IN THE
MISSOURI SUPREME COURT

IN RE THE MARRIAGE OF	)	
	)	
MARK RUSSELL,	)	
	)	
Appellant,	)	
	)	
vs.	)	Supreme Court No. SC 87917
	)	
KIMBERLY RUSSELL,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY
ELEVENTH JUDICIAL CIRCUIT
FAMILY COURT DIVISION
THE HONORABLE GRACE M. NICHOLS

SUBSTITUTE BRIEF OF APPELLANT MARK RUSSELL

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JURISDICTIONAL STATEMENT

Appellant brings this Appeal from a Judgment of Dissolution of Marriage modifying a prior Judgment of Dissolution of Marriage, entered December 7, 2004, and amended March 10, 2005, by The Honorable Grace Nichols in the 11th Judicial Circuit of Missouri. (L.F. 72, 82) Appellant alleges the trial court erred in its statement and application of Missouri domestic relations law in the aforesaid Judgment, and that the aforesaid Judgment is against the weight of the evidence.

Appellant filed his Notice of Appeal on March 18, 2005. (L.F. 84) Upon timely filing of the Notice of Appeal and in the absence of any issues within the exclusive jurisdiction of the Missouri Supreme Court, venue and jurisdiction lay with the Missouri Court of Appeals, Eastern District. The Court of Appeals rendered its decision on August 8, 2006, which affirmed the trial court's judgment in part, reversed the trial court's judgment in part, and transferred the case to the Missouri Supreme Court. Therefore, the Missouri Supreme Court properly has jurisdiction of this case.

STATEMENT OF FACTS

All references to the Legal File are preceded by an "L.F." and, where applicable, the paragraph number will be preceded by a "¶" symbol, *e.g.* (L.F. XX ¶YY). All references to the Transcript are preceded by a "T." and designated by page and line number separated by a colon, *e.g.* (T. XX:YY). References to Exhibits are preceded by a "Pet. Ex." for Petitioner's Exhibits and a "Resp. Exh." for Respondent's Exhibits.

Appellant/Respondent below Mark Russell will be referred to as "Father" and Respondent/Petitioner below Kimberly Russell will be referred to as "Mother."

The parties' marriage was dissolved on June 6, 2000. (L.F. 1) The parties have one daughter, Jordan Nichole Russell, born July 24, 1997. (L.F. 2) The trial court awarded the parties joint legal and physical custody, with Father receiving overnight custodial periods every weekend from Friday at 6:00 p.m. to Monday at 11:00 a.m., with exceptions for holidays and special days. (L.F. 3 – 5) Father was also awarded custody for one-half of the summer vacation. (L.F. 5) Father was ordered to pay Child Support in the amount of $449.00 per month. (L.F. 21)

Mother filed a Motion to Modify on March 1, 2004, claiming that: (1) Father had failed to exercise periods of temporary custody; (2) Father's income had risen and Mother's expenses had risen substantially; (3) Mother needed the parties' tax exemption; (4) Father had agreed to pay *all* of the private schooling costs for Jordan and was now refusing to pay; (5) Mother was a fit parent; and (5) Mother required an award of attorney's fees. (L.F. 22 – 24) (emphasis added)

The trial court conducted a hearing on this matter on November 3, 2004. (L.F. 72) At the hearing Mother testified that the parties' original custodial schedule was planned around her working weekends, but in August of 2002 (18 months before bringing the Motion to Modify) she switched to a traditional full-time schedule. (T. 6:5-23; 9:13-21) Mother requested that the custodial schedule be modified so that she would have custody of Jordan on alternate weekends, with Father exercising custody from Sunday evening to Monday morning on those weekends when Mother had custody of Jordan. (T. 14:18 – 15:18)

Mother claimed Father had promised to pay one-half of Jordan's parochial education expenses, and asked that the Court order him to do so. (T. 18:1-20) Mother stated that she misplaced the letter Father had signed containing this promise, and that she had also misplaced the computer copy of the document. (T. 32:25 – 33:8) Father testified that he had signed a letter, but by its terms it only applied to kindergarten. (T. 138:4-12) Mother also requested that the Court allow her to claim Jordan as an income tax exemption every year, and acknowledged that she had previously so claimed Jordan in violation of her original Judgment of Dissolution of Marriage, which allowed each party to claim Jordan as an exemption in alternating years. (T. 21:17 – 22:2, 51:10-14)

Mother testified that she is employed at Gateway Medical Research, earning $16.00 per hour base pay and $17.00 per hour as a phlebotomist. (T. 40:2-20) Mother testified that she earned overtime pay of $263.08 and bonus pay of $720.00 in the first quarter of 2004. (T. 43:9-18) In the second quarter of 2004, after filing her Motion to Modify, Mother's overtime pay dropped to $183.00 and she earned a bonus of $765.00. (T. 43:23 – 44:6)

Mother's proposed Form 14s did not include phlebotomist pay, overtime, or bonus income in her gross income calculation. (T. 45:14 – 46:2, Pet. Exh. 2, Pet. Exh. 3) The parties agreed on Father's gross income. (Pet. Exh. 2, Pet. Exh. 3, Resp. Exh. H) Mother testified that Father did not owe her Child Support, and she is paid when due. (T. 51:15 – 52:5)

Mother testified that Father exercised custody every weekend except his National Guard drill weekends from June 6, 2000, until he was deployed to Kosovo in February, 2003. (T. 61:10-18) Mother testified that since Father has returned from said deployment he has exercised every period of temporary custody with Jordan. (T. 62:24 – 63:3)

Father testified that in his role with the National Guard, he was deployed to Kosovo beginning in March 1, 2003. (T. 82:1-6) While he was on leave, Father returned to St. Louis and spent his 10 days with his daughter, despite Mother's contention that Father took a trip to Las Vegas during that time. (T. 83:23 – 84:25) Father testified that from 2000 until 2002 he did not have a copy of his Judgment of Dissolution, and up until that time he thought his custody was only every single weekend, and did not include extra time during the summer. (T. 89:4-25) Upon reviewing a calendar, Father testified that he had custody of Jordan from June 13 to June 26, 2004, July 11 to July 24, 2004, and August 8 to August 17, 2004. (T. 106:23-25, 107:11-13, 109:23 – 110:7, Resp. Exh. K) Father testified he is entitled to 165 days of temporary custody under the parties' original Judgment of Dissolution. (T. 117:2-3)

Father testified that, based upon his income and Mother's gross income (including overtime, bonus pay and phlebotomist pay), and with various adjustments to Line 11 of Form 14, his presumed Child Support Payments would be $325.00 with a Line 11 adjustment of

34%, $420.00 with a Line 11 adjustment of 25% and $525.00 with a Line 11 adjustment of 15%. (T. 120:20 – 121:20; Resp. Exhs. H, I, J)

Father testified that he thought the Modification was not in Jordan's best interests as it would upset her routine, and that he allows Mother to have custody of Jordan on weekends when there is an important event. (T. 131:21 – 132:25)

The trial court entered its Judgment on December 7, 2004. (L.F. 72 – 79) The trial court found that: (1) the parties had agreed on sending Jordan to parochial kindergarten, but there was no agreement beyond that; (2) parochial education was not necessary; (3) that the tax exemption should not be modified; (3) it was not necessary to include Mother's overtime or bonus pay in her gross income; and (4) Mother earned $16.00 per hour for her wages. (L.F. 72– 75)

The trial court concluded as a matter of law that: (1) Father and Mother had joint physical custody, but a modification of custody did not require analysis pursuant to RSMo. §452.410 unless the modification was "drastic" and a non-drastic modification of physical custody amounted to merely a modification of visitation; (2) there was sufficient evidence to justify a change in child support and that said change could be made retroactive to the date of filing; (3) Father had a better financial ability to pay a portion of Mother's attorney's fees; (4) it was not necessary to include costs of private education in calculating child support; and (5) the original judgment should not be modified regarding the parties' income tax exemption for Jordan. (L.F. 76 – 77) The trial court modified Father's custodial time with Jordan by removing Friday overnights and granting him custody beginning on Saturday mornings at

9:00 a.m., and awarding Mother one full weekend of custody per month. The trial court also increased 's child support obligation from $449.00 per month to $623.00 per month, and ordered Father to pay $1,000.00 of Mother's attorney's fees. (L.F. 77– 78)

Father appealed the judgment of the trial court to the Missouri Court of Appeals, Eastern District. The Eastern District affirmed the judgment of the trial court in part, reversed the judgment of the trial court in part and transferred the cause to the Missouri Supreme Court. This appeal follows.

POINTS RELIED UPON

I.

THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED MISSOURI LAW REGARDING CHILD CUSTODY BY APPLYING THE WRONG STATUTE TO DETERMINE IF MODIFICATION OF PHYSICAL CUSTODY WAS APPROPRIATE AS IT APPLIED THE LAW REGARDING MODIFYING VISITATION TO MODIFICATION OF CUSTODY AND, IN THE ALTERNATIVE, ITS JUDGMENT WAS AGAINST THE WEIGHT OF THE EVIDENCE REGARDING WHETHER THE CHANGE IN CUSTODY WAS "DRASTIC" AS THE TRIAL COURT FAILED TO CONSIDER A REDUCTION OF FATHER'S OVERNIGHT CUSTODY BY NEARLY THIRTY-THREE PERCENT TO BE "DRASTIC"; AND IN THE ALTERNATIVE, THE MODIFICATION WAS AGAINST THE WEIGHT OF THE EVIDENCE AND NOT JUSTIFIED BY THE EVIDENCE AS THE RESULTING SCHEDULE WAS NOT IN THE CHILD'S BEST INTERESTS AS TAKING AWAY FATHER'S FRIDAY NIGHT VISITATION WOULD WORK A HARDSHIP ON THE CHILD AND THE PARENTS.

A. THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED MISSOURI LAW BY RELYING UPON RSMo. §452.400, WHICH APPLIES TO VISITATION, TO DETERMINE THE NEED FOR CUSTODIAL MODIFICATION AS A COURT MUST APPLY RSMo. §452.410 TO DETERMINE WHETHER A CASE MEETS THE THRESHOLD REQUIREMENTS FOR MODIFYING CUSTODY, WHETHER SAID MODIFICATION IS "DRASTIC" OR NOT.

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

Walker v. Walker, 184 S.W.3d 629 (Mo.App. S.D. 2006)

RSMo. §452.375

RSMo. §452.400

RSMo. §452.410

Rule 84.14

B. THE TRIAL COURT'S JUDGMENT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIED THE LAW AS THE CHANGE IN CUSTODY WAS "DRASTIC" AND THEREFORE REQUIRED APPLICATION OF RSMo. §452.410.1 TO DETERMINE IF MODIFICATION OF CUSTODY WAS APPROPRIATE.

Babbitt v. Babbitt, 15 S.W.3d 787 (Mo.App. S.D. 2000)

RSMo. §452.410

Rule 84.14

C. THE TRIAL COURT'S MODIFICATION WAS AGAINST THE WEIGHT OF THE EVIDENCE AND NOT JUSTIFIED BY THE EVIDENCE AS THE RESULTING SCHEDULE WAS NOT IN THE CHILD'S BEST INTERESTS AS TAKING AWAY FATHER'S FRIDAY NIGHT VISITATION WOULD SERVE AS A HARDSHIP ON THE CHILD AND THE PARENTS.

Humphrey v. Humphrey, 888 S.W.2d 342 (Mo.App. E.D. 1994)

RSMo. §452.400

Rule 84.14

II.

THE TRIAL COURT'S DECISION TO MODIFY CHILD SUPPORT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE, AND ERRONEOUSLY APPLIES THE LAW IN DETERMINING

THERE HAS BEEN A TWENTY PERCENT CHANGE IN FATHER'S CHILD SUPPORT AS THE TRIAL COURT FAILED TO PROPERLY CALCULATE MOTHER'S INCOME AND FAILED TO MAKE THE PROPER ADJUSTMENT FOR FATHER'S CUSTODIAL PERIODS.

A. THE TRIAL COURT'S CALCULATION OF MOTHER'S INCOME IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS AGAINST THE WEIGHT OF THE EVIDENCE AS THE TRIAL COURT FAILED TO CONSIDER MOTHER'S ADDITIONAL WAGES, OVERTIME, AND BONUS INCOME IN ITS CALCULATION.

Speer v. Colon, 155 S.W.3d 60 (Mo. banc 2005)

Rogers v. Rogers, 93 S.W.3d 852 (Mo.App. E.D. 2003)

Rothfuss v. Whalen, 812 S.W.2d 232 (Mo.App. E.D. 1991)

Appling v. Appling, 156 S.W.3d 454 (Mo.App. E.D. 2005).

Rule 84.14

B. TRIAL COURT ERRED IN NOT GRANTING FATHER AN APPROPRIATE ADJUSTMENT TO HIS CHILD SUPPORT FOR PERIODS OF OVERNIGHT CUSTODY, AS FAILING TO GRANT APPELLANT AN ADJUSTMENT ABOVE TEN PERCENT IS AN ABUSE OF THE COURT'S DISCRETION.

Rule 84.14

III.

THE TRIAL COURT ERRED IN AWARDING MOTHER'S ATTORNEY'S FEES AS

MOTHER EARNS SUFFICIENT INCOME TO PAY HER ATTORNEY AND THE TRIAL COURT'S DECISION IS AN ABUSE OF DISCRETION.

Meservey v. Meservey, 841 S.W.2d 240 (Mo.App. W.D. 1992)

RSMo. §452.355

Rule 84.14

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED MISSOURI LAW REGARDING CHILD CUSTODY BY APPLYING THE WRONG STATUTE TO DETERMINE IF MODIFICATION OF PHYSICAL CUSTODY WAS APPROPRIATE AS IT APPLIED THE LAW REGARDING MODIFYING VISITATION TO MODIFICATION OF CUSTODY AND, IN THE ALTERNATIVE, ITS JUDGMENT WAS AGAINST THE WEIGHT OF THE EVIDENCE REGARDING WHETHER THE CHANGE IN CUSTODY WAS "DRASTIC" AS THE TRIAL COURT FAILED TO CONSIDER A REDUCTION OF FATHER'S OVERNIGHT CUSTODY BY NEARLY THIRTY-THREE PERCENT TO BE "DRASTIC."

In a custody modification case, the appellate court will affirm the trial court's judgment "if the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law." Speer v. Colon, 155 S.W.3d 60, 61 (Mo. banc 2005) (Internal citations omitted). Appellant contends that the trial court erred by (a) erroneously declaring and applying Missouri Law by using the wrong statute to determine whether modification of custody was justified and (b) declaring, against the manifest weight of the evidence, that its modification of custody was not a "drastic" one.

A. THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED

MISSOURI LAW BY RELYING UPON RSMo. §452.400, WHICH APPLIES TO VISITATION, TO DETERMINE THE NEED FOR CUSTODIAL MODIFICATION AS A COURT MUST APPLY RSMo. §452.410 TO DETERMINE WHETHER A CASE MEETS THE THRESHOLD REQUIREMENTS FOR MODIFYING CUSTODY, WHETHER SAID MODIFICATION IS "DRASTIC" OR NOT.

In a custody modification case, the appellate court will affirm the trial court "if the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law." Speer v. Colon, 155 S.W.3d 60, 61 (Mo. banc 2005) (Internal citations omitted).

In Paragraphs 1 and 2 of its Conclusions of Law, the trial court stated the following:

> **That since the entry of the Judgment there has been a change of circumstances so as to make the original physical custody arrangement of the parties not in the child's best interest, therefore weekend visitation for Respondent should be changed to Saturday at 9:00 a.m. every weekend except one weekend per month in that it would be in the best interest of the child as testified to by the parties that each parent have some time during the week or weekend when they can have interaction with the child when not required to work and the child is not required to attend school. Such modification of the physical custody schedule is not a**

> **"drastic" change and therefore, to modify the physical custody merely needs to find that the modification would be in the best interest of the child, which the Court so finds. Baker, 77 S.W.3d 711.**
>
> **In the case at bar, the law does not require a showing of a substantial and continuing change of circumstances to make said modification in the physical custody. Baker v. Welborn, Supra.** (L.F. 76, ¶1, 2) (Emphasis added)

The trial court erroneously stated and applied the law, as the law requires a showing of a "substantial and continuing change of circumstances" before a court may modify physical custody, regardless of whether or not a change is "drastic."

It is well established under Missouri law that joint physical custody does not require that the child or children spend an equal amount of time with each parent. "Joint physical custody does not require an equal amount of time each parent." Stewart v. Stewart, 988 S.W.2d 622, 624 (Mo.App. W.D. 1999); Tilley v. Tilley, 968 S.W.2d 208, 213 (Mo.App. S.D. 1998); Emig v. Curtis, 117 S.W.3d 174, 179 (Mo.App. W.D. 2003). "When the court orders significant periods of time where the child is under the care and supervision of each parent, the award is one of joint physical custody, regardless of how the court characterizes it." Wood v. Wood, 193 S.W.3d 307, 311 (Mo.App. E.D. 2006).

The Missouri Court of Appeals, Eastern District has consistently looked to the language of RSMo. §452.375.3 to justify a specific, fact-based inquiry to determine whether

parties share physical custody.[1] LaRocca v. LaRocca, 135 S.W.2d 522, 525 (Mo.App.E.D. 2004); Malawey v. Malawey, 137 S.W.2d 518, 524 (Mo.App. E.D. 2004) . The Court in LaRocca found that an award granting the parents a 57% to 43% split of time spent with the child amounted to an award of joint physical custody. LaRocca, 135 S.W.2d at 526. Likewise, in Nichols v. Ralston, 929 S.W.2d 302, 303 (Mo.App. S.D. 1996), an arrangement granting the father care of the child for approximately 20 percent of the year was held to be joint physical custody as opposed to visitation.

It is also well established under Missouri law that joint physical custody and visitation

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[1] "**'Joint physical custody'** means an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents. Joint physical custody shall be shared by the parents in such a way as to assure the child of frequent, continuing and meaningful contact with both parents." RSMo. §452.375.3 (2004)

are mutually exclusive rights. "If a parent is awarded sole physical custody, the other parent is awarded visitation; if both parents have joint physical custody, neither parent is awarded visitation." Alberswerth v. Alberswerth, 184 S.W.3d 81, 88, n.3 (Mo.App. W.D. 2006). Loumiet v. Loumiet, 103 S.W.3d 332, 337-38 (Mo.App. W.D. 2003), provides that:

> where the parties are awarded joint physical custody, there is no visitation schedule, only a joint physical custody schedule; and conversely, where one parent is awarded sole custody, there is not a joint custody schedule, only a visitation schedule setting forth periods of time the child is to reside with the other parent, the remaining time reserved to the sole physical custodian, unless third-party custody under §452.375.1(4) dictates otherwise.

"[B]y definition, visitation is ordered where sole physical custody is awarded to a parent; not under a joint physical custody plan." Timmerman v. Timmerman, 139 S.W.3d 230, 234 (Mo.App. W.D. 2004). Appellate courts in numerous sister states have also held that only non-custodial parents may exercise visitation rights, indicating that custody and visitation are mutually exclusive rights.[2]

[2]Willing v. Willing, 655 So.2d 1064, 1066 (Ala. Civ. App. 1995); Andrews v. Andrews, 520 So.2d 512, 513 (Ala. Civ. App. 1987); In re Marriage of Edlund, 78 Cal.Rptr.3d 671, 684 (Cal. Ct. App. 1998); In re Marriage of Brophy, 421 N.E.2d 1308,

1311 (Ill. App. Ct. 1981); In re Marriage of Toedter, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991); LeBouef v. LeBouef, 325 So.2d 290, 292 (La. Ct. App. 1975); North v. North, 648 A.2d 1025, 1032 (Md. Ct. Spec. App. 1994); Digatono v. Digatono, 414 N.W.2d 498, 502 (Minn. Ct. App. 1987); Caldwell v. Caldwell, 579 So.2d 543, 549 (Miss. 1991); Gerber v. Gerber, 407 N.W.2d 497, 502-03 (Neb. 1987); Walters v. Walters, 673 N.W.2d 585, 589 (Neb. Ct. App. 2004); Zarou v. Levine, 627 N.Y.S.2d 790, 791 (N.Y. App. Div. 1995); Hendrickson v. Hendrickson, 590 N.W.2d 220, 222-23 (N.D. 1999); Pettry v. Pettry, 486 N.E.2d 213, 215 (Ohio Ct. App. 1984); Nauman v. Nauman, 320 N.W.2d 519, 521 (S.D. 1982); Ebbert v. Ebbert, 744 P.2d 1019, 1022 (Utah Ct. App. 1987); Cleverly v. Cleverly, 561 A.2d 99, 101 (Vt. 1989); Vissicchio v. Vissicchio, 489 S.E.2d 425, 431 (Va. Ct. App. 1998).

Under Missouri law, visitation may be modified upon a showing that "modification would serve the best interests of the child," without any finding of substantial changed circumstances. Malawey,137 S.W.2d at 524 citing, RSMo.§452.400.2.

In order to modify a custody decree, however, RSMo. §452.410.1 (2004) requires that a court must find, based upon facts arising since the prior decree, "that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child." RSMo. §452.410 (2004). "The plain language of section 452.410.1 provides no exception to the requirement that a moving party, any moving party, who seeks to modify a custody order must first establish that a substantial 'change in circumstances of the child or his custodian' has occurred." Searcy v. Seederoff, 8 S.W.3d 113, 117 (Mo. banc 1999); LaRocca, 135 S.W.3d at 525; Malawey, 137 S.W.3d at 524. A party seeking modification of child custody has the burden of proving a substantial change in circumstances and that a modification is in the best interests of the child. Walker v. Walker, 184 S.W.3d 629, 632 (Mo.App. S.D. 2006). Appellate courts in numerous sister states have also held that in order to modify a custody decree, the party seeking to modify the decree has the burden of establishing that a substantial change in circumstances has occurred, such that modification in the child's best interests. Bazan v. Gambone, 924 So.2d 952, 955 (Fla. Dist. Ct. App. 2006), provides that not only is a substantial change in circumstances required to modify a custody decree, but in addition, "the substantial change must be one that was not reasonably contemplated at the time of the original judgment." Bazan also provides that the substantial change test "promotes the finality of the judicial determination of the custody of

children." Id. at 956.[3]

[3] *See Also* In re Marriage of Burgess, 913 P.2d 473, 481-82 (Cal. 1996); Wade v. Hirschman, 903 So.2d 928, 932 (Fla. 2005) (substantial change test applies to all custody modification agreements unless the judgment otherwise provides for the standard that should be applied for modification); Morales v. Morales, 915 So.2d 247, 249 (Fla. Dist. Ct. App. 2005); Higginbotham v. Higginbotham, 822 N.E.2d 609, 611 (Ind. Ct. App. 2004); Westenberger v. Westenberger, 813 N.E.2d 343, 345-46 (Ind. Ct. App. 2004); Apter v. Ross, 781 N.E.2d 744, 758 (Ind. Ct. App. 2003); Van Schoyck v. Van Schoyck, 661 N.E.2d 1, 5 (Ind. Ct. App. 1996); In re Marriage of Malloy, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004); In re Marriage of Walton, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998); In re Marriage of Garvis, 411 N.W.2d 703, 705 (Iowa Ct. App. 1987); In re Marriage of Stanley, 411 N.W.2d 698, 700 (Iowa Ct. App. 1987); Beasley v. Beasley, 913 So.2d 358, 360 (Miss. Ct. App. 2005); Johnson v. Johnson, 913 So.2d 368, 370 (Miss. Ct. App. 2005); Pierce v. Chandler, 855 So.2d 455, 457 (Miss. Ct. App. 2003); Voit v. Voit, 721 A.2d 317, 326 (N.J. Super Ct. Ch. Div. 1998); Brady v. Schermerhorn, 810 N.Y.S.2d 230, 231 (N.Y. App. Div. 2006); Mathis v. Parkhurst, 805 N.Y.S.2d 155, 156 (N.Y. App. Div. 2005); Musgrove v. Bloom, 797 N.Y.S.2d 161, 162 (N.Y. App. Div. 2005); Carey v. Kimball, 790 N.Y.S.2d 276, 277 (N.Y. App. Div. 2005); Anderson v. Anderson, 791 P.2d 116, 117 (Okla. Ct. App. 1990); Barclay v. Barclay, 533 A.2d 143, 144 (Pa. Super. Ct. 1987) (party seeking modification has burden to prove substantial change even if prior

custody order was entered into by agreement of the parties); In re J.R.D.,169 S.W.3d 740, 742 (Tex. App. 2005); Greene v. Hahn, 689 N.W.2d 657, 664 (Wis. Ct. App. 2004); Rogers v. Rogers, 973 P.2d 1118, 1122 (Wyo. 1999).

The first step, therefore, is determining whether the parties' original Judgment of Dissolution of Marriage awarded the parties joint physical custody, or awarded Mother sole physical custody and Father periods of visitation. As the trial court in this case correctly noted, the parties' Judgment of Dissolution of Marriage awarded the parties joint physical custody. This determination is consistent with Missouri law.

In the present case, the parties' original Custody Decree awarded Father the care of the parties' child for three overnight periods every week, exclusive of summer vacation and holidays, along with a minimum of four weeks of care in the summer and the appropriate holidays. (L.F. 2 – 5) Assuming a minimum summer break of 10 weeks, resulting in 5 weeks of continuous care and 42 weekends of care with three periods of overnight care, Father had approximately 165 periods of overnight care per year, or about 45.20% of the year. In addition, the unrebutted trial testimony of Father and his girlfriend Rhonda O'Toole was that Father had about 165 periods of overnight care per year. (T. 90: 22-23; 117:1-2; 182:9-14) Such periods of care, viewed in light of this Court's decision in LaRocca, must therefore be categorized as custody as opposed to visitation. Therefore, the Court was required to find a substantial change of circumstances, pursuant to RSMo. §452.410.1, before modifying the parties' custodial arrangements with their child.

The trial court, however, followed Baker v. Wellborn, 77 S.W.3d 711, 718 (Mo.App. S.D. 2002), and stated that even if the parties do share physical custody, a court modifying the Judgment of Dissolution need not apply the standards of RSMo. §452.410.1 unless the custody scheme is altered "drastically." (L.F. 76, ¶1, 2) As recognized by the Western

District, however, such a decision turns the adjudication process on its head, delaying the determination over the applicable standard of proof until after the evidence has all been heard. Timmerman, 139 S.W.3d at 235. "No rule that leaves the determination of the standard of proof until the end of the case is practical or sensical." Id. Parties would be forced to select what standard of proof they must meet by guessing the extent to which the Court will modify the terms of the Judgment of Dissolution of Marriage before any testimony is heard or evidence presented. For all of these reasons, this Court should reject the Southern District's decision in Baker and categorize periods of overnight care as either custody or visitation based solely upon examination of the original Judgment of Dissolution of Marriage.

"When a trial court does not find a substantial change of circumstances, it never reaches the best interests issue." Walker, 184 S.W.3d at 632. "[U]nless the trial court finds the requisite substantial change of circumstances, it never reaches the best interests issue." Wood v. Wood, 94 S.W.3d 397, 405 (Mo.App. W.D. 2003).

Because Father's Judgment of Dissolution of Marriage provided him with joint physical custody of his child, and because RSMo. §452.410.1 requires a showing of a substantial change of circumstances before custody can be modified, the trial court's declaration that such a finding was not necessary to modify custody and its application of RSMo. §452.400 to justify modifying the parties' custodial arrangement was in error. This Court should therefore reverse the decision of the trial court and remand this matter to the trial court with instructions to apply RSMo. §452.410.1 in determining whether modification

is appropriate or necessary. Rule 84.14.

B. THE TRIAL COURT'S JUDGMENT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIED THE LAW AS THE CHANGE IN CUSTODY WAS "DRASTIC" AND THEREFORE REQUIRED APPLICATION OF RSMo. §452.410.1 TO DETERMINE IF MODIFICATION OF CUSTODY WAS APPROPRIATE.

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In Paragraphs 1 and 2 of its Conclusions of Law, the trial court stated the following:

> **That since the entry of the Judgment there has been a change of circumstances so as to make the original physical custody arrangement of the parties not in the child's best interest, therefore weekend visitation for Respondent should be changed to Saturday at 9:00 a.m. every weekend except one weekend per month in that it would be in the best interest of the child as testified to by the parties that each parent have some time during the week or weekend when they can have interaction with the child when not required to work and the child is not required to attend school. Such modification of the physical custody schedule is not a**

> **"drastic" change and therefore, to modify the physical custody merely needs to find that the modification would be in the best interest of the child, which the Court so finds. Baker, 77 S.W.3d 711.**
>
> **In the case at bar, the law does not require a showing of a substantial and continuing change of circumstances to make said modification in the physical custody. Baker** (L.F. 76, ¶1, 2) (Emphasis added)

The trial court's Judgment was against the weight of the evidence and erroneously declared the law, as the reduction in Mother's periods of overnight custody were severe enough to be considered "drastic" and therefore the original Judgment of Dissolution of Marriage could not be modified without a threshold showing of a substantial change of circumstances as required by RSMo. §452.410.1.

The trial court cited Baker v. Wellborn, 77 S.W.3d 711 (Mo.App. S.D. 2002) as supporting its failure to consider whether there was a substantial change in circumstances before modifying the parties' custodial arrangements. Under Baker v. Wellborn, the inquiry as to whether periods of overnight childcare amount to visitation or custody requires an initial determination of the type of arrangements the parties have, and then an examination of whether the modification of that arrangement is a "drastic" one, before any definitive decision can be made as to whether custody or visitation is being modified. Id. at 718. In the present case, the trial court determined that reduction of Father's custodial periods with his child by

approximately 50 overnight days a year was not a "drastic" reduction. (L.F. 76, ¶1, 2) Such a determination is clearly an erroneous application of the law and against the manifest weight of the evidence.

As previously mentioned, under the terms of the parties' Dissolution of Marriage Father had approximately 165 annual periods of overnight custody, amounting to 45.2% of the year. (T. 90: 22-23; 117:1-2; 182:9-14) After the trial court's modification, Father would have approximately 115 nights of overnight custody, or 31.5% of the year. The trial court's decision effectively deprived Father of approximately 50 days of overnight custody per year, nearly one-third of his approximately 165 original days of custody. Appellant is at a loss as to how this reduction can be described as anything but "drastic."

In Babbitt v. Babbitt, 15 S.W.3d 787, 789 (Mo.App. S.D. 2000), the trial court eliminated approximately 42 overnight periods of the Father's custody of the child per year. Babbitt held that the trial court erroneously treated the Father's summertime custody of the child as visitation. Id. at 790. Babbitt concluded that "the trial court misapplied the law and committed reversible error" by modifying the joint custody plan and eliminating 42 overnight periods of the Father's custody of the child per year "without considering whether a substantial change in circumstances had occurred." Id. at 791.

The present case is on point with Babbitt. The elimination of approximately 50 overnight periods of Father's custody per year is such a significant change in Father's custody, that Mother had the burden of proving a substantial change in circumstances in order for the trial court to make a custody modification of this magnitude.

Because Appellant's Judgment of Dissolution of Marriage provided him with joint physical custody of his child, and because the trial court's modification of his periods of overnight custody was a "drastic" change, RSMo. §452.410.1 requires a showing of a substantial change of circumstances before custody can be modified. The trial court's declaration that its actions did not constitute a "drastic" change erroneously applied the law and is against the weight of the evidence. The trial court's actions clearly amount to a modification of custody pursuant to RSMo. §452.410.1. This Court should therefore reverse the decision of the trial court and remand this matter with instructions to apply RSMo. §452.410.1 in determining whether modification is appropriate or necessary. Rule 84.14.

C. THE TRIAL COURT'S JUDGMENT WAS AGAINST THE WEIGHT OF THE EVIDENCE AND NOT JUSTIFIED BY THE EVIDENCE AS THE RESULTING SCHEDULE WAS NOT IN THE CHILD'S BEST INTERESTS AS TAKING AWAY FATHER'S FRIDAY NIGHT VISITATION WOULD SERVE AS A HARDSHIP ON THE

CHILD AND THE PARENTS.

Should this Court determine that the trial court's December 7, 2004 Judgment modified visitation, and not custody, and therefore the court applied the proper standard, the trial court's Judgment still is against the weight of the evidence and not supported by the evidence. In a custody modification case, the appellate court will affirm the trial court "if the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law." Speer v. Colon, 155 S.W.3d 60, 61 (Mo. banc 2005) (Internal citations omitted) Visitation may be modified upon a showing that "modification would serve the best interests of the child,"without any finding of substantial changed circumstances. Malawey v. Malawey, 137 S.W.2d 518, 524 (Mo.App. E.D. 2004) citing, RSMo.§452.400.2.

"Children should not be moved from one environment to another upon slight changes of status of the parents." Humphrey v. Humphrey, 888 S.W.2d 342, 345 (Mo.App. E.D. 1994); Wilson v. Wilson, 873 S.W.2d 667, 670 (Mo.App. E.D. 1994); Clark v. Clark, 805 S.W.2d 290, 295 (Mo.App. E.D. 1991). "It is only where the changes are such that the welfare of the children requires it that custody should be transferred." Clark, 805 S.W.2d at 295.

In the present case, the slight change in Father's work schedule does not require a custody modification. Father's new work schedule overlapping with a few hours of his custodial periods with Jordan is certainly not the type of change where Jordan's welfare requires that custody be modified.

Furthermore, The custodial plan contained in the trial court's December 7, 2004 Judgment is simply not in Jordan's best interests. In its Judgment, the trial court removed Father's periods of Friday night custody, reasoning that because of his work schedule he was unable to spend time with Jordan anyway, and moved the transfer of custody to 9:00 a.m. Saturday morning. (L.F. 74 ¶9, 77, ¶1) This decision is not in the child's best interest for several reasons.

First, as already mentioned, the trial court's custody modification deprives Jordan of one night with her father, reducing the time spent with him by nearly one-third. Given Father's work schedule, there is no time to make this up during the week. Second, it will force Jordan and her parents to effect a custodial transfer early Saturday morning, disrupting potential travel plans, cutting short time for breakfast, possibly conflicting with other activities, removing any chance for Jordan to sleep in on a morning not reserved for school or worship. Third, it will remove nearly one-third of Jordan's mornings with her father and his family, with whom she has become close, together. Fourth, it will deprive her of a set pattern to which she has been accustomed for nearly five years. Finally, it will deprive her of time with her aunt, with whom she has also become close. (T. 131:10 – 132:22; 134:14 – 135:13; 179:12 – 181:1)

For the foregoing reasons, the trial court's decision removing Friday night custody from Father was against the weight of the evidence and was not supported by the evidence. Such action was clearly not in Jordan's best interest. Therefore, this Court should reverse the trial court's Judgment and remand this matter to the trial court for further proceedings with

instructions to reinstate Father's periods of Friday night custody. Rule 84.14

POINT II.

THE TRIAL COURT'S DECISION TO MODIFY CHILD SUPPORT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE, AND ERRONEOUSLY APPLIES THE LAW IN DETERMINING THERE HAS BEEN A TWENTY PERCENT CHANGE IN FATHER'S CHILD SUPPORT AS THE TRIAL COURT FAILED TO PROPERLY CALCULATE MOTHER'S INCOME AND FAILED TO MAKE THE PROPER ADJUSTMENT FOR FATHER'S CUSTODIAL PERIODS.

In a custody modification case, the appellate court will affirm the trial court "if the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law." Speer v. Colon, 155 S.W.3d 60, 61 (Mo. banc 2005) (internal citations omitted) Furthermore, an award of child support is within the sound discretion of the trial court and an appellate court will not substitute its judgment for the trial court's absent a manifest abuse of discretion, nor will it disturb a child support award unless "the evidence is 'palpably insufficient' to support it." Krost v. Krost, 133 S.W.3d 117, 118 (Mo.App. E.D. 2004)

A child support award may be modified only upon the movant showing changed circumstances so substantial and continuing as to make the terms of the original decree unreasonable. Drury v. Racer, 17 S.W.3d 608, 611 (Mo.App. E.D. 2000). The burden of proof rests with the party seeking modification, and the change must be proven by detailed evidence. Id. A party may make a prima facie showing of said changed circumstances if there has been a change of twenty percent or more in the child support amount since the last

decree. Id.

A. THE TRIAL COURT'S CALCULATION OF MOTHER'S INCOME IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS AGAINST THE WEIGHT OF THE EVIDENCE AS THE TRIAL COURT FAILED TO CONSIDER MOTHER'S ADDITIONAL WAGES, OVERTIME, AND BONUS INCOME IN ITS CALCULATION.

The trial court's judgment is not supported by substantial evidence and is against the weight of the evidence in that the trial court failed to include overtime, bonuses, or Mother's higher wage rate for phlebotomist work in calculating her income for child support purposes. The record is clear that Mother is capable of making, and has made in the past, a monthly income far in excess of the $2,773.00 figure used by the trial court. Because use of a proper income would alter the resulting child support amount, this Court should reverse and remand to the trial court for further proceedings with instructions to include overtime, bonus pay, and phlebotomist pay in any child support calculation. (Resp. Exh. H, I, J; T. 120:20 – 121:20)

Under Missouri law, a trial court is obligated to consider all sources of income in making its determination regarding child support. Pearson v. Pearson, 22 S.W.3d 734, 737 (Mo.App W.D. 2000); In re the Marriage of Chorum, 959 S.W.2d 900, 905 (Mo.App. S.D.1997). "[P]ast earnings history is indicative of present earning capacity." Thill v. Thill, 26 S.W.3d 199, 207 (Mo.App. W.D. 2000); Pearcy v. Pearcy, 193 S.W.3d 844, 847 (Mo.App. S.D. 2006).

"Occasional" sources of income are properly considered when determining net income for a child support determination. Copeland v. Copeland, 116 S.W.3d 726, 732 (Mo.App.

S.D. 2003). Trial courts should include bonuses when calculating a parents net income, provided that payment of bonuses is the employer's regular practice. Rogers v. Rogers, 93 S.W.3d 852, 853 (Mo.App. E.D. 2003). Trial courts are required to consider a history of bonuses as part of average income. Samples v. Kouts, 954 S.W.2d 593, 598 (Mo.App. W.D. 1997); Guignon v. Guignon, 579 S.W.2d 664, 667 (Mo.App. E.D. 1979). In Rothfuss v. Whalen, 812 S.W.2d 232, 240 (Mo.App. E.D. 1991), the husband had consistently received bonuses, but was diagnosed with cancer, resulting in a significant reduction in job status and time on the job. Nonetheless, the Eastern District upheld the trial court's inclusion of the husband's bonuses when determining the husband's average income. Id.

It is also well established under Missouri law that "[a] parent may not escape responsibility to his or her family by deliberately limiting his or her work to reduce income." Appling v. Appling, 156 S.W.3d 454, 459 (Mo.App. E.D. 2005).[4] "Imputed income is used

[4]*See Also* Peniston v. Peniston, 161 S.W.3d 428, 433 (Mo.App. W.D. 2005); In re Marriage of Graham, 87 S.W.3d 898, 900 (Mo.App. E.D. 2002); Williams v. Williams, 55 S.W.3d 405, 414 (Mo. App. W.D. 2001); Burton v. Donahue, 69 S.W.3d 76, 79 (Mo.App. E.D. 2001); Haden v. Riou, 37 S.W.3d 854, 861 (Mo.App. W.D. 2001); Davis v. Dep't of Soc. Serv., 21 S.W.3d 140, 141 (Mo.App. W.D. 2000); Jordan v. Jordan, 984 S.W.2d 878, 881 (Mo.App. W.D. 1999); State ex rel. Cote v. Kelly, 978 S.W.2d 812, 815 (Mo.App. S.D. 1998); Smith v. Smith, 969 S.W.2d 856, 858 (Mo.App. E.D. 1998); Stufflebean v. Stufflebean, 941 S.W.2d 844, 846 (Mo.App. W.D. 1997); Silverstein v.

to prevent a parent from escaping responsibilities to support a child or children by deliberately reducing their income." State ex rel. Stirnaman v. Calderon, 67 S.W.3d 637, 640 (Mo.App. W.D. 2002). In proper circumstances, courts will impute income to parents according to what the parent could earn by using his or her best efforts to gain employment suitable to his or her capabilities. Stufflebean v. Stufflebean, 941 S.W.2d 844, 846 (Mo.App. W.D. 1997).

At trial, the evidence and Mother's testimony proved that she receives ample overtime from her employer, totaling $263.00 in the first quarter of 2004 and $183.00 in the second quarter. (T. 43:13 – 44:17) Mother testified that the records showed she earned between $200.00 and $250.00 per quarter in overtime. Id. Furthermore, she testified that her overtime wages dipped immediately after her Motion to Modify was filed. (T. 44:18-25; 68:24 – 69:22) This testimony was evidence that Mother deliberately reduced her income by not working up to her full capabilities in order to receive more child support, and the trial court should have imputed income to Mother accordingly.

In addition, Mother testified that she earned quarterly bonuses of $750.00. (T. 44:8-14) The trial court gave credence to Mother's testimony that she would no longer pursue these bonuses if she did not sent the child to private school. (L.F. 75, ¶13) This decision constitutes an abuse of the Court's discretion and is against the weight of the evidence, as the

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Silverstein, 943 S.W.2d 300, 302 (Mo. App. E.D. 1997).

Mother has demonstrated a willingness to earn as much as possible, as demonstrated by her seeking the child support exemption every year and her decision to claim said exemption even though it was against the terms of her original decree of dissolution. (T. 52:10-13) Given these facts and the totality of the evidence, the trial court should have rejected Mother's testimony on this issue and factored in continued bonuses of a minimum of $720.00 per quarter or $240.00 per month, because giving bonuses is a regular practice of Mother's employer. Excluding bonuses from Mother's gross monthly income solely because Mother and Father decided to stop sending Jordan to private schools is against the great weight of authority on this issue. Rothfuss, 812 S.W.2d at 240; Rogers, 93 S.W.3d at 853; Samples, 954 S.W.2d at 598. Given Mother's testimony, it was clearly an abuse of the trial court's discretion to decide not to include *any* overtime or bonuses in calculating Mother's gross monthly income on its Form 14. (L.F. 75, ¶13)

Finally, the Court calculated Mother's monthly income based upon a wage of $16.00 per hour, which is not supported by the evidence and is against the weight of the evidence. (L.F. 75, ¶13) Mother herself testified that her wages are split, and she received $16.00 per hour for her recruiting work and $17.00 per hour for phlebotomist work. (T. 40:18-20) She also testified that the income figure on her Form 14 of $2,733.00 per month (adopted by the trial court) failed to take into account this higher hourly wage. (T. 45:14 – 46:2; L.F. 79) By failing to consider this additional, higher wage when drafting its own Form 14, the trial court abused its discretion, and the evidence regarding Mother's income is palpably insufficient to support the trial court's award. Had the proper wage been included, along with a proper

adjustment provided in Line 11 (discussed in point II.B. *supra*), Mother would not have made a prima facie showing of a 20% change in child support amounts. (Resp. Exh. H, I, J)

The trial court's decision to exclude overtime, bonus pay, and a higher per hour phlebotomist's wage in Mother's monthly income when completing its Form 14 was not supported by substantial evidence, is against the weight of the evidence, and constitutes and abuse of discretion. Furthermore, the evidence is palpably insufficient to support the trial court's eventual Child Support award based upon the trial court's decision to ignore Mother's $17.00 per hour phlebotomist wage. Therefore, this Court should reverse the trial court's Judgment and remand this matter to the trial court for further proceedings with instructions to include overtime, bonus pay, and phlebotomist pay in any child support calculation in order to determine whether the requisite twenty percent prima facie change in child support threshold has been met and modification of child support is appropriate. Rule 84.14

B. TRIAL COURT ERRED IN NOT GRANTING APPELLANT AN APPROPRIATE ADJUSTMENT TO HIS CHILD SUPPORT FOR PERIODS OF OVERNIGHT CUSTODY, AS FAILING TO GRANT FATHER AN ADJUSTMENT ABOVE TEN PERCENT IS AN ABUSE OF THE COURT'S DISCRETION.

In a custody modification case, the appellate court will affirm the trial court "if the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law." Speer v. Colon, 155 S.W.3d 60, 61 (Mo. banc 2005) (internal citations omitted). Furthermore, an award of child support is within the sound discretion of the trial court and an appellate court will not substitute its judgment for the trial court's absent a manifest abuse of discretion, nor will it disturb a child support award unless "the evidence is 'palpably insufficient' to support it." Krost v. Krost, 133 S.W.3d 117, 118 (Mo.App. E.D. 2004)

A child support award may be modified only upon the movant showing changed circumstances so substantial and continuing as to make the terms of the original decree unreasonable. Drury v. Racer, 17 S.W.3d 608, 611 (Mo.App. E.D. 2000). The burden of proof rests with the party seeking modification, and the change must be proven by detailed evidence. Id. A party may make a prima facie showing of said changed circumstances if there has been a change of twenty percent or more in the child support amount since the last decree. Id.

Missouri law requires that, in calculating child support payments pursuant to Form 14, the trial court grant the parent paying support a ten percent credit in support payments on

Line 11 when that parent exercises between 92 and 109 days of temporary custody a year. Krost v. Krost, 113 S.W.3d 117, 121 (Mo.App. E.D. 2004). Should the parent paying support exercise above 109 days of custodial visits a year, an adjustment above 10% is allowed, but not mandated. Id.

In the present case, the trial court reduced Father's periods of temporary custody from approximately 165 days to 110 days per year of temporary custody. However, as discussed in Point I, *infra*, the trial court's decision arose from applying the wrong standards to determine if modifying physical custody was appropriate, and said decision was against Jordan's interests. Because that decision was in error, this matter should be reversed and remanded to the trial court for further proceedings consistent with RSMo. §452.410.1. Rule 84.14. Upon remand, Father asks that this Court instruct the trial court that Father's increased days of temporary physical custody mandate an adjustment of greater than ten percent on Line 11 of Form 14. Rule 84.14.

POINT III.

THE TRIAL COURT ERRED IN AWARDING MOTHER'S ATTORNEY'S FEES AS MOTHER EARNS SUFFICIENT INCOME TO PAY HER ATTORNEY AND THE TRIAL COURT'S DECISION IS AN ABUSE OF DISCRETION.

An award of attorney's fees by the trial court will be reversed only upon a finding of a manifest abuse of discretion. Meservey v. Meservey, 841 S.W.2d 240, 248 (Mo.App. W.D. 1992). RSMo. §452.355 (2004) governs the award of attorney's fees and costs. Under RSMo. §452.355.1 the trial court may consider factors including the financial resources of both parties in deciding to award attorney's fees. After reviewing the facts of the present case, it is clear the judgment of the trial court was not a manifest abuse of discretion.

The trial court awarded Mother the sum of $1,000.00 for attorney's fees based upon "all financial circumstances of the parties." (L.F. 78 ¶4) In making this award, however, the trial court could not have given proper consideration to Mother's ability to earn bonus pay at work. The record is clear that Mother has the capability of earning quarterly bonuses of $750.00. (T. 44:8-14) In addition, the Court recognized that Mother would no longer need this money to pay for Jordan's private school tuition. (L.F. 75 ¶13) Mother could easily pay her attorney's fees over time using this bonus money, and the parties' income is not so substantially different as to require an award of attorney's fees. Therefore the trial court's decision amount's to a manifest abuse of discretion.

This Court should therefore reverse the trial court's award of $1,000.00 in attorney's fees and costs to Mother. Rule 84.14

CONCLUSION

For the foregoing reasons, Appellant argues that the trial court erred in its Findings of Fact and Conclusions of Law and Judgment of Dissolution of Marriage by misstating and incorrectly applying the law regarding modifying custody, by issuing a Judgment which was not supported by substantial evidence and was against the weight of the evidence regarding temporary custody, by issuing a Judgment which was against the weight of the evidence regarding child support, and by abusing its discretion in awarding attorney's fees.

WHEREFORE, Appellant prays that this Court reverse the Trial Court's Findings of Fact and Conclusions of Law and Judgment of Dissolution of Marriage dated December 7, 2004 and remand the matter for reconsideration with instructions regarding the proper standard of law, the proper periods of temporary custody, the proper means of calculating Mother's income, the proper Line 11 adjustment to be used by the trial court, and an instruction to strike the award of attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH MISSOURI RULE OF CIVIL PROCEDURE 84.06 (b) and (c)

The undersigned does hereby certify that the aforegoing Appellant's Opening Brief complies with Missouri Rule 55.03 and contains the information required by same and complies with the limitations contained in Rule 84.06(b). Excluding the cover page, signature block and the certificate of service and compliance, the brief contains 9,288 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief in the Missouri Supreme Court contains a complete copy of this brief. It has been scanned for viruses and is virus-free.

The undersigned does hereby certify that a copy of Appellant's Substitute Brief, along with a copy of same contained on a double-sided, high density, IBM-PC Compatible 1.44MB, 3½ inch size, Word Perfect Format, scanned and virus free, pursuant to Missouri Rules of Civil Procedure 84.05 and 84.06, and the Appendix to the Substitute Brief, were mailed by U.S. First Class Mail, postage prepaid, to: Claude Knight, Esquire, Knight & Tomich, 118 North Main Street, P. O. Box 953, St. Charles, Missouri 63302 by depositing same in the U.S. Mail on or before 5:00 p.m. on September 15, 2006.

Jonathan K. Glassman