

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 REPLY BRIEF OF APPELLANT MARK RUSSELL

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JURISDICTIONAL STATEMENT

Appellant adopts the jurisdictional statement of Appellant's Opening Substitute Brief as if fully set forth herein.

STATEMENT OF FACTS

Appellant ("Father") adopts the Statement of Facts of Appellant's Substitute Brief as if fully set forth herein. However, Father submits that Respondent ("Mother") substantially mis-characterizes numerous facts in the Statement of Facts in the Substitute Brief of Respondent.

Mother's Statement of Facts repeatedly refers to Father's temporary custody with the minor child ("Jordan") as "visitation." (Resp't Sub.Br. 3,4). The Judgment of Dissolution Marriage, entered on June 12, 2000, plainly and unambiguously provides that Mother and Father "shall share the joint legal and physical *custody* of the parties' minor child, namely JORDAN NICHOLE RUSSELL, subject to reasonable and liberal rights of *temporary custody* in Respondent [Father], as the parties may agree[.]" (L.F. 2) (emphasis added).

Mother asserts in her statement of facts that "From the time the dissolution judgment was entered, Father was not consistent with exercising his weekend visitation. Sometimes he would pick up the child on Saturday. Sometimes he would bring her back early on Sunday." (Resp't Sub.Br. 3). There is ample evidence in the record that Father exercised his temporary custody with Jordan each and every weekend, except when he was deployed on active military duty in Kosovo. (T. 85:8-10; 98:13-20; 155:10-14; 167:10-19; 168:12-16; 169:17-19). Mother even testified on cross-examination that Jordan spent every weekend with Father. (T. 61:16-17).

Father submits that Mother is attempting to characterize the instances when Jordan spent Friday or Sunday nights with Mother as being a result of Father's unwillingness or inability to exercise his temporary custody with Jordan. There was some testimony that Jordan occasionally spent Friday and Sunday nights with Mother because Mother requested this change in Father's temporary custody and Father complied with this request. (T. 88:11-22). Mother requested that Jordan spend Sunday nights with her when she first started school so that Mother could take Jordan to school on Monday mornings and Father agreed to change his temporary custody of Jordan to accommodate Mother's request. (T. 137:14-21; 149:1-10). Jordan also had some sleepovers on Friday nights with her friends, and mother insisted that Jordan not spend these Friday nights with Father. (T. 137:2-13; 149:14-25; 150:1-7). Furthermore, the trial court's findings of fact provide that although there was disputed testimony as to the extent of deviation from the original physical custody schedule, that these deviations occurred only occasionally, and that Father has voluntarily allowed Mother to have custody of Jordan on some weekends. (L.F. 74). None of these changes in Father's temporary overnight custody, however, were due to Father's unwillingness or inability to exercise his temporary custody with Jordan. The fact that Father made these concessions for Jordan demonstrates his willingness and desire to accommodate Mother's requests. For Mother to now attempt to characterize this acquiescence to her requests as unwillingness or inability to exercise temporary custody is a blatant misstatement of fact.

Mother also claims in her statement of facts that "Father did not exercise his summer custody. During the summer he continued to exercise a sporadic weekend schedule." (Resp't

Sub.Br. 3). There is evidence in the record that from 2000 through 2002, Father did not follow the custody decree during the summers because he was not in possession of the Judgment of Dissolution and he believed his temporary custody of Jordan was limited to weekends all year round and holiday periods, which he exercised. (T. 89:4-25). There is also evidence in the record that Jordan spent two two-week periods with Father during her summer vacation from school in 2004. (T. 106:23-25; 107:11-13).

Mother claims in her statement of facts that Father has insisted on following the divorce decree with respect to custody of Jordan since Mother filed her motion to modify. (Resp't Sub.Br. 4). This contradicts the evidence in the record that Mother insisted on following the divorce decree when Father returned from military duty and Mother filed her motion to modify. (T. 97:7-15).

Mother claims in her statement of facts that her time with Jordan is diminished because of Jordan's after school activities. (Resp't Sub.Br. 4). This argument fails to take into that account Father's time with Jordan is also diminished because of Jordan's weekend activities. (T. 102:19-25; 103:1-2; 186:7-14).

Mother claims in her statement of facts that the weekend custody schedule was disrupted by Father's work schedule and that Mother usually kept custody of Jordan when Father had drill weekends with the Army Reserve. (Resp't Sub.Br. 3-4). This contradicts the evidence in the record that Jordan spends weekends with Father even when he has drill weekends. (T. 131:1-6; 178:7-16).

Mother claims in her statement of facts that she "never has a weekend with Jordan."

(Resp't Sub.Br. 5). This contradicts the evidence in the record that Father has allowed Mother to spend some weekends with Jordan. (T. 181:2-25). This also contradicts Mother's own claim in her statement of facts that "Father was not consistent with exercising his weekend visitation." (Resp't Sub.Br. 3).

Finally, Mother claims in her statement of facts that she agreed with Father that they would both contribute to Jordan's private school tuition costs. (Resp't Sub.Br. 5-6). This contradicts the evidence in the record that Mother threatened to take Father to court if he did not pay for Jordan's entire kindergarten tuition. (T. 138:7-17).

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.

Searcy v. Seederoff, 8 S.W.3d 113 (Mo. banc 1999)

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.

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.

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)

State ex rel. Stirnaman v. Calderon, 67 S.W.3d 637 (Mo.App. W.D. 2002)

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.

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.

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.”

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 Point I of her Substitute Brief, Mother argues that “[n]o statute addresses this type of modification.” (Resp’t Sub.Br. 11). Mother also argues that:

Application of change in circumstances standard from 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.

(Resp't Sub.Br. 14).

The plain language of Section 452.400.1 provides, in relevant part, that “[a] parent *not granted custody of the child* is entitled to reasonable visitation rights[.]” (Emphasis added).

The plain language of Section 452.400.2(1) provides, in relevant part, that “[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]”

The plain language of Section 452.410 provides, in relevant part, that:

[T]he court shall not *modify a prior custody decree* unless it has jurisdiction under the provisions of section 452.245 and it finds, upon the basis of facts that have arisen since the prior decree or that 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 the modification is necessary to serve the best interests of the child.* (Emphasis added).

Mother's arguments that (1) the custody modification entered in this case is not addressed by any statute and (2) there was no change in custody in this case both lack merit. In the present case, Mother and Father share joint legal and physical custody of Jordan. (L.F. 2). Even though Mother and Father shared joint legal custody of Jordan both before and after the modification, the elimination of Father's overnight custody on Fridays is a modification of custody, and Mother's burden of proof for this type of modification is clearly governed by Section 452.410. By contrast, Section 452.400 only applies to visitation rights of non-

custodial parents, so under no circumstance should a trial court apply Section 452.400 to a motion to modify a joint legal and physical custody arrangement. “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). Published Missouri appellate court opinions also establish that under Missouri law, joint physical custody and visitation 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). “[W]here 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[.]” Loumiet v. Loumiet, 103 S.W.3d 332, 337-38 (Mo.App. W.D. 2003).

Mother also argues in Point I of her Substitute Brief that the approach followed by Baker v. Wellborn, 77 S.W.3d 711 (Mo.App. S.D. 2002), is the more reasonable way to determine slight modifications of a joint custody plan. (Resp’t Sub.Br. 18). Mother claims that the approach in Timmerman v. Timmerman, 139 S.W.3d 230 (Mo.App. W.D. 2004), which requires application of Section 452.410 and proof of a change in circumstances in all modifications of joint custody, is likely to result in illogical results and improper adjudication of child custody issues and will deter litigants from entering into any plan labeled as joint

custody. (Resp't Sub.Br. 18). Mother argues that the bright line test in Timmerman should not be favored over reasonable and logical adjudication of child custody issues. (Resp't Sub.Br. 13).

Mother's arguments lack merit. Timmerman rejected the analysis used in Baker and recognized that 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. Under the Baker approach, parties are 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. Therefore, the Timmerman approach is superior to the Baker approach.

Mother claims in Point I of her Substitute Brief that the present case also meets the standard set forth in Timmerman. (Resp't Sub.Br. 18). Mother argues that if this Court decides to examine this case as a change in custody, the facts meet the requirements of Section 452.410, because "[t]here 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." (Resp't Sub.Br. 17). Mother further claims that "the facts of the present case are very similar 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." (Resp't Sub.Br. 17). Mother

also argues that “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.” (Resp.Sub.Br. 18). Finally, Mother argues that if this Court follows Timmerman and applies 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.” (Resp.Sub.Br. 19).

All of these arguments made by Mother are completely devoid of merit. The facts of present case are distinguishable from the facts of Timmerman on numerous grounds. Mother’s work schedule has changed from weekends to weekdays. However, unlike the child in Timmerman who had not yet reached school age at the time that case was decided, Jordan was already attending school on weekdays when Mother filed her motion to modify. Timmerman, 193 S.W.3d at 233. Mother’s claim that her work schedule prevents Jordan from spending enough time with Mother lacks merit, because even if Mother still worked on weekends, she would have the same amount of time with Jordan as she does with her current work schedule, due to Jordan’s school schedule. Furthermore, Timmerman actually found that there was a change in circumstances due to a complete breakdown of parental communication about the parenting time schedule for the child. Timmerman, 139 S.W.3d at 237. By contrast, in the present case, both Mother and Father testified at trial that they have cooperated and communicated effectively about matters regarding Jordan. (T. 33:9-14; 87:6-

25; 88:1-25; 89:1-3). In fact, Mother and Father communicated so effectively that when Mother requested additional weekends, Father acquiesced, thus demonstrating that Father conformed to the concept of joint parenting. (T. 37:13-25; 38:1-2). Furthermore, the trial court in the present case never reached the issue of whether there was a change in circumstances and specifically stated that a “the law does not require a showing of a substantial and continuing change of circumstances to make said modification in the physical custody.” (L.F. 76).

Finally, Mother's claim that the decision of the trial court may be affirmed without the necessity of additional evidence on remand if this Court chooses to follow Timmerman is completely baseless and unsupported by any case law or statutory law precedent. If this Court chooses to follow Timmerman, Mother is only entitled to a modification of the original Judgment of Dissolution if she first satisfies the burden of proof set forth under Section 452.410 that a change in circumstances has occurred and then also proves that a modification of the custody arrangement is in Jordan's best interests.

If the trial court follows Timmerman on remand, the requirement for Mother to satisfy the burden of proof that a change in circumstances has occurred before reaching the issue of Jordan's best interests is well-established in Missouri appellate court decisions. “When a trial court does not find a substantial change of circumstances, it never reaches the best interests issue.” Walker v. Walker, 184 S.W.3d 629, 632 (Mo.App. S.D. 2006). “[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).

Mother also cites Bell v. Bell, 125 S.W.3d 899, 905 (Mo.App. W.D. 2005), in Point I of her Substitute Brief, in which the Western District held that the “[m]other was not required to prove that a change in circumstances had occurred because the requested modification concerned the terms and nature of the parenting plan under the joint legal custody decree” as opposed to an actual change in legal custody. (Resp’t Sub.Br. 13, n1).

First, in Bell the Western District Court of Appeals explicitly did *not* decide between using the standards in Section 452.400.2 and Section 452.410.1 when modifying joint physical custody. In footnote 4 of its decision the Court stated:

The Western District has not yet decided whether the standard found in section 452.410.1 or the standard found in section 452.400.2 applies to the modification of custody time between two joint physical custodians. Because Father does not challenge the trial court’s finding that a change in circumstances occurred, however, we only need to decide whether the modification was in the child’s best interests under either statute.

We need not, then, decide the issue here.

Bell, 125 S.W.3d at 903, fn. 4.

Mother’s argument, therefore, that the Western District held that a custodial parent is only required to meet the standards found in Section 452.410.1 when changing a joint physical custody arrangement to one of a sole physical custody arrangement is directly contradicted by the case she cites to support her argument.

In order to get around this hurdle, Mother urges this Court to rely on a portion of the Bell decision relating to modification of legal, not physical, custody. (Resp't Sub.Br. 13, n1).

However, in this part of its decision the Bell limited its examination to the child's best interests, rather than also looking for evidence of changed circumstances, based on the text of Section 452.375.9, which is not at issue in the present case. Bell, 125 S.W.3d at 905. Mother's reliance upon the portion of Bell dealing with legal custody rather than the portion dealing with physical custody is misplaced, and this Court should reject her arguments regarding same.

Mother's final error in citing Bell is ignoring the fact that any perceived contradiction between the standards used in Bell and Timmerman must be resolved in favor of the standards used in Timmerman. First, Timmerman is a more recent decision than Bell, as the cases were decided July 27, 2004 and January 27, 2004, respectively. Timmerman v. Timmerman, 139 S.W.3d 230 (Mo.App. W.D. 2004); Bell v. Bell, 125 S.W.3d 899 (Mo.App. W.D. 2004). Furthermore, Timmerman was decided by the Missouri Court of Appeals *en banc* and therefore has a higher precedential value than Bell. Timmerman, 139 S.W.3d at 230. Therefore, to the extent that the two opinions conflict on the issue of standards to be applied to modification of physical custody (and it is Father's opinion that they do not, as Bell did not address the issue), this Court should apply Timmerman.

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. Because the

Judgment of Dissolution of Marriage provided Father with joint physical custody of Jordan, and because Section 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 Section 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 Section 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.

Mother also argues in Point I of her Substitute brief that the present case is not a drastic modification because Mother and Father's status of sharing joint physical custody of Jordan has remained unchanged. (Resp't Sub.Br. 15). Mother also argues that the elimination of 50 days of Father's overnight custody per year is neither drastic nor useful in the analysis of the present case because Mother claims that Father never consistently exercised all of the custody he was awarded in the dissolution decree. (Resp't Sub.Br. 15). In support of her argument, Mother makes nearly identical factual allegations in Point I of her Substitute Brief to those made in the Statement of Facts. (Resp't Sub.Br. 15). As previously described in greater detail in Father's Statement of Facts, Father submits that Mother also substantially mis-characterizes numerous facts in Point I of her Substitute Brief.

Mother also claims in Point I of her Substitute Brief that Father's reliance on Babbitt v. Babbitt, 15 S.W.3d 787, 790-91 (Mo.App. S.D. 2000), is misplaced because "[i]n Babbitt,

the periods of custody taken away from the father were ones that he actually exercised.” (Resp’t Sub. Br. 16). Mother asserts that “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.” (Resp’t Sub. Br. 16). Mother also argues that “[t]he time that the trial court took from Father and gave to Mother is time that Father is not available to spend with Jordan.” (Resp’t Sub. Br. 16).

Mother’s arguments lack merit. In the present case, there is ample evidence on the record that with the exception of a few Friday nights that Jordan had sleep-overs with friends and when Mother insisted that Jordan not stay with Father, Jordan has slept in Father’s home every Friday night since the time of the dissolution. (T. 131:15-16; 137:2-13; 149:14-25; 150:1-7; 168:12-16). Therefore, the elimination of Father’s Friday night custody clearly constitutes an elimination of periods of overnight custody that Father was actually exercising, and Mother’s attempt to distinguish Babbitt from the present case is misplaced.

In Babbitt, the trial court eliminated approximately 42 periods of the Father’s overnight custody of the child per year. Babbitt, 15 S.W.3d at 789. 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 periods of the Father’s overnight 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 should have 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, Section 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 Section 452.410.1. This Court should therefore reverse the decision of the trial court and remand this matter with instructions to apply Section 452.410.1 in determining whether modification is appropriate or necessary. 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.

In Point I of Mother's Substitute Brief, Mother argues that "[t]he new schedule set out in the modification judgment is in Jordan's schedule 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." (Resp't Sub. Br. 17).

Mother's argument lacks merit and unsupported by any factual or legal basis. There is no evidence that Jordan did not have a close relationship with both of her parents prior to the elimination of Father's overnight custody on Fridays. There is also not any evidence that the elimination of Father's overnight custody on Fridays gives Jordan the opportunity to have a close relationship with both of her parents. Furthermore, Father's sister Linda Russell and Father's girlfriend Rhonda O'Toole both testified that Jordan had a close and loving relationship with Father under original the custody schedule, prior to the trial court's modification, and that it was in Jordan's best interests to keep the original custody schedule. (T. 161:1-8; 177:15-25; 178:1-6). Furthermore, Rhonda O'Toole also inferred on cross-examination by Mother's counsel that Jordan had an equally close and loving relationship with Mother under original the custody schedule, prior to the trial court's modification. (T.

184:13-17).

Mother has provided no legal or factual basis that would explain why the elimination of approximately 50 of Father's overnight periods of temporary custody per year would give Jordan the opportunity to have a close relationship with Father.

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

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.

Mother argues in Point II of her Substitute Brief that there was substantial evidence to support the trial court's finding that her income was \$2,773.00 per month, and that it was within the trial court's discretion whether to include overtime and bonuses in her income. (Resp't. Sub. Br. 21).

Mother's argument lacks merit. Under Missouri law, 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). 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). "Imputed income is used

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 send the child to private school. (L.F. 75). This decision constitutes an abuse of the Court’s discretion and is against the weight of the evidence, as Mother has shown 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 v. Whalen, 812 S.W.2d 232, 240 (Mo.App. E.D. 1991); Rogers v. Rogers, 93 S.W.3d 852, 853 (Mo.App. E.D. 2003); 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).

Mother also argues in Point II of her Substitute Brief that she earned bonus pay solely because Jordan was attending private school and claims that "Father reneged on their agreement that they would each contribute toward her tuition." (Resp't Sub. Br. 21).

This argument also lacks merit. During cross-examination, Mother was unable to prove that there was an agreement for both Mother and Father to pay to send Jordan to private school for more than one year. (T. 32:25; 33:1-8).

For all of the foregoing reasons, 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 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.

Father adopts Point II B of Appellant's Substitute Brief as if fully set forth herein.

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.

Father adopts Point III of Appellant's Substitute Brief as if fully set forth herein.

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 foregoing Appellant's Substitute Reply 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 5,944 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

Reply 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, 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 October 25, 2006.

Jonathan K. Glassman