

Supreme Court No. SC87917

IN THE MISSOURI SUPREME COURT

KIMBERLY RUSSELL
Respondent/Petitioner

vs.

MARK RUSSELL
Appellant/Respondent

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT
FAMILY COURT DIVISION NO. 11, HONORABLE GRACE NICHOLS

SUBSTITUTE BRIEF OF RESPONDENT, KIMBERLY RUSSELL

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STATEMENT OF FACTS

Mother and Father divorced on June 6, 2000, and agreed to share joint legal and joint physical custody of their daughter, Jordan, who was three years old at the time. (T. 5:3-4) When the parties divorced, Mother worked at Gateway Medical Research every Saturday and Sunday and also one to two days through the week. (T. 6:5-12) Because of Mother's work schedule, the parties devised a custody schedule which gave Father temporary custody and visitation of Jordan each weekend from Friday at 6:00 p.m. through Monday at 11:00 a.m. (T. 6:13-21) At the time of the divorce, Jordan was not yet attending school, and Mother had most days and evenings during the week to spend with Jordan. (T. 23:6-9) Father was ordered to pay Mother \$449.00 per month for child support. (T. 5:20-22)

From the time the dissolution judgment was entered, Father was not consistent with exercising his weekend visitation. (T. 7:2-10) Sometimes he would pick up the child on Saturday. (T. 7:5-10) Sometimes he would bring her back early on Sunday. (T. 7:5-10) Sometimes Father's sister would pick up Jordan on Friday. (T. 7:5-10) Whatever happened, at no time did he exercise every weekend, and the schedule was never consistent. (T. 7:5-10)

Pursuant to the custody schedule set forth in the dissolution, the parties were to each receive one-half of the summer. Father did not exercise his summer custody. (T. 7:17-23) During the summer, he continued to exercise a sporadic weekend schedule. (T. 7:24-25)

The weekend custody schedule was also disrupted by Father's work schedule. (T. 8:13-21) Father is in the National Army Reserve and must participate in drill weekends. (T. 8:10-14) Mother usually kept custody of the minor child during Father's drill weekends,

but occasionally, three to four times per year, Jordan would stay with Father's sister if Mother had to work or could not make other arrangements. (T. 8:15 - 9:12)

In August 2002, Mother's work schedule changed to Monday through Friday from 8:00 a.m. until 4:30 p.m. (T. 9:13-21) Jordan is also older and attending school. (T. 12:17-22) With Father having visitation every weekend, Mother has minimal time with Jordan during the week. (T. 12:14-16) Mother drops off Jordan at school a 7:35 a.m. and picks her up at 4:45 p.m. (T. 12:17-22) Many evenings Jordan has soccer practice and home work to do. (T. 12:23 - 13:3) Sometimes there are other school activities scheduled. (T. 12:24 - 13:3) At best, Mother has an hour of quality time to spend with Jordan in the evenings. (T. 13:1-3) Because of these changes, Mother filed a motion to modify the schedule. (L.F. 22-25)

Since Mother filed her motion to modify, Father instructed his sister to pick up Jordan every Friday at 6:00 p.m. (T. 13:9-15) For the first time since the divorce, Father or his designee is picking up the child for visitation every weekend according to the schedule set forth in the decree. (T. 13:9-15) Father does not get off work Friday evenings until 10:00 p.m. or 11:00 p.m., but he still has his sister pick up Jordan from Mother at 6:00 p.m. Father takes Jordan to school on Monday morning. (T. 13:16-25)

Although the parties were awarded joint legal and joint physical custody of Jordan, if Jordan is sick and misses school, Mother is the parent who misses work to stay home with her. (T. 14:5-7) Father never does. (T. 14:8-9) If Jordan is on vacation from school, Mother is the parent who takes time off from work or arranges for day care. (T. 14:10-12)

Because Mother never has a weekend with Jordan, she asked the court to give the parties alternating weekends. (T. 14:18-22) Mother offered to accommodate Father's weekend guard duty. (T. 14:23 - 15:2) If Father's weekend with Jordan conflicted with his guard duty weekend, Mother would trade weekends with him. (T. 15:3-8) Because Father works evenings, week night custody is not feasible. (T. 15:9-13) In lieu of week night custody, Mother suggested the court award custody to Father each Sunday evening from 6:00 p.m. until Monday morning on her weekends. (T. 15:14-18)

Mother requested the court recalculate Form 14 in that four years had passed since the previous judgment for support. (L.F. 22-25) Mother pays \$1,200.00 per year for day care. (T. 15:19-23) Father pays \$11.00 per month for dependent health care insurance. (T. 15:23 - 16:2) There was no dispute regarding Father's income as all parties agreed he earned \$5,552.00 per month. (L.F. 75)

At the time of the trial, Jordan attended private school. (T. 17:6-7) Mother paid tuition of \$782.00 every three months and makes four payments per year. (T. 17:8-11) Jordan began to attend private school in kindergarten. (T. 17:12-15) Mother and Father agreed to enroll Jordan in private school at that time. (T. 17:16-21) At the time Jordan was enrolled, Mother and Father had an agreement that they would each contribute to the private school tuition. (T. 18:1-6) In 2003, Father stopped paying his share of the tuition. (T. 18:12-16)

Mother earned \$16.00 per hour and worked forty hours per week. (T. 16:9-12) Mother sometimes earned bonus pay for drawing blood samples from Gateway's test

subjects. (T. 16:13-25) Mother had been doing this extra work only to pay for Jordan's private school tuition. (T. 17:3-5) Mother occasionally earned a small amount of overtime. (T. 43:5-8) The first quarter of 2004, Mother earned \$263.08 in overtime pay and \$720.00 in bonus pay. (T. 43:13-18) From April 10, 2004 through June 19, 2004, Mother earned \$183.00 in overtime pay and \$765.00 in bonus pay. (T. 44:4-7) In 2003, Mother earned \$33,551.11. (T. 65:6-10)

The trial court found that Mother's average income was \$2,773.00 per month. (L.F. 75) The trial court based her income on her rate of pay of \$16.00 per hour and a forty hour work week. (L.F. 75) The trial court found that Mother's overtime pay was sporadic and should not be included for purposes of Form 14. (L.F. 75) The trial court found that Mother's bonus pay should not be included as she was only drawing blood samples to defray the cost of private school tuition and would not be earning that money once the court failed to include private school in Form 14. (L.F. 75) The trial court gave Father a ten percent visitation credit (L.F. 79), but refused to give Mother the right to claim the child as a dependent on her State and Federal taxes each year (L.F. 75). The trial court ordered Father to pay Mother \$623.00 per month for child support. (L.F. 78)

The trial court modified the parties' custody/visitation schedule so that Father has custody of Jordan every weekend from Saturday at 9:00 a.m. until Monday morning. (L.F. 77) This eliminated his Friday evening custody, but Father was not actually exercising this time because he works every Friday until 10:00 p.m. or 11:00 p.m. (L.F. 74) The trial court set aside to Mother the third weekend of each month from Saturday to Monday morning.

(L.F. 77) The original holiday and summer schedules from the earlier judgment were left in place. (L.F. 77-78) The trial court also entered an order to accommodate Father's military drill duty weekends. (L.F. 78)

POINTS RELIED ON

I. The trial court’s judgment should be affirmed, and the trial court correctly declared and applied the law in modifying the parties’ custody schedule and applied the correct standard of law in that there was no change in custody, but merely a modification of the schedule and it was not necessary to apply the standard set forth in Section 452.410, and further, regardless of what standard of law this Court deems appropriate, the trial court’s judgment should be affirmed because the facts of the present case meet all pertinent standards for modification of custody and visitation and the judgment was not against the weight of the evidence and is in the best interests of the child.

Responding to Appellant’s Point I, A-C.

Baker v. Welborn, 77 S.W.3d 771 (Mo. Ct. App. 2002)

Timmerman v. Timmerman, 139 S.W.3d 230 (Mo. Ct. App. 2004)

Mo. Rev. Stat. § 452.410 (2000)

Mo. Rev. Stat. § 452.400.2 (2000)

II. The trial court did not err in calculating child support, and the trial court correctly declared and applied the law and did not abuse its discretion in that the figure the trial court used for Mother’s income is supported by substantial evidence on the record and in that the trial court awarded Father a ten percent custody adjustment which is appropriate because the law does not mandate the trial court award more than a ten percent credit. Responding to Appellant’s Point II, A and B.

Krost v. Krost, 113 S.W.3d 117 (Mo. Ct. App. 2004)

Endebrook v. Endebrook, 916 S.W.2d 456 (Mo. Ct. App. 1996)

Ficker v. Ficker, 62 S.W.3d 496 (Mo. Ct. App. 2001)

III. The trial court did not abuse its discretion in awarding Mother her attorney's fees and correctly declared and applied the law because the financial circumstances of the parties supported the award and Father had income higher than Mother. Responding to Appellant's Point III.

In re Marriage of Eikermann, 48 S.W.3d 605, 613 (Mo. Ct. App. 2001)

Mistler v. Mistler, 816 S.W.2d 241, 256 (Mo. Ct. App. 1991)

Mo. Rev. Stat. § 452.355.1 (2000)

ARGUMENT

I. The trial court’s judgment should be affirmed, and the trial court correctly declared and applied the law in modifying the parties’ custody schedule and applied the correct standard of law in that there was no change in custody, but merely a modification of the schedule and it was not necessary to apply the standard set forth in Section 452.410, and further, regardless of what standard of law this Court deems appropriate, the trial court’s judgment should be affirmed because the facts of the present case meet all pertinent standards for modification of custody and visitation and the judgment was not against the weight of the evidence and is in the best interests of the child. Responding to Appellant’s Point I, A-C.

This is a court-tried case; therefore, the judgment of the trial court will be affirmed unless no substantial evidence supports it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976). The Appellate Court accepts as true the evidence and reasonable inferences therefrom in the light most favorable to the judgment and disregards all contradictory evidence and inferences. Malawey v. Malawey, 137 S.W.3d 518, 522 (Mo. Ct. App. 2004) (internal citations omitted). The Court defers to the trial court's superior ability to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles not revealed in the transcript. Id. The trial court may accept or reject all, part, or none of witnesses' testimony. Id. The Court presumes the trial court reviewed all the evidence and awarded custody in accordance with the child's best interests. Id. The Court gives the trial court greater

deference in child custody proceedings than in other matters. Id. The Court will not disturb a child custody award unless it is firmly convinced that the child's welfare requires some other disposition. Id.

Section 452.410 of the Revised Missouri Statutes governs modification of custody cases, setting forth the standard to be applied to all modifications of custody. A court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that a modification is necessary to serve the best interests of the child. Mo. Rev. Stat. § 452.410 (2000). Such a change in circumstances must be substantial. Searcy v. Seedorff, 8 S.W.3d 113, 117 (Mo. banc 1999). A change of visitation is governed by Section 452.400.2. Under Section 452.400.2, a court may modify a parent's visitation rights whenever modification would serve the best interests of the child. Mo. Rev. Stat. § 452.400.2 (2000). A question of what standard to apply arises when a party seeks to modify only the schedule in a joint physical custody arrangement. No statute addresses this type of modification, and Missouri Appellate Courts provide different answers.

The Southern District was first to examine this specific issue in Baker v. Welborn, 77 S.W.3d 771 (Mo. Ct. App. 2002). The Southern District noted that it is the substance of the custody award and not the label assigned to it that should be of concern to the modifying court. Id. at 718 (internal citations omitted). Baker held that if the former custody decree is, considering the entire custody scheme, altered significantly or drastically, the change in

circumstances standard from Section 452.410 would apply. Id. If, considering the entire custody scheme, the modification was not significant or drastic, the best interests standard would apply. Id. Baker employed a case by case analysis, setting aside terminology in favor of examining the facts of the case to determine the appropriate standard.

The Western District specifically rejected the approach of Baker in favor of a bright line test in Timmerman v. Timmerman, 139 S.W.3d 230 (Mo. Ct. App. 2004).¹ Timmerman criticized Baker for leaving the determination of the burden of proof until the end of the case, stating it was not practical. Timmerman also disagreed with Baker as being inconsistent with the principals of res judicata. Id. at 234 (internal citations omitted). The Western District solution is a harsh one: apply the change of circumstances standard in all cases where the parties have joint custody and some modification, no matter how small. Id. at 236.

While a bright line test is preferable, it should not be favored over reasonable and logical adjudication of child custody issues. The Western District acknowledged that by

¹However, in Bell v. Bell, the Western District seemed to use an analysis closer to that of the Southern District when it held that mother was not required to prove a change in circumstances because the requested modification concerned the terms and nature of the parenting plan under the joint legal custody decree and not a change in legal custody itself. Bell v. Bell, 125 S.W.3d 899, 905 (Mo.App. W.D. 2004).

employing the bright line test, illogical consequences would result. Id. at 236. The Western District was too quick to dismiss the solution in Baker.

The Baker approach does not necessarily postpone determination of the burden of proof until the end of a case. The burden of proof may be determined once a party files a motion to modify and a proposed parenting plan. From the party's motion and proposed parenting plan, one can determine whether that party is seeking a significant change. For example, in the Timmerman case, the mother sought a modification of joint physical custody and requested she be awarded sole physical custody. Because Ms. Timmerman sought an actual modification of custody, Section 452.410 is the appropriate standard to apply.

The Baker approach is not perfect. Litigants will disagree over whether the parent seeking modification is requesting a significant change, just as Appellant is doing in the present case. A party attempting to create a controversy over what is "significant" does not mean the standard is fatally flawed. "Significant" is a term commonly employed by Missouri Courts in adjudicating many issues, and the lack of a specific definition of the word has not crippled the Courts.

In addition to producing illogical consequences in modification cases, application of Section 452.410 to every case where a joint custodial parent seeks even a slight modification will impact cases involving the initial determination of custody, such as dissolution and paternity judgments. Litigants will be less willing to agree to any parenting plan labeled as joint custody, knowing they will be locked into that plan regardless of its suitability. Family law practitioners will be required to advise clients considering joint custody that no aspect

of the custody arrangement will be modified absent a showing of a substantial change in circumstances.

Application of the change in circumstances standard from Section 452.410 to any and all cases labeled joint physical custody, regardless of what is actually being modified, is inappropriate and unreasonable. In the present case, joint physical custody was in place prior to the modification, and it remains in place after the trial court's modification. There was no change in custody; therefore, Section 452.410 which addresses changes in custody, does not apply. While the facts of the present case do meet the change in circumstances standard, application of Section 452.410 to all joint custody cases, regardless of what a litigant is seeking to modify, is an unreasonably high standard and will work against Missouri's aim of serving the best interests of children.

Regardless of what standard this Court determines appropriate in modification of joint custody arrangements, the present case should be affirmed in that it meets all applicable standards.

In the Baker approach, the issue to be determined is whether the modification changed the relative status of Mother and Father, or whether the modification merely provided one parent additional time with the child. 71 S.W.3d at 718. If the parties' relative status changed, it would be a drastic modification. However, if one party merely ended up with some more time with the child, that would not be a drastic modification and would therefore be in the nature of a change in visitation privileges. Id. at 718-19.

The present case is not a drastic modification. The status of neither party changed, and joint physical custody is still in place. Mother will still be the parent who misses work to stay home with Jordan when she is sick or on a school vacation (T. 14:5-12), and Father will still see Jordan most weekends from Saturday morning until Monday morning.

Father attempts to show the trial court's modification was drastic by counting days of custody he was awarded under the dissolution decree and comparing that to the number of days of custody he was awarded in the modification. Because Father never consistently exercised all of the time he was given by the dissolution decree, such a comparison is not useful in the analysis of the present case.

From the time the dissolution judgment was entered, Father was not consistent with exercising his weekend visitation. (T. 7:2-10) Sometimes he would pick up the child on Saturday. (T. 7:5-10) Sometimes he would bring her back early on Sunday. (T. 7:5-10) Sometimes Father's sister would pick up Jordan on Friday. (T. 7:5-10) Whatever happened, at no time did he exercise every weekend, and the schedule was never consistent. (T. 7:5-10) Father did not exercise his summer custody. (T. 7:21-23) During the summer, he continued to exercise a sporadic weekend schedule. (T. 7:24-25) The weekend custody schedule was further disrupted by Father being part of the National Army Reserve. (T. 8:13-21) Father must participate in drill weekends. (T. 8:10-14) Mother usually kept custody of the minor child during Father's drill weekends, but occasionally, three to four times per year, Jordan would stay with Father's sister if Mother had to work or could not make other arrangements. (T. 8:15 - 9:12)

Things changed once Mother filed her motion to modify. Once Mother filed her motion to modify, Father instructed his sister to pick up Jordan every Friday at 6:00 p.m. (T. 13:9-15) For the first time since the divorce, Father or his designee picked up the child for visitation every weekend according to the schedule set forth in the decree. (T. 13:9-15) Father does not get off work Friday evenings until 10:00 p.m. or 11:00 p.m., but he still has his sister pick up Jordan from Mother at 6:00 p.m. (T. 13:9-15)

Father's reliance on Babbitt v. Babbitt, 15 S.W.3d 787 (Mo. Ct. App. 2000), is misplaced. The facts of Babbitt are not similar to the present case. In Babbitt, the periods of custody taken away from father were ones that he actually exercised. Id. at 790-91 (internal citations omitted). Father complains that his custody is reduced by nearly thirty-three percent; however, the time that Father no longer receives under the new schedule is time that he was not spending with Jordan because of his work schedule. (T. 13:18-20) The time that the trial court took from Father and gave to Mother is time that Father is not available to spend with Jordan. It is an undisputed fact that Father works every Friday night until 10:00 p.m. or 11:00 p.m., and is therefore unavailable to be with Jordan on Fridays. Yet, he would rather have Jordan stay at her aunt's house than with her Mother. (T. 13:6-20)

The schedule that is best for Jordan is one that maximizes the time she can spend with both of her parents. The new schedule set out in the modification judgment is in Jordan's best interests because it gives her the opportunity to have a close relationship with both of her parents by allowing her to spend as much time as possible with each of them.

The present case also meets the standard set forth in Timmerman. If this Court decides to examine this case as a change in custody, the facts meet the requirements of Section 452.410 and should be affirmed. There was substantial evidence on the record which could have supported a finding that a substantial change in circumstances occurred that warranted a modification in child custody, and that modification was in the child's best interests. The facts of the present case are very similar to the facts of Timmerman v. Timmerman, and the only substantial difference is that Ms. Timmerman sought an actual change in custody by requesting she be designated as the sole physical custodian.

In Timmerman, the work schedule of the parents at the time of the dissolution had been a significant factor in the court's award of joint physical custody. 139 S.W.3d at 231. A year after their divorce, the Timmermans started to deviate from the schedule in their dissolution judgment. Id. The following year, Ms. Timmerman's work schedule changed to a regular Monday to Friday, 7:30 a.m. to 3:30 p.m. schedule. Id. The Timmermans could no longer agree on a custody schedule, and Ms. Timmerman filed a motion to modify. Id. "Considering that the parties' fluctuating work schedules was a significant factor in the trial court's award of joint physical custody of the child, the substantial change in one of the parties' schedule constituted a change in circumstances." Id. at 237.

Even under the higher burden set forth by the Western District in Timmerman which employs Section 452.410, the facts of the present case meet the standard. Like Timmerman, the parties arranged the custody schedule at the time of the divorce around their work schedules. (T. 6:13-23) Mother worked weekends so Father had his custody during the

weekends and Mother had Jordan during the week. (T. 6:5-12) This arrangement worked so long as Jordan was not in school and Mother worked weekends. (T. 6:10-12; 23:6-9) However, once Mother's work schedule changed and Jordan started school, this constituted a substantial change in circumstances and made the original schedule unreasonable. Jordan's best interests required a modification of the custody schedule. Jordan was not getting to spend enough time with Mother. The schedule needed to be modified to maximize time with both parents. The facts of the case are strikingly similar to Timmerman and certainly meet the requirements of Section 452.410.

Neither of the approaches to this issue is ideal. However, the Southern District approach is a more reasonable way to determine slight modifications of a joint custody plan. The Western District's decision to apply Section 452.410 to each and every modification of joint custody, no matter how slight, provides a bright line test, but is likely to result in illogical results and improper adjudication of child custody issues. Further, the Western District approach will deter litigants from entering into any plan labeled as joint custody.

The present case should be affirmed in that the trial court correctly followed the approach set out by the Southern District in Baker. Should this Court decide to follow the Western District and apply Section 452.410, the facts of the present case clearly meet the requirement for a substantial change in circumstances, and the decision of the trial court may be affirmed without the necessity of additional evidence on remand.

II. The trial court did not err in calculating child support, and the trial court correctly declared and applied the law and did not abuse its discretion in that the figure the trial court used for Mother’s income is supported by substantial evidence on the record and in that the trial court awarded Father a ten percent custody adjustment which is appropriate because the law does not mandate the trial court award more than a ten percent credit. Responding to Appellant’s Point II, A and B.

A judgment for child support must be affirmed unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). This Court views the evidence and the inferences therefrom in the light most favorable to the judgment and disregards all contrary evidence. Endebrock v. Endebrock, 916 S.W.2d 456, 457 (Mo. Ct. App.1996) (internal citations omitted). The Court recognizes the superior position of the trial court to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles that are not revealed in a trial transcript. Ficker v. Ficker, 62 S.W.3d 496, 499 (Mo. Ct. App. 2001) (internal citations omitted). The trial court is free to accept or reject all, part, or none of the testimony of a witness. Endebrock, 916 S.W.2d at 459.

This Court will not overturn an award of child support unless the evidence is “palpably insufficient” to support it. Krost v. Krost, 133 S.W.3d 117, 119 (Mo. Ct. App. 2004) (internal citations omitted). Further, inclusion of overtime compensation is within the trial court's discretion. Id. at 120. Father complains that the trial court erred in calculating

Mother's income by failing to include overtime and bonus pay, two areas that are within the trial court's discretion, and the trial court did not abuse its discretion.

First, there is substantial evidence to support the trial court's finding that Mother's income was \$2,773.00 per month. The trial court based its figure on Mother's rate of pay which is \$16.00 per hour and a forty hour work week. (T. 16:9-12; L.F. 75) It is also consistent with her income for the previous year. (T. 65:6-10) Mother did have a very small amount of overtime; however, it is in the trial court's discretion whether to include that in her income. The trial court found that Mother's overtime pay was sporadic and should not be included for purposes of Form 14. (L.F. 75) Mother had also earned bonus pay by drawing blood samples from Gateway's test subjects. (T. 16:13-25) She had been doing this because Jordan was in private school, and Father reneged on their agreement that they would each contribute toward her tuition. (T. 17:3-5; 18:12-16) The trial court found that Mother's bonus pay should not be included as she was only drawing blood samples to defray the cost of private school tuition and would not be earning that money once the court failed to include private school in Form 14. (L.F. 75)

All of these determining factors lie within the discretion of the trial court, and the trial court did not abuse its discretion. Nothing about the trial court's calculation of Mother's gross income is so arbitrary and unreasonable that it shocks the sense of justice and indicates lack of careful consideration. *See* Corrier v. Corrier 112 S.W.3d 443, 446 (Mo. Ct. App. 2003).

Regarding the issue of the custody adjustment, Father's brief gives this Court all the case law it needs to review this issue, "Should the parent paying support exercise above 109 days of custody visits a year, an adjustment above 10% is allowed, but not mandated." Appellant's Substitute Brief at page 41 *citing to* Krost v. Krost, 113 S.W.3d 117, 121 (Mo. Ct. App. 2004). Giving Father a ten percent credit is not reversible error.

The trial court did not err in calculating Mother's income or in giving Father a ten percent custody adjustment . The child support award was based on substantial evidence, and the trial court correctly declared and applied the law with regard to child support modification, and the judgment should be affirmed.

III. The trial court did not abuse its discretion in awarding Mother her attorney's fees and correctly declared and applied the law because the financial circumstances of the parties supported the award and Father had income higher than Mother. Responding to Appellant's Point III.

Review of the trial court's award of attorney's fees is for abuse of discretion. In re Marriage of Eikermann, 48 S.W.3d 605, 613 (Mo. Ct. App. 2001) (internal citations omitted). The issue of attorney's fees is governed by Section 452.355.1 of the Revised Missouri Statutes. The statute allows a court to award attorney's fees after considering all relevant factors, including the financial resources of both parties, the merits of the case, and the actions of the parties during the pendency of the action. Mo. Rev. Stat. § 452.355.1 (2000) Exactly how relevant factors balance with regard to a request for attorney's fees varies from case to case. Eikermann at 613.

In the present case, Mother earned \$2,773.00 per month. (L.F. 75) Father earned \$5,552.00 per month. (L.F. 75) This disparity in income alone is sufficient to support the trial court's decision. Father argues that Mother has the ability to pay her fees. However, a spouse's inability to pay attorney's fees is not a requirement for awarding attorney's fees. Mistler v. Mistler, 816 S.W.2d 241, 256 (Mo. Ct. App. 1991) (internal citations omitted). However, one spouse's greater ability to pay is sufficient to support an award of attorney's fees to the other spouse. Eikermann at 613.

To demonstrate an abuse of discretion, the complaining party bears the burden of showing the award to be clearly against the logic of the circumstances and so arbitrary and

unreasonable as to shock one's sense of justice. Mistler at 256. Father failed to meet this burden. For that reason, the judgment of the trial court with respect to attorney's fees should be affirmed.

CONCLUSION

For the foregoing reasons, Respondent requests the judgment of the trial court be affirmed in that the judgment correctly declares and applies the law and is not against the weight of the evidence. If this Court finds that the trial court should have applied a different standard with regard to the modification of the parties' schedule, the judgment should be affirmed in that the facts of the present case meet all pertinent standards for modifying custody or visitation. With regard to child support and attorney's fees, the judgment should be affirmed in that the trial court acted well within its discretion.

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULES 55.03 AND 84.06(b)**

1. The undersigned certifies that Respondent's Substitute Brief complies with Missouri Supreme Court Rule 55.03.
2. The undersigned certifies that Respondent's Substitute Brief complies with the limitations set forth in Missouri Supreme Court Rule 84.06(b).
3. Respondent's Substitute Brief contains 5713 words.
4. Counsel for Respondent relied on the word count of the word-processing system used to prepare the Brief, WordPerfect 9.0.
5. The floppy disk filed with this Substitute Brief contains a complete copy of Respondent's Substitute Brief. The disk has been scanned for viruses and is virus free.
6. The undersigned does certify that two copies of Respondent's Substitute Brief and a virus free disk containing said Substitute Brief were mailed by U.S. First Class Mail, postage prepaid, to: David G. Waltrip and Jonathan K. Glassman, 8000 Maryland, Suite 600, St. Louis, Missouri, 63105, by depositing same in the U.S. Mail on or before 5:00 p.m. on October 4, 2006.

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APPENDIX

Findings of Fact, Conclusions of Law and Judgment of Dissolution of Marriage [sic],
dated December 7, 2004 A-1

Judgment Amending Judge of Modification Entered on December 7, 2004,
dated March 10, 2005 A-9

Mo. Rev. Stat. § 452.355 A-11

Mo. Rev. Stat. § 452.400 A-12

Mo. Rev. Stat. § 452.410 A-16