yes, I did receive a letter from my ex-wife, at my school actually.
>
> Q. Okay.
>
> THE COURT: On March 23rd, 2001, sir?
>
> A. The exact date – The letter was dated March 23rd, 2001. It was in my school mailbox. I took it out of my school mailbox with my other mail.

Direct Examination of Respondent by attorney Susi [Tr.2 p. 53, ln. 5].

Respondent testified to having received the Notice at the end of March, which corroborates the date stamp on the return receipt.

Q. And do you know when you actually received that particular letter?

A. It was in the end of March.

Cross-Examination of Respondent by attorney Hais [Tr.2 p. 58, ln. 3]

Throughout his brief, Respondent argues that he could not recall the exact date he retrieved the Notice from his mailbox at his place of employment; therefore concluding that he was not required to respond; however, he testified that he received the Notice at his place of employment, at the end of March.

THE WITNESS: I thought I just said I wasn't sure of the exact date, but I did receive a letter in my mailbox at school from my ex-wife, typed, not on – from an attorney. It was just a typed letter from my ex-wife in my mailbox at school, sir, I did receive that.

A. I did not respond to that letter.

Response to the trial court's question during Direct Examination of Respondent by attorney Susi [Tr.2 p. 56, ln. 14]

Respondent must have realized the date he received the Notice as he admitted on the record that he failed to respond to the Notice within thirty (30) days after receiving it:

THE COURT: Ms. Susi – So the question is simply, did you respond to the letter that you received on March 23rd, 2001, within 30 days?

MS. HAIS: I'm going to object. He didn't –

A. No. I didn't respond to that letter.

The trial court clarifying a question asked to Respondent on Direct Examination by attorney Susi [Tr.2 p. 55, ln. 21]

Respondent never denied receiving the Notice delivered to his place of employment prior to the end of March.

D. Documentary Evidence supports the fact that Respondent received Notice prior to the end of March 2001.

Documentary evidence supporting delivery of the Notice in March 2001, consists of a certified mail receipt, dated March 27, 2001, a return-receipt from Respondent's place of employment date-stamped by the United States Postal Service as delivered on March 29, 2001. See Appendix to Appellant's Substitute Brief p. A-8.

Respondent readily admitted receiving the Notice in March of 2001. Respondent's attorneys in the briefs written on his behalf do deny this; however, they also contradict themselves by admitting receipt in other arguments within the brief. Respondent did not challenge the authenticity of the certified mail receipt, the date-stamped return-receipt from his place of employment or Petitioner's testimony that she sent the Notice on March 27, 2001, via certified mail, return-receipt requested. The record is clear that Respondent did in fact receive the Notice prior to the end of March; therefore his objections, filed May 3, 2001, were not timely filed as required by the Relocation Statute.

IV. Respondent failed to cite any legal authority to rebut Appellant's well-supported argument that the personal signature of a recipient of notice under the Relocation Statute is not required, and that actual notice is sufficient to meet the notice provisions of the Relocation Statute.

In his brief, Respondent relies heavily on the fact that he did not personally sign

the return-receipt card for the Notice he received at the end of March 2001; however, he cites to no legal authority which would render delivery of the Notice defective for his failure to sign. Appellant cites to a plethora of well established Missouri law which holds that a letter sent by certified mail (and even by ordinary mail) creates a presumption of receipt, as well as legal authority which holds that actual notice is sufficient to meet the requirements of the Relocation Statute as well as other such statutory notice requirements. This evidence and supporting legal authority is discussed at length in Appellant's Substitute Brief, so it will not be repeated here.

The trial court stated in its March 26, 2003, judgment that "The statute does not provide for any presumption of receipt based on the day of mailing or accept regular mail notice or even actual notice as sufficient." [LF 94]. This is clearly a misapplication of the law, thoroughly discussed in Appellant's brief which went unaddressed in Respondent's brief.

In Weaver v. Kelling, 538 S.W.3d 610 (Mo.App.W.D. 2001), a case cited in Appellant's brief the court held that oral notice was acceptable to comply with the statutory notice provisions; however, Respondent distinguishes Weaver by first agreeing that the oral notice received by the father in Weaver was proper, then arguing that Weaver is distinguishable because Respondent in this case did not have actual notice, further stating that the Notice sent by Appellant on March 27, 2001, which he admitted receiving was defective. Respondent still does not identify how he believes the Notice was defective.

The only "defects" alleged by Respondent in his entire brief were that Respondent

failed to personally sign the return-receipt and that Respondent could not remember the exact date on which he received the Notice. Neither of which were caused by Appellant or rendered the Notice legally defective. Respondent has cited no legal authority in support of those claims.

In his brief, Respondent simply states that Baxley v. Jarred, 91 S.W.3d 192 (Mo.App.W.D. 2002) is distinguishable because the mother in Baxley only sent one letter (which was sent via standard mail) and that the Appellant in this case sent two letters. Yes, it is true that Appellant sent a copy of the Notice to Respondent on April 17, 2001, but it stands to reason that the Appellant in this case was certainly more in compliance with the Relocation Statute than the mother in Baxley, yet the Western District held that the Baxley mother's letter sent by regular mail was sufficient to put the father on notice. Later in his brief, Respondent states with regard to the notice that "he did not receive [the Notice] in the statutorily prescribed fashion." [Respondent's Substitute Brief p.35] The Relocation Statute includes provisions for delivery of the notice, not receipt. There are no "statutorily prescribed" rules for receipt set forth in the Relocation Statute.

Later in his brief Respondent again attempts to distinguish Baxley by stating that this case should be treated differently than the parties in Baxley because the child in Baxley was a year-old illegitimate child. It is well-settled law in that children born of unwed parents have the same rights and must be treated equally under the law. Weber v. Aetna Casualty & Surety, Co, 406 U.S. 164 (1972); therefore, that cannot be a distinguishing factor in this case.

In her brief Appellant cites to Wright v. Wright, WD 62155 (Mo.App. 2004)[4], and Herigon v. Herigon, 131 S.W.3d 562 (Mo.App.W.D. 2003), wherein the Western District refined part of its ruling in Baxley by holding that a defect in the manner of delivery is of no consequence where there is actual notice and the notice contains to the content set forth in the Relocation Statute. Respondent attempts to distinguish those two cases by extracting a quote out of context. The quote was extracted from an introductory statement by the court identifying the issue. The full quote reads as follows:

> Appellant's first point hinges on the propriety of the first "notice." If the June 13, 2001, oral notice was in accordance with section 452.377.2, then Appellant is correct: she had an absolute right to relocate without permission of the court or Respondent when Respondent did not file a timely motion objecting to the relocation within thirty days. **If the notice was not proper, then she cannot rely upon it to justify the relocation without permission from Respondent or the court.**

[Emphasis Added to indicate quote used in Respondent's Substitute Brief] Id.

The court in Wright reaffirmed the Baxley ruling that technical defects in the manner of delivery are of no consequence where the nonrelocating party has actual notice. The Wright court was presented with a notice that did not contain all of the information specifically required by the Relocation Statute. The Wright court properly held that where the information is not complete, the notice is not proper. The Wright

[4] Page numbers are not yet available.

case was cited in Appellant's brief to point out the discussion where the court contrasted technical defects in delivery which were held to be irrelevant versus noncompliance with the notice content provisions of the Relocation Statute which is not at issue in the present case.

In discussing Crawford v. Crawford, 986 S.W.2d 525 (Mo.App.W.D. 1999), Respondent once again parses a quote to mislead this Court of its meaning. The following quote appears in Crawford, however, it is the entire quote.

> **The spirit behind procedural rules such as Rule [sic] is to "ensure the orderly resolution of disputes and to attain just results. They are not ends in themselves. For this reason, we do not generally consider noncompliance with rules or statutory procedures to warrant reversal in the absence of prejudice."** Heintz v. Woodson, 758 S.W.2d 452, 454 (Mo.banc 1988). In the case at bar, Mary had actual notice of the counter-motion, even though the service date was incorrect. She timely filed a response, and having received actual notice, is not in a position to complain of prejudice for the failure to receive the strict statutory notice. Macon-Atlanta State Bank v. Gall, 666 S.W.2d 934, 940 (Mo.App. 1984). Without a showing of prejudice from the technical non-compliance of the certificate of service, nor the lack of reasonable notice on issues raised, the complaining party may not expect a reversal. Heintz v. Woodson, 758 S.W.2d at 453-54; Burton v. Everett, 845 S.W.2d 710, 713 (Mo.App. 1993); Rule 84.13(b).

[Emphasis added to show the portion used in Respondant's Substitute Brief] Crawford at 528.

Appellant also cited to Heslop in support of her assertion that the trial court did not have the authority to extend the statutory deadline. Respondent attempts to distinguish Heslop on two grounds: "1. In Heslop, the relocating parent sent only one certified notice of relocation. 2. In Heslop, the non-relocating parent actually received and signed for the letter that was sent to him." Respondent's Substitute Brief p.42. We agree that Appellant in this case mailed two letters; however, it does not have any bearing on the issue discussed in Heslop, *i.e*. whether the trial court had authority to extend the statutory deadline. We also agree that the nonrelocating party in Heslop signed the return receipt for the notice; however, the father filed untimely objections which was the issue in Heslop as it is in the present case.

Respondent continues by claiming that if this Court finds that the trial court was without subject-matter jurisdiction to hear Respondent's objections, it would violate his due process rights by reducing the statutory time period because Respondent cannot remember the date he received the Notice. This is not a viable argument since the return-receipt in this case was date stamped as delivered on March 29, 2001, and Respondent admitted under oath that he received that letter at the end of March. Even if he received it on the last day of March, his objections were still untimely filed.

On appeal, Respondent argues that his failure to personally sign the return-receipt renders the Notice defective, yet he provides no supporting law, and his argument if adopted would have grave consequences. If this Court were to require the personal

signature of nonrelocating parties on the return-receipt, nonrelocating parties could delay the relocation indefinitely simply by refusing to sign. Further, unless the restricted delivery box is checked on the certified letter form the USPS letter carrier may deliver the letter to any person at the address on the letter. By requiring the nonrelocating party's personal signature on the return-receipt we would be frustrating the purpose of the Relocation Statute and adding a provision to the Relocation Statute that does not currently exist. More delays than ever would result from such a ruling.

V. Respondent fails to respond to Appellant's arguments and supporting legal authority that a properly addressed and delivered letter raises a presumption of delivery.

In her brief Appellant argues that there is a longstanding principle in Missouri law which provides that a properly addressed letter, with adequate prepaid postage affixed and deposited in US mail raises the presumption of delivery. Respondent fails to address this issue; therefore, it can be assumed that Respondent agrees with this principle.

VI. Respondent argues without any supporting legal authority that the trial court had subject-matter jurisdiction even if Respondent's objections were untimely filed.

A. Respondent argues that the "best interest of the child" should override compliance with statutory deadlines.

Respondent essentially argues for a hearing of "best interest of the child" determination even where there are untimely filed objections. Requiring a hearing on the best interest of the child where there the notice has been delivered and received and

where objections have not been filed frustrates the purpose of the statute.

Respondent argues that the best interest of the child is "paramount" and should override his failure to follow the rules clearly defined in the Relocation Statute[5]. If Respondent was concerned that relocating to Nevada was contrary to the best interest of his child he would have contacted an attorney or at least called the Appellant after receiving the Notice at the end of March. Instead he ignored it.

In passing the Relocation Statute the Missouri General Assembly set forth a policy determination that lengthy litigation in relocation cases is not in any child's best interest. Our legislature therefore crafted reasonable notification provisions into the Relocation Statute which included a thirty-day period in which a nonrelocating parent has to file objections to a proposed relocation. This portion of the Relocation Statute is clear; hence, the trial court has no legal authority to ignore that provision.

Respondent cites Green v. Green, 26 S.W.3d. 325 (Mo.App.E.D. 2000), in support of his argument that there should not be strict adherence to the rules in relocation and custody cases. In Green, a court-ordered relocation case the trial court refused to allow the mother to relocate with the minor child. The father filed timely objections and the case was properly before the judge to make a determination based upon the best interest

[5] Although not relevant to the legal issues on appeal it should be noted that the Guardian ad Litem submitted a parenting plan that provided that the Appellant be allowed to relocate with the minor child. So strong was her recommendation that she filed a post-judgment motion asking the trial court to reconsider its decision to deny the relocation.

of the child and the factors set forth in the Relocation Statute. The Eastern District reversed the trial court and remanded with instructions to the trial court to allow the mother to relocate. The "rules" the Green court referred to were the factors set forth in the Relocation Statute to be used to determine the best interest of the child in cases of court-ordered relocation cases properly before the trial court, not the procedural rules which initially give rise to the trial court's jurisdiction. Green is not instructive in the present case as this Court is now presented with a non-court-ordered relocation due to lack of the trial court's subject-matter jurisdiction.

Respondent also cites to Abernathy v. Meier, 45 S.W.3d 917 (Mo.App.E.D. 2001) wherein the Eastern District held that in relocation cases the best interest of the child is "paramount." The Abernathy case was also a court-ordered relocation case wherein the father had timely filed his objections and the trial court had the requisite subject matter jurisdiction to make a determination based upon the best interests of the child. The quote cited by Respondent in his brief was also made in the context of evaluating the factors set forth in the Relocation Statute for court-ordered relocation cases. Again, the present case is distinguishable, in that we are presented with facts where the trial court did not have subject-matter jurisdiction to apply the factors to make such a determination.

B. Respondent argues he would be "unthinkably" prejudiced if this Court were to hold him to the language of the Relocation Statute.

Any resulting prejudice was solely caused by Respondent's own inaction. Further, Respondent cites no relevant legal authority which would indicate that resulting prejudice grants trial courts the authority to ignore statutory deadlines.

In Bosworth v. Sewell, 918 S.W.2d 773 (Mo.banc 1996) this court held that "A party who has received actual notice is not prejudiced by and cannot complain of the failure to receive statutory notice. Id. at 778, *citing* Larabee v. Washington, 793 S.W.2d 357, 361 (Mo.App. 1990); Macon-Atlanta State Bank v. Gall, 666 S.W.2d 934, 940 (Mo.App. 1984).

At the end of March, 2001, Respondent received a letter sent certified mail return receipt requested stating that his ex-wife intended to relocate with their Minor Son. The Notice was not an invitation for discussion rather the Notice clearly indicated Appellant's intention to relocate with the Minor Child. The content of the Notice complied with the Relocation Statute as it included specific information as to where they would be living, a proposed change in visitation schedule and when they would be moving. Prior to receiving the official looking letter, the parties had discussed Appellant's intention to relocate. Yet, after receiving the official notice Respondent simply ignored it. It can be reasonably assumed that any parent who has a serious objection to the relocation of his or her child would have taken the letter to an attorney or at the very least contacted his or her ex-spouse and inquired about it. In this case, Appellant complied with the letter of the law, Respondent simply did nothing.

C. Respondent argues that by receiving the copy of the Notice in April 2001, it was reasonable that the Respondent was confused and that confusion should excuse his untimely response.

Respondent cites no legal authority to support the argument that reasonable confusion is a defense to compliance with a statutory deadline, because there is no such

authority. In fact, a case cited by Respondent in support of his argument that one cannot use M.R.C.P. Rule 74.06 in lieu of a timely filed appeal (discussed below) actually supports the fact that confusion as to a statutory deadline does not provide a defense to one's failure to file within a statutory deadline. In Love v. Board of Police Commissioners, 943 S.W.2d 862 (Mo. App. E.D. 1997), the pro se defendant failed to file a timely notice of appeal because he was confused about the rule. He filed a Rule 74.06 motion to set aside the judgment, based upon "surprise" resulting from his confusion as to the deadline for appeal. In Love, the Eastern District held that ignorance of the law does not excuse his untimely filing of an appeal and a mistake or confusion about a statutory deadline, *i.e.* filing a notice of appeal is not a valid defense to an untimely filing.

The Relocation Statute provides that "A party required to give notice of a proposed relocation pursuant to subsection 2 of this section has a continuing duty to provide a change in or addition to the information required by this section as soon as such information becomes known." Section 452.377(3) R.S.Mo. (2000). The statute does not state that such additional communications resets the time limit in which the nonrelocating party must file objections, nor could it be implied from reading the statute. Appellant should not be penalized for her additional efforts to communicate with the Respondent regarding the relocation of their Minor Child.

D. Respondent argues that he does not remember the exact date that he received the Notice therefore resulting in an unascertainable time period in which to respond.

Respondent testified that he received the Notice at the end of March, and further testified that he failed to respond within thirty (30) days of receiving it, therefore he had sufficient knowledge as to when he received it to testify under oath.

Respondent's argument that there was an unascertainable deadline because he later forgot the exact date he received it not legally supported. Respondent cited no legal authority which would support "forgetting" when a party receives any kind of statutory notice is grounds to extend a deadline.

The recipient of any communication sent by mail is the only person who has actual personal knowledge of when he received it. Respondent had full knowledge of the date he received the Notice when he took possession of the letter at his place of employment. It is of no consequence that he could not later recall the exact date. In this case, Respondent tries to counter Appellant's uncontroverted evidence of receipt by testifying that he did not remember the exact date he took the Notice out of his mailbox at his place of employment, yet when asked by the judge he specifically recalled not responding to the Notice within the thirty (30) days following receipt. Respondent's brief ignores his own testimony, as did the trial court in making its judgment.

In Baxley v. Jarred, 91 S.W.3d 192 (Mo.App.WD 2003) the Western District interpreted the statute to mean that failure of a nonrelocating party to file verified objections within thirty (30) days following receipt of the relocation notice constitutes implied consent, leaving the trial court without jurisdiction to make determinations as to whether the petitioner can relocate. Id., at 200. Respondent cites no legal authority to contradict Baxley or its application to this case.

E. Respondent does not contest Appellant's argument that a judgment entered without subject matter jurisdiction is void *ab initio*.

Appellant cites several cases in support of her argument that judgments entered without the requisite subject-matter jurisdiction are void *ab initio*. On page 43 of Respondent's brief, he asserts that the cases cited by Appellant are distinguishable. The sole reason Respondent gives for distinguishing the cases is that the court in this matter did have subject-matter jurisdiction. It can therefore be inferred that if this Court finds that the trial court was without subject-matter jurisdiction, Respondent would not contest the fact that the trial court's judgments are void from inception.

VII Respondent erroneously states that Appellant's discussion pertaining to jurisdiction of the trial court under subsection 10 of the Relocation Statute was first raised in this brief and should be stricken.

Respondent asks this Court to strike the Appellant's discussion pertaining to subsection 10 of the Relocation Statute in that he alleges it is first discussed in Appellant's Substitute Brief. Subsection 10, and the trial court's jurisdiction in that regard is discussed at length in Appellant's brief filed with the Eastern District, and has been incorporated into the conclusion as a prayer for relief in every brief Appellant has filed at every level in this appeal.

Striking the discussion and prayer for the trial court's determination under subsection 10 of the Relocation Statute would serve only to harm the Respondent should this Court rule in Appellant's favor. Subsection 10 provides that the trial court has

jurisdiction in both court-ordered and noncourt-ordered relocation cases to determine 1) the amount and type of contact the Minor Child should have with Respondent sufficient to assure the child has frequent, continuing and meaningful contact with Respondent; and 2) the allocation of travel expenses between the parties.

VIII. Respondent fallaciously argues that the Relocation Statute may violate due process because the Relocation Statute fails to require a warning as to the thirty-day deadline.

On page 28 of Respondent's brief, he argues that the Relocation Statute may "arguably" serve to deprive nonrelocating parties of their due process rights because it fails to provide that the notice of proposed relocation contain a warning of sorts which outlines the consequences should the recipient fail to file objections within thirty (30) days of receiving notice. Respondent's Substitute Brief is the first time this argument was raised and as such it should be stricken.

Adding such a provision to the Relocation Statute would do no harm; however, in its present form it does not threaten the due process rights of nonrelocating parties. The language required by the statute is affirmative language that advises the nonrelocating party of the relocation rather than proposes it. Receiving a letter from an ex-spouse that he or she intends to relocate with their child that sets out the specifics and offers a proposed revised visitation schedule would cause any parent with sincere objections to contact an attorney to determine his or her rights.

IX. Respondent raises three affirmative defenses, none of which are applicable to this case.

Respondent makes three arguments at the end of his brief:

A. That Appellant's claim of subject matter jurisdiction is barred by laches.

Laches does not apply to any of the issues in this appeal, as all of the issues before this Court are matters of law under a Missouri statute, not equity. Laches is an equitable affirmative defense used where the court is endowed with the powers of equity on the relevant issues. Bowden v. Dept. of Social Services, 903 S.W.2d 577 (Mo.App.S.D. 1995). London v. London, 826 S.W.2d 30 (Mo.App.W.D. 1992), the only case cited by Respondent on this issue is a dissolution case which involves an appeal on the issue of property division, a purely equitable subject matter.

Even in equitable cases laches only applies where a party, aware of his or her rights allows an excessive period of time to pass before asserting them. Higgins v. McElwee, 680 S.W.2d 335, 341 (Mo.App.E.D. 1984). London involved a six and a half (6 ½) year delay. The case cited in the London quote in Respondent's brief involved a delay of fourteen (14) years. In the case before this Court, the final judgment was entered on May 13, 2002. Appellant filed her Motion to Set Aside Judgment on February 6, 2003, less than eight (8) months after the judgment became final. Even if this case was of an equitable nature, less than one year cannot be considered an "excessive amount of time" to bar any claim by applying the doctrine of laches, much less a case where the trial court did not have subject-matter jurisdiction.

M.R.C.P. Rule 74.06(b) sets a one-year deadline in which to make a motion to set aside judgments based upon mistake, fraud or irregular judgments, but does not set a time limit to set aside judgments which are void or satisfied. M.R.C.P. Rule 74.06(c). In cases where judgments are void for lack of subject-matter jurisdiction, as in the case at hand there is no time limitation. Williams v. Williams, 932 S.W.2d 904, 905 (Mo.App.E.D. 1996).

Respondent states that Appellant "submitted herself to the jurisdiction of the trial court." [Respondent's Substitute Brief p. 36]. With regard to personal jurisdiction one may impliedly waive personal jurisdiction by appearing in court, whereas subject-matter jurisdiction cannot be waived at any point in the proceedings. "Parties cannot waive subject matter jurisdiction and can challenge subject matter jurisdiction at any stage of the proceedings." Williams v. Williams, 932 S.W.2d 904, 905 (Mo.App.E.D. 1996) *citing* Kuntzman v. Kuntzman, 724 S.W.2d 331, 333 (Mo. App. 1987).

It should be noted that in spite of the incredible hardship Appellant has been respectful of the judicial process and has been living separate and apart from her husband for 3 and ½ years during the pendency of this litigation.

B. That Appellant accepted the benefit of the judgment and therefore cannot appeal a portion of it.

Respondent argues that Appellant accepted the benefit of the judgment because the trial court ruled that the Minor Child shall attend school in the district where the mother resides rather than the district where the father worked and as a result should not be entitled to prevail on appeal. In the present case, the trial court stated in its judgments

that its decisions were based on the best interest of the child. It should therefore be assumed that it was the Minor Child who benefited rather than either of the parents. Additionally, that decision was a separate ruling based upon a post-judgment motion, and Respondent was awarded Wednesday overnight visitation.

Benefit of the judgment cases apply only to financial matters as can be seen by the cases cited in Respondent's brief. Respondent cites two cases in support of his benefit of the judgment argument: Hicks v. Hicks, 859 S.W.2d 842 (Mo.App.W.D. 1993); and In re Marriage of Tennant, 769 S.W.2d 454 (Mo.App.S.D. 1989), which was cited within the Hicks case. Both cases were dissolution cases involving disputed financial issues. The benefit of the judgment doctrine does not apply across the board; rather, it applies only to those particular issues where one party might receive a financial windfall by prevailing on appeal. In Hicks, the court refused to provide relief to Appellant by ruling that a sale of the life insurance policies were improper because she accepted the proceeds from the sale of those policies. The court did not apply the benefit of the judgment argument across the board, rather only to that particular issue. It reversed the trial court on a second issue of maintenance.

C. That Appellant has attempted to use a request to set aside a judgment under M.R.C.P. Rule 74.06(b) as an improper substitute for a timely appeal.

Finally, Respondent argues that Appellant is asking this Court to set aside the trial court's judgment on Appellant's Motion to Set Aside as a substitute for a timely appeal. Respondent cites one case, *i.e.* Love v. Board of Police Commissioners, 943 S.W.2d 862 (Mo. App. E.D. 1997) in support of his argument that it is "well settled law in Missouri"

that someone cannot use Rule 74.06(b) in lieu of a timely filed appeal. In Love the appellant moved the court to set aside the judgment on the grounds of mistake. The mistake he alleged was that he missed the appeal deadline because he did not understand the law in that regard.

The present case is entirely distinguishable from the Love. In this case, Appellant is not claiming mistake, rather that the judgment was void at its inception for lack of subject-matter jurisdiction and should therefore be set aside under M.R.C.P. Rule 74.06(b)(4). Strong and unrefuted case law cited in Appellant's Substitute Brief supports the assertion that void judgments must be set aside, so it will not be repeated here.

If this Court finds that Respondent was properly noticed, either by receipt of the Notice which technically complied with the Relocation Statute, or by actual notice prior to the end of March then all of the judgments of the trial court are void for lack of subject-matter jurisdiction and must be set aside.

CONCLUSION

Respondent's brief essentially relies on a denial of the evidence presented to the trial court. Respondent contradicts himself as to the facts and fails to cite any relevant legal authority with respect to the pivotal issues in this appeal.

The trial court improperly ruled against the overwhelming weight of uncontroverted evidence when it found that Notice was insufficient because the evidence did not indicate when Respondent received it. The trial court further erred in its application of the law when it failed to recognize actual notice sufficient to comply with the mailing provisions of the Relocation Statute.

The Petitioner complied with the provisions of the Relocation Statute in providing to Respondent properly delivered statutory notice on March 27, 2001. The fact that Respondent failed to sign the return-receipt and subsequently forgot when he received the Notice is of no consequence. Respondent failed to file his Objections within the thirty-day deadline; therefore he implicitly consented to the relocation. As a result, the trial court lacked subject-matter jurisdiction to rule on Respondent's Objections. The initial judgment on the Respondent's Objections, the temporary restraining order and the judgment denying Petitioner's Motion to Set Aside entered by the trial court are therefore void *ab initio*, and must be set aside.

Petitioner therefore prays this Honorable Court to reverse the trial court's judgment denying Petitioner's Motion to Set Aside the void judgments of the trial court. Petitioner also requests a specific finding allowing Petitioner and the Minor Child to relocate to Nevada to be reunited with Petitioner's Husband.

Petitioner further prays this Court remand with direction to the trial court to determine the only two issues over which it has authority to rule: 1) the amount and type of contact the Minor Child should have with Respondent sufficient to assure the child has frequent, continuing and meaningful contact with Respondent; and 2) the allocation of travel expenses between the parties.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

WITH MISSOURI SUPREME COURT RULE 84.06

COMES NOW, Appellant, by and through her attorneys of record and certify the following concerning the Appellant's Substitute Reply Brief filed herein:

1. The Appellant's Substitute Reply Brief was prepared using Microsoft Word, version 2003, computer software.

2. The font used is Times New Roman, size 13.

3. The brief is double spaced, except the signature block, certificates, cover page and documents in the Appendix.

4. The paper size is 8.5 x 11 inches.

5. The paper used weighs not less than nine pounds to the ream.

6. The pages are all one-sided with no type on the back side of any page.

7. The left, right, top and bottom margins are not less than one inch.

8. The pages are numbered consecutively after the cover page.

9. The brief is securely bound on the left.

10. The brief contains 7464 words, as indicated in the word processing "Properties" function. The word count is exclusive of the cover page, this certificate, the Affidavit of Service and signature page.

11. The undersigned, attorney for Appellant, certifies that she has transferred this brief to a double-sided, high density, IBM-PC compatible 1.44 MB, 3 ½" floppy disk, to which an adhesive label identifying the caption of the case, and the party filing the disk and the number of the disk (*e.g.* 1 of 2) is attached to the disk.

12. One such floppy disk is being filed with the brief. A second floppy has been mailed to Respondent attorney along with one printed copy of the brief.

13. Both disks have been scanned for viruses using Norton Antivirus software which was updated with the latest virus definitions just prior to the scan.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

Jennifer K. Suits, being of lawful age, being first duly sworn upon oath stated that she caused one printed copy and a copy in Microsoft Word format on floppy disk of the foregoing Appellant's Substitute Reply Brief in Appeal Number SC85879 to be delivered, postage prepaid via first-class mail to Ms. Susan Hais, Attorney for Respondent, 100 S. Brentwood Blvd., Suite 400, Clayton, Missouri 63105.

Dated this 19th day of May, 2004.

_____

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