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JURISDICTIONAL STATEMENT

Respondent is satisfied with the accuracy and completeness of the jurisdictional statement in Appellant's brief.

STATEMENT OF FACTS

Respondent would include the following in correction of or addition to Appellant's Statement Of Facts.

The minor children of the parties resided in the home of Respondent and attended school in that school district at the time that the Motion to Modify was filed on January 17, 2003, and except for a short period of time, continued to do so. TR 19-20.

On May 27, 2003, the date upon which trial of all pending issues had been scheduled, Appellant, Appellant's trial attorney, Respondent, Respondent's attorney, and the Guardian ad Litem entered into a written Stipulation documenting their agreement as to child custody and support. LF 67-68.

On July 17, 2003, a proposed Judgment Modifying Judgment And Decree Of Dissolution Of Marriage As To Child Custody And Support was received by the Circuit Clerk of Webster County. LF 110. That proposed judgment had been signed by Appellant's attorney of record, Respondent's

attorney of record, and the Guardian ad Litem. LF 66. The Parenting Plan awarded the parties joint legal and physical custody of their minor children, and did not designate either parent as “primary physical custodian.” LF 69-75.

Appellant relocated to Kansas City, Missouri on September 27, 2003.
TR 21.

POINTS RELIED ON

POINT ONE

THE TRIAL COURT WAS CORRECT IN REFUSING TO SET ASIDE THE JUDGMENT MODIFYING THE CUSTODY PROVISIONS IN THE PREVIOUS JUDGMENT BECAUSE THE TRIAL COURT HAD JURISDICTION TO MODIFY THE PRIOR CUSTODY JUDGMENT IN THAT THERE WAS SUFFICIENT EVIDENCE RECEIVED TO SHOW A SUFFICIENT CHANGE IN CIRCUMSTANCES TO WARRANT A MODIFICATION OF THE PREVIOUS JUDGMENT.

Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976).

Section 452.410 RSMo. 2000

Section 452.423 RSMo. 2000

ARGUMENT

POINT ONE:

The trial court was correct in refusing to set aside the judgment modifying the custody provisions in the previous judgment because the trial court had jurisdiction to modify the prior custody judgment in that there was sufficient evidence received to show a sufficient change in circumstances to warrant a modification in the previous judgment.

As stated by Appellant, the standard of review is that the decision of the trial court will be affirmed unless it misstates the law, misapplies the law, substantial evidence does not support the judgment, or the judgment is against the weight of the evidence. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo banc 1976).

Appellant argues in her brief that Missouri law is clear that a trial court must conduct a hearing before it can modify a custody decree. That is an erroneous statement of the law. The provisions of Section 452.410.1, R.S.Mo. 2000 do not require a trial court to have a formal evidentiary hearing to make sufficient findings for a modification of custodial orders. Throughout this State, various judicial circuits have implemented local rules which allow parties to submit motions to modify prior orders of custody for decision by documentary evidence without a formal hearing on the record.

At the time that the trial court ruled upon Appellant's motion to set aside the judgment, the following circuits within the jurisdiction of this Honorable Court had established local rules of procedure which allowed parties to obtain modification of prior orders of custody without a formal hearing: 27, 28, 29, 31, 32, 33, 36, 38, and 39. Missouri Court Rules 2004, Volume III, Thomson West, 2004.

In *Blackburn v. Mackey*, 131 S.W.3d 392 (Mo.App. W.D. 2004), the only evidence presented at hearing was counsel's statements and stipulations, and a proposed judgment. *Id.* at 398. The trial court's modification of the previous judgment was upheld on the basis of examination of the documentary evidence and the trial judge's previous knowledge of the facts of the case. *Id.* at 399. In this case, the trial court's decision was supported by counsel's statements, a stipulation of the parties, and a proposed judgment.

Most importantly, the trial court appointed a Guardian ad Litem pursuant to Section 452.423, RSMo. 2000 to represent the interests and to ensure the welfare of the minor children of the parties. The Guardian ad Litem had the duty to be legal representative of the child and to conduct the necessary investigation to ascertain the child's wishes, feelings, attachments, and attitudes. *McCormick v. McCormick*, 807 S.W.2d 556, 557 (Mo.App.

S.D. 1991). Pursuant to the provisions of Section 452.423.3, RSMo. 2000, the trial judge had the responsibility to monitor the guardian's performance of her duties and discharge her if she failed to perform them diligently.

Guier v. Guier, 918 S.W.2d 940, 950 (Mo.App. W.D. 1996). Appellant has not presented any evidence to overcome the presumption that the actions undertaken by the Guardian ad Litem in connection with the performance of official acts in the line of her duties was legally and rightfully done.

Blackburn v. Mackey, 131 S.W.3d 392, 397 (Mo.App. W.D. 2004).

Before judgment was entered by the trial court, the Guardian ad Litem signed the Stipulation between the parties and approved the proposed judgment and parenting plan submitted to the Court. LF 66 and 68. As there is no requirement that a guardian ad litem make a particular or specific recommendation to the trial court, the trial court could rely on the Guardian acting in the best interests of the minor children. *Guier v. Guier*, 918 S.W.2d 940, 951-952 (Mo.App. W.D. 1996).

The trial judge in this case had previously decided the dissolution of the marriage of the parties and the modification of the financial support awarded to the minor children. LF 20-33. Both parties had sworn under oath that there were changed circumstances, and prayed for the modification of the prior judgment. LF 36-40 and 45-50. On the morning of the

scheduled trial, the trial court had a conference with the Guardian ad Litem and counsel for the parties, who informed him that a settlement had been reached. The court was presented with a proposed judgment and parenting plan, approved by counsel for both parties and the Guardian ad Litem and a Stipulation setting for custodial and support arrangements which had been signed by each party, all counsel of record, and the Guardian ad Litem.

Under these circumstances, the trial court had sufficient evidence to make its independent determination that upon the basis of facts that had arisen since the prior decree that a change had occurred in the circumstances of the children and their custodian and that modification was necessary to serve the best interests of the children.

Appellant does not contend that there is an insufficient factual basis to modify the previous judgment in this case. She complains that primary physical custody was transferred from her to Respondent due to her attorney acting without her approval. However, “primary physical custody” is not a type of custody recognized in Missouri. *In Re The Marriage Of Loftis*, 148 S.W.3d 315, 318 (Mo.App. S.D. 2004). The custodial arrangement before, and after, the judgment of modification was joint legal and joint physical custody. The address which was designated as the principal residence for mailing and educational purposes was the home in which the children had

lived since June, 1999. TR 19. By the parenting plan entered as part of the judgment of modification, Appellant would have been entitled to spend substantial amounts of parenting time with the minor children, possibly more than was available Respondent, if she did not relocate to Kansas City, Missouri. Her complaints about the judgment are semantic and not substantive.

Appellant's complaints about her attorney do not deprive the trial court of its jurisdiction. The actions of a party's attorney, including procedural neglect that precludes a client's substantive rights are imputed to the client. *Cotleur v. Danziger*, 870 S.W.2d 234, 238 (Mo. Banc 1994). Until he was discharged, the trial court was entitled to rely upon Appellant's counsel acting on her behalf.

Appellant became aware of the provisions of the judgment of modification which had been entered in August, 2003. TR 9. She moved away from her children to Kansas City, Missouri on September 27, 2003. TR 21. Appellant's Motion To Set Aside Judgment Modifying Judgment And Decree Of Dissolution Of Marriage As To Child Custody And Support was filed on December 11, 2003 and did not allege a legal and proper basis for setting aside the judgment. The trial court had jurisdiction to enter the

judgment of modification and was correct in overruling Appellant's motion to set aside.

CONCLUSION

The trial court's decision denying Appellant's motion for new trial was correct. Provided that the trial court made an independent judgment based upon sufficient evidence before it, there is no requirement of a formal hearing on the record to modify a previous judgment pursuant to Section 452.410, RSMo. The trial court had sufficient evidence before it, including the trial judge's previous experience in the prior proceedings in the case; the pleadings filed by the parties; the statements of counsel in his chambers; the Stipulation signed by the parties, their attorneys, and the Guardian ad Litem; the proposed judgment and parenting plan approved by the Guardian ad Litem and the counsel for the parties, to enter a judgment of modification.

For these reasons, this Honorable Court should affirm the trial court's denial of Appellant's motion to set aside.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND

OF COMPLIANCE WITH RULE 84.06(b) AND (c)

The undersigned hereby certifies that on the 7th day of February, 2005, two true and correct copies of the foregoing brief and one disk containing the foregoing brief were mailed to Mark J. Murphy and J. Michael Murphy, 1170 West Kansas, Suite AA, Liberty, Missouri 64068 and Amy M. Vernon, 123 North Jefferson, Lebanon, Missouri 65536 and ten true and correct copies of the foregoing brief and one disk containing the foregoing brief was delivered to Missouri Court of Appeals, Southern District, University Plaza, 300 Hammons Parkway, Springfield, Missouri 65806.

The undersigned further certifies that the foregoing brief complies with Rule 55.03 and the limitations contained in Rule 84.06 (b) and that the brief contains 1,897 words. The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.

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