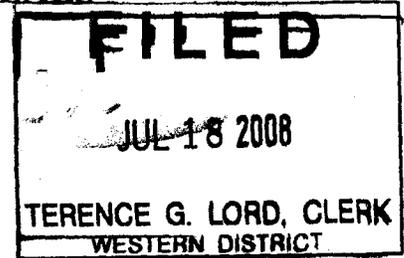


IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

W.D. NO. 69095



89951

MELISSA ANN MYERS,
APPELLANT,

v.

JOHN T. HIGHTOWER,
RESPONDENT

FILED

APR 3 2009

Thomas F. Simon
CLERK, SUPREME COURT

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
HONORABLE SANDRA C. MIDKIFF, JUDGE
DIVISION I

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

Appellant brings an appeal from a Judgment of Modification of child custody, visitation, and child support entered by the Honorable Sandra C. Midkiff, Judge of Division 1 of the Circuit Court of Jackson County, Missouri on July 25 2007.

Appellant raises several questions dealing with issues of subject matter jurisdiction and whether the Court had jurisdiction to enter judgment in the original litigation, in 2003, which dealt with the paternity, custody, and child support of the parties' minor child; and, on July 31, 2007, when the trial Court entered Judgment in Father's Motion to Modify Custody and Child Support. Appellant also questions whether the weight of the evidence supports a change in custody of the minor child from mother to father and whether said change was in the best interest of the minor child; and, finally, whether Father met the burden of showing a substantial and continuing change of circumstances at the time of filing his motion to modify custody.

Article 5, Section 3 of the Missouri Constitution states that, "The Supreme Court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The Court of Appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the Supreme Court.

An appeal taken from the Circuit Court of Jackson County falls within the jurisdiction of the Missouri Court of Appeals, Western District. *Sections 477.050 to 477.070 R.S.Mo. (1996).*

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STATEMENT OF FACTS

Johnae Paige Hightower was born on August 16, 1999, in Kansas City, Wyandotte County, Kansas. *L.F. at 10 and 37.* Respondent, John Hightower (hereafter “Father”), and Appellant, Melissa Ann Myers (Napper) (hereafter “Mother”), were not married at the time of the child’s birth. *L.F. at 1.* Father signed and filed an Affidavit of Paternity with the Bureau of Vital Statistics which was later recognized in an administrative Order of child support. *L.F. at 37.*

On January 12, 2002, Father filed his Petition for Determination of Child Custody, Visitation, and for Other Relief. The child was two and one-half years old at the time of the filing. Prior to Father filing his Petition, the child lived continuously with both parents until May 13, 2001, at which time the parties ended their relationship. The child was one year and nine months old at this time. Mother desired to return to Salem, New Jersey, to seek solace from friends and family and took the minor child with her to New Jersey with the understanding that the child would be returned to Missouri. *L.F. 10.* Mother did return the child to Father on June 23, 2001. *L.F. 10.*

Father and Mother agreed to share custody of the child; however, Mother would refuse to abide by the parties agreement and would withhold the child from Father. Mother decided at some point from the time she went to New Jersey and Father filed his petition custody, et. al. remain in New Jersey; or, Mother knew from the beginning she had no intention of coming back to Missouri.

The following chronological order sets forth the child’s whereabouts during the eight (8) months between Mother going to Salem and Father filing his petition:

May 13, 2001 to June 23, 2001	Salem, New Jersey
-------------------------------	-------------------

June 23, 2001 to August 12, 2001	Kansas City, Missouri	
August 13, 2001 to November 17, 2001	Salem, New Jersey	
November 17, 2001 to December 23, 2001	Kansas City, Missouri	
December 23, 2001 to January 12, 2002	Salem, New Jersey	L.F. 10.

When Mother took the child on December 23, 2001, she made it clear she had no intention of bringing the child back to Father which was the reason for his filing of the petition for paternity on January 12, 2002. Mother withheld the child from Father from December 23, 2001 until August 10, 2002, when Mother allowed the child to visit with Father. The child remained with Father until November 25 or 26, when the Mother came to Missouri, took the child back to Salem, New Jersey, without informing Father she was doing so and, thereafter, withheld the child until the final hearing on April 17, 2003. **L.F. 10 and 49 (see 5th paragraph down) and T.R. Pages 141 -144, Lines 1-16.**

On April 17, 2003, Judge Torrence entered a Judgment & Order of Paternity, Parenting Time and Child Support wherein he granted joint legal and physical custody to the parties with Mother's address designated as that of the child's. **L.F. 43-51.** On August 25, 2003, the Court entered an Amended Judgment. Upon a paragraph by paragraph comparison between the original and amended judgments, the Court simply amended certain provisions in the Parenting Plan. **L.F. 43-51 and 52-61.**

On September 5, 2006, Father filed a Motion to Modify Custody, Visitation and Support alleging Mother's withholding of his parenting time and the transfer of the child from the state of New Jersey to Georgia to live without informing Father. **L.F. 96-103 and T.R. 144, Lines 18-25 through 148.**

On July 31, 2007, the trial Court granted Father's Motion to Modify Custody and transferred physical custody to Father. *L.F. 96-103.*

Mother filed a Motion for New Trial which was subsequently denied. *L.F. 231.* On November 19, 2007, the Court entered Additional Findings of Fact and Conclusions of Law Concerning Issues of Child Custody Jurisdiction. *L.F. 235.*

**RESPONDENT OBJECTS TO THE FOLLOWING STATEMENT OF FACTS MADE BY
APPELLANT**

In May 2001, by agreement of all parties, the Mother and the minor child moved to the State of New Jersey. *Tr. at 7,8, L.F. at 10-11.* Respondent objects to Appellant's suggestion that *L.F. 10-11 supports the contention that the child "moved" to New Jersey.*

Between May 13, 2001 and January 12, 2002, Johnae returned to the State of Missouri for two visitations with her Father, one for several weeks during the summer of 2001, and again for a few weeks during the fall of 2001, but each time she returned afterwards to her Mother's residence in New Jersey. Respondent objects to Appellant's suggestion that *Johnae was merely visiting her Father in the year 2001. See L.F. 10-11.*

In September of 2002, Mother applied for the establishment of paternity and child support in the State of New Jersey, and this application for a determination of parentage and child support was transferred to the State of Missouri, Division of Child Support Enforcement. Respondent objects to this statement as Appellant has no evidence that an administrative case was even filed in September 2002 in New Jersey and the legal file is devoid of any document to support this contention. See Volumes I & II of Appellant's Legal File.

On April 17, 2003, after Mother's attorney had raised the issue of lack of subject-matter jurisdiction over Johnae's custody and visitation in Missouri, the Honorable John Torrence entered an Amended Judgment of paternity, child support, and medical support, which also

included child custody and visitation provisions -- neither party appealed that Judgment. **L.F. at 43.** *Respondent objects to the suggestion in this averment that the issue of subject-matter jurisdiction was raised on April 17, 2003 when in fact the Motion to Dismiss for Lack of Jurisdiction was filed on November 25, 2002, more than four and a half months prior. See L.F. 7-8.*

On July 20, 2006, Mother requested that the Division of Child Support Enforcement review and consider modification of Father's child support obligation, and the Division of Child Support Enforcement determined that Father's child support obligation should be increased and filed a Motion to Modify the child support provisions of the 2003 Judgment on July 5, 2006. **L.F. at 74.** *Respondent objects to this averment as Appellant refers this Court to evidence that was not presented at the trial in this matter. See Respondent's Objections to the Legal File Pursuant to Civil Rule 81.15(c) and 81.15(d).*

After receiving the Division of Child Support Enforcement's request to increase his child support, Father filed a Motion to Modify custody and visitation seeking residential custody of Johnae on September 5, 2006. **L.F. at 96-103.** *Respondent objects to this averment as Appellant has no evidence to support its averment; however Respondent did provide testimony to support that Respondent's motivation to file his motion was learning that his daughter was moved from New Jersey to Georgia without notifying him of the move. T.R. 144, Lines 18-25, through 146.*

Between May 13, 2001 and September 5, 2006, Johnae and her Mother continued to reside in New Jersey, and Father continued to reside in the State of Missouri. **Tr. throughout.** *Respondent objects to this averment as Appellant fails to direct this Court to specific evidence that supports such an averment. In fact, the entire transcript does not support this contention.*

On September 5, 2007, the same day that Father filed his Motion to Modify in the Jackson County Circuit Court, Johnae and her Mother relocated to the State of Georgia with the intent to reside there permanently. *Respondent objects to this averment as Appellant fails to refer this Court to any evidence that supports this alleged fact.*

I - POINT RELIED ON

THE TRIAL COURT ERRED IN DETERMINING THAT THE STATE OF MISSOURI HAD SUBJECT MATTER JURISDICTION OVER THE CUSTODY OF JOHNAE HIGHTOWER IN JANUARY OF 2002 BECAUSE THIS FINDING WAS AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED TO SUCH A DEGREE THAT AN ABUSE OF DISCRETION OCCURRED IN THAT THE EVIDENCE REGARDING SUBJECT MATTER JURISDICTION SHOWED THAT JOHNAE MOVED WITH HER MOTHER TO RESIDE PERMANENTLY IN NEW JERSEY ON MAY 13, 2001; HER SUBSEQUENT TIME SPENT IN MISSOURI THEREAFTER WAS EXCLUSIVELY FOR THE PURPOSE OF VISITATION WITH HER FATHER; AND, NO PROVISION OF RSMO. SECTION 452.450 (2000) AUTHORIZED MISSOURI'S EXERCISE OF SUBJECT MATTER JURISDICTION OVER JOHNAE IN JANUARY OF 2002.

RSMo. Sec. 210.829

RSMo. Sec. 452.450, Uniform Child Custody Jurisdiction Act

RSMo. Sec. 452.823

RSMo. Sec. 454.850-454.997

UCCJA Section 3, comment, U.L.A. 144 (1988)

Bachman v. Bachman, 997 S.W.2d 23 (Mo. App. ED 1999)

Bell v. Bell, 987 S.W.2d 395 (Mo. App. ED 1999)

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Schoenecke v. Schoenecke, 230 S.W.3d 62 (Mo. App. WD 2007)

Straight v. Straight, 195 S.W.3d 461 (Mo. App. WD 2006)

Tripp v. Harryman, 613 S.W.2d 943 (Mo. App. 1981)

Woods v. Melville, 198 S.W.3d 165 (Mo. App. ED 2006)

II – POINT RELIED ON

THE TRIAL COURT ERRED IN FINDING THAT THE STATE OF MISSOURI HAD SUBJECT MATTER JURISDICTION OVER THE CUSTODY OF JOHNAE HIGHTOWER ON SEPTEMBER 5, 2006 BECAUSE THIS FINDING WAS AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED TO SUCH A DEGREE THAT AN ABUSE OF DISCRETION OCCURRED IN THAT ON SEPTEMBER 5, 2006, JOHNAE’S HOME STATE WAS NEW JERSEY, AND IT WAS INAPPROPRIATE FOR MISSOURI TO EXERCISE JURISDICTION PURSUANT TO ANY OF THE SUBSECTIONS OF RSMO. SEC. 452.450 (2000).

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State ex. rel. Lopp v. Munton, 67 S.W.3d. 666 (Mo. App. 2002)

Timmings v. Timmings, 628 S.W.2d 724 (Mo. App. ED 1982)

III-POINT RELIED ON

THE TRIAL COURT ERRED IN FINDING THAT THE PARTIES IN THIS CASE HAD EXPERIENCED A CONTINUING CHANGE IN THEIR CIRCUMSTANCES SO SUBSTANTIAL THAT A MODIFICATION WAS NECESSARY TO SERVE THE BEST INTERESTS OF JOHNAE HIGHTOWER BECAUSE MANY OF THE TRIAL COURT'S FINDINGS AND JUDGMENTS CONCERNING CUSTODY WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, WERE AGAINST THE WEIGHT OF THE EVIDENCE, OR WERE A RESULT OF THE TRIAL COURT'S MISAPPLICATION OF THE LAW IN THAT A CHANGE IN JOHNAE HIGHTOWER'S RESIDENTIAL CUSTODY FROM MOTHER TO FATHER WAS BOTH UNNECESSARY AND NOT IN HER BEST INTEREST

RSMo. Sec. 452.375

RSMo. Sec. 452.377

Bowan v. Express Med. Transporters, Inc., 135 S.W.3d 452 (Mo. App. 2004)

Bullard v. Bullard, 929 S.W.2d 942 (Mo. App. ED 1996)

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Wilson v. Wilson, 873 S.W.2d 667 (Mo. App. 1994)

Young v. St. Louis Public Service Co., Mo. Sup., 326 S.W.2d 107, 111.

I - POINT RELIED ON

THE TRIAL COURT ERRED IN DETERMINING THAT THE STATE OF MISSOURI HAD SUBJECT MATTER JURISDICTION OVER THE CUSTODY OF JOHNAE HIGHTOWER IN JANUARY OF 2002 BECAUSE THIS FINDING WAS AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED TO SUCH A DEGREE THAT AN ABUSE OF DISCRETION OCCURRED IN THAT THE EVIDENCE REGARDING SUBJECT MATTER JURISDICTION SHOWED THAT JOHNAE MOVED WITH HER MOTHER TO RESIDE PERMANENTLY IN NEW JERSEY ON MAY 13, 2001; HER SUBSEQUENT TIME SPENT IN MISSOURI THEREAFTER WAS EXCLUSIVELY FOR THE PURPOSE OF VISITATION WITH HER FATHER; AND, NO PROVISION OF RSMO. SECTION 452.450 (2000) AUTHORIZED MISSOURI'S EXERCISE OF SUBJECT MATTER JURISDICTION OVER JOHNAE IN JANUARY OF 2002.

STANDARD OF REVIEW

Point I deals with subject matter jurisdiction, and as such, this Court's review of the jurisdictional issues is *de novo*. *Gosserand v. Gosserand*, 230 S.W.3d 628, 631(Mo. App. 2007), *citing*, *In Re: Marriage of Miller v. Sumpter*, 196 S.W. 3d 683, 689 (Mo. App. 2006).

As this was a court-tried case, on Appeal this Court should uphold the Judgment of the trial court unless there is no substantial evidence to support 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. banc 1976).

ARGUMENT

Father is confident that the trial court did have subject matter jurisdiction over the issue of child custody when Father filed his Petition for Determination of Custody, Visitation, and Child Support on January 12, 2002, and when the Court entered its Judgment on April 17, 2003. Mother's I-Point Relied On does not argue whether subject matter jurisdiction was appropriate in September of 2006 when Father filed his Motion to Modify; therefore, Father contains his discussion to whether subject matter existed in January of 2002 when Father filed his petition.

The Uniform Child Custody Jurisdiction Act, setforth in Mo. Rev. Stat. 452.450, determines whether a Court has subject matter jurisdiction over the issues of custody and visitation of a minor child.

Mo. Rev. Stat. 452.450 states that:

1. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
 - (1) This state:
 - (a) Is the home state of the child at the time of commencement of the proceeding; or
 - (b) Had been the child's home state within six months before commencement of the proceeding and the child is absent from this state for any reason, and a parent or person acting as parent continues to live in this state; or
 - (2) It is in the best interest of the child that a court of this state assume jurisdiction because:
 - (a) The child and his parents, or the child and at least one litigant, have a significant connection with this state; and
 - (b) There is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
 - (3) The child is physically present in this state and:
 - (a) The child has been abandoned; or
 - (b) It is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse, or is otherwise being neglected; or
 - (4) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.
2. Except as provided in subdivisions (3) and (4) of subsection 1 of this section, physical presence of the child, or of the child and one of the litigants, in this state is not sufficient alone to confer jurisdiction on a court of this state to make a child custody determination.
3. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

“The comments to the UCCJA make it clear that the bases of jurisdiction in section 452.450.1(1) through (4) are set out in descending preferential order, and that the first two bases for jurisdiction, home state and significant connection with the family ‘establish the two major

bases for jurisdiction.’ ” In re the Marriage of Dooley, 15 S.W.3d 747 (Mo. App. 2000) citing Bell, 987 S.W.2d at 398 (quoting UCCJA § 3, comment, U.L.A. 144 (1988)).

Father argues that Missouri was the child’s home state. Mother asserts that Krasinski v. Rose, 175 S.w.3d 202 (Mo. App. 2005) is on point. Father argues to the contrary.

Krasinski v. Rose, 175 S.W.3d (Mo. App. ED 2005) is not on point at all with the facts in this case in that the evidence of subject matter jurisdiction in the Krasinski case was clear and convincing in that both parties admitted that Michigan was the “home state” of the minor children in that both parties admitted that the children lived in Michigan for the six months preceding the filing of the litigation with the Mother whereas in this case the facts in evidence resulting in the 2003 Judgment are that the minor child lived continuously in Missouri until May 2001 and, thereafter, was taken for short, sporadic periods of time by the child’s Mother to New Jersey and then returned by Mother each time thereafter to the care and custody of Father up to December 23, 2001, when Mother refused to return the child back to Father who, thereafter filed his litigation on January 12, 2002 asking for custody of the minor child.

Petitions to Establish Paternity and Child Support brought under Mo. Rev. Stat. §§454.850-454.997 confer subject matter jurisdiction over both issues of paternity and child support by filing same in the state and county within which the obligor resides; however, the Court in Gosserard vs. Gosserard, 230 S.W. 3d 628, 631 (Mo. App. W.D. Aug. 2007) stated that “. . . it is important to note that when subject matter jurisdiction is predicated upon the UCCJA for a child custody matter, a trial court that does not have jurisdiction over child custody also does not have jurisdiction to adjudicate child support.” Citing In re Marriage of Miller & Sumpter, 196 S.W.2d 683, 694 (Mo. App. 2006).

The original Petition in this matter was brought by Father under the UCCJA, making any

analysis of jurisdiction under the UIFSA irrelevant.

In Krasinski, custody and visitation claims were brought by the Father in a Petition for Paternity pursuant to the UCCJA; but, the Division of Family Support brought an action under the UIFSA which is why the appellate court allowed the provisions of the original judgment relating to support to stand as the Court asserted jurisdiction pursuant to Mo. Rev. Stat. 454.450-454.497 (RSMo).

Father denies that the Straight v. Straight, 195 S.W.3d 461 (Mo. App. WD 2006) Court “bemoaned the conflict created by Missouri’s failure to enact the UCCJA” as Missouri has enacted its version of the UCCJA back in 1978; rather, Father suggests that the holding in the Straight case is simply that subject matter jurisdiction for any given issue, i.e. parentage, child support, custody, or visitation, must be determined pursuant to the appropriate statute, either the UCCJA or the UIFSA, depending on which legislation a parties’ claims are filed under, and that all claims for custody or visitation must be analyzed under Mo. Rev. Stat. 452.450 (UCCJA) to determine subject matter jurisdiction and that, upon proper analysis of each subject matter under the appropriate statutes, the result may be that one state may not have sole jurisdiction over all the issues raised.

Mother refers to the Straight court stating that it “bemoaned the conflict created by Missouri’s failure to enact the UCCJEA [rather than the UCCJA] and the complications this creates in that it is far from unusual for Missouri to have jurisdiction over some issues regarding a child, while another state has exclusive jurisdiction over others. “ *Straight* at 466-467. However, the Straight court simply discussed how a conflict between one state’s UCCJA and the Federal PKPA and another state’s UCCJEA statutes should be resolved.

In this case, our parties do not have such a conflict as Missouri is the original state of jurisdiction. Clearly, the Straight case is not even on point with the facts in this case as the Father herein brought his case pursuant to the Uniform Paternity Act and the Uniform Child Custody Jurisdiction Act *not* pursuant to the UIFSA.

Further, the Krasinski case is not on point with the facts of our case in that, first, our litigation was not brought by the Division of Family Support and, second, the litigation in this case was brought pursuant to the Uniform Child Custody Jurisdiction Act and the minor child herein did not have a clear-cut “home state” like the child in the Krasinski case in that the minor child herein lived approximately fifty percent of the time in each state from June of 2001 to January 2002, and prior to June of 2001, the child had lived her entire life in Missouri, except for the first few months of her life when she lived in Kansas with both Father and Respondent leaving the Court to find, under Mo. Rev. Stat. 452.450.2 that it was in the child’s best interest to assume jurisdiction over the issues of custody and visitation of this child and that, pursuant to Mo. Rev. Stat. 452.450.1 that the child’s “home state” in January of 2002 was Missouri in that the child’s absences from Missouri were temporary in nature.

The child did not, at any time between May 2001 and January 2002, spend more than three and one half consecutive months in New Jersey at any given time.

Missouri was the home state of the minor child in January 2002 as temporary absences from a child’s state does not constitute a change in residence. The Court in Love v. Love, 75 S.W.3d 747 (Mo. App. WD 2002) held that:

The phrase “**temporary absence**,” as used in § 452.445(4) in defining “home state,” is itself not statutorily defined. However, in In re S.M., this court, after discussing the various approaches used in other **jurisdictions**, adopted the totality of the circumstances test for deciding what constitutes a **temporary absence** under § 452.445(4). 938 S.W.2d at 918.

The totality of the circumstances in this case prove that in those eight (8) months from May of 2001 to January of 2002, when Father filed his Petition for Paternity, the child had resided solely in the state of Missouri her entire life, with an exception of a few months when the parties and the child lived together in Olathe, Kansas, and both parties made Missouri their home state thereafter and lived there continuously, and the child continued to live in Missouri until Mother fled with the minor child in December of 2001 and refused to allow Father custody of the child.

It was clear that the parties had an agreement that the child would remain in Missouri as Mother would merely take custody of the child for short periods of time and then return her to the Father.

Furthermore, the Court in Davis v. Davis, 799 S.W.2d 127 (Mo. App. WD 1990) held that: “Under Dobyns, supra, 650 S.W.2d 701, a home **state's jurisdiction** remains intact for six months after a child's departure from that **state** if one parent continues to live in that home **state**. Id. at 706, citing § 452.450.1(1)(b). In Dobyns, however, one parent fled the home **state** taking the child, while the other parent remained there.”

As in Dobyns, Father continued to live in Missouri while Mother made an unilateral decision to flee with the child in December of 2001 which raises the issue of whether the Court should decline to entertain this party's arguments that the state in which she fled to with the child should have jurisdiction of the child.

And, Father denies that the minor child's presence in Missouri were merely visits and further states that the pleadings and evidence presented at the trial of this matter have shown otherwise. New Jersey was not the home state of the minor child on January 12, 2002 when Father filed his Petition for Paternity. Mother cites In re S.M. for the proposition that

“temporary absences” do not count in determining the home state of minor children which supports Father’s position that the child’s visits to New Jersey from May of 2001 to January 2002 were temporary in nature and Missouri was her home state.

Mother suggests that Father cannot even argue subject matter jurisdiction as he was not the legal father of the child citing Hudson, 158 S.W.3d 319 (Mo. App. WD 2006) but his case is not on point with the facts in this case. The father in the case of Department of Social Services vs. Hudson, 158 S.W.3d 319, 323 (Mo. App. WD 2006) had not been determined to be the child’s legal father and the Court made a fleeting reference to the effect an absence of such finding early in a paternity case would have on an alleged father requesting custody of a child and child support from the opposing party; however, once again, this case is ***not on point*** with the legal theory emphasized by Mother in this case as Father was the legal father of the minor child at the time Father filed his Petition for Paternity pursuant to Mo. Rev. Stat. 452.823 as his name appeared on the child’s birth certificate.

Mother fails to argue successfully that Missouri was not the child’s home state. Her actions of returning the child back to Missouri to remain in the custody of Father for lengthy periods of time is contrary to this argument. Missouri was the only state known to the child prior to the child going with Mother to New Jersey and, after the child’s first visit to New Jersey, returned back to Missouri on several occasions during the next seven (months) when Father filed his Petition. The child never spent six (6) consecutive months in the state of New Jersey before Father filed his Petition for Paternity, Custody and Support. Father refers this Court to Mother’s own brief, Page 16-18 to support the fact that the child was not absent from the state of Missouri for more than three months at a time after the Mother moved to New Jersey.

Father admonishes Mother for her attempt to mislead this Court as Mo. Rev. Stat.

452.450.1 states with clarity and in plain language that if “(1) This State: . . . (b) Had been the child’s home state within six months before commencement of the proceeding and the child is absent from this state for any reason, and a parent or person acting as parent continues to live in this state a state would continue to have subject-matter jurisdiction. Obviously, the purpose of this law is to avoid situations just like the one in Miller where the Mother attempted to take the children to a new state and claim it as the child’s home state when the children’s Father continued to live in Virginia and the children had lived in Virginia for the six (6) months prior to Mother filing her divorce in Missouri.

The following exchange occurred between Ms. Higinbotham and Mother:

- Q. So in 2002 just prior to the judgment in 2003 who had the child? Who had Johnae?
- A. I did.
- Q. And when did she come into your custody?
- A. On May 13th of 2001 I believe it was when Mr. Hightower chose to put myself and his daughter in a car and drive us to New Jersey and dropped us off at my parent's house where we have resided.
- Q. And, during that period of time that you lived in New Jersey and Mr. Hightower was here, you exchanged Johnae every two or three months; is that right?
- A. That is correct. *Tr. 7, 8.*

The following exchange occurred between Judge Midkiff and Mother:

- THE COURT: I'm sorry, Counsel. Can I interrupt a minute just to try to move this along so I get some information that I need to understand this. You said that you moved to New Jersey in 2001.
- THE WITNESS: That is correct.

THE COURT: Is that right? And what month -- or when did you move there?

THE WITNESS: May.

THE COURT: May of 2001. When is the next time that Mr. Hightower saw Johnae?

THE WITNESS: May, June, July, August. I believe it was in August.

THE COURT: And how did that go?

THE WITNESS: It's about every three months.

THE COURT: And how did those visits happen? Did he come to where you were located or how did --

THE WITNESS: I would fly her out there and then he would fly her back.

THE COURT: And that happened every three months?

THE WITNESS: Yes.

THE COURT: So there were four visits like that in 2001 and two.

THE WITNESS: Until the order was put in place, yes, ma'am.

THE COURT: Okay. *Tr. at 82, 83.*

Further, Mother inaccurately states the facts on Page 16 of her brief, Paragraphs 3 and 4, wherein she suggests that the parties argued about the child's expected return in November of 2001 when actually the incident referred to by Mother was in November of 2002 when Mother fled with the child and refused to allow Father to see the child again until the Court entered its Judgment herein. *See L.F. 10.*

Also, Mother spends much time suggesting that there was no formal agreement between the parties as to custody and visitation after Mother moved to New Jersey which is irrelevant to the issue at hand. Rather, Father suggests that the actions of the parties are what the Court should look to as both parties agree that custody of the child was shared from May 2001 to

January 2002. TR. 82, 83 and L.F. 10.

Mother's reference to a letter written by Father's attorney is, again, irrelevant as it does not show the Court Father's state of mind or understanding, but rather that of the attorney and is clearly negotiations between the parties which cannot be used as evidence and is inadmissible at trial.

"The general rule is that an offer of compromise of an existing controversy is privileged and inadmissible as an admission of fault. See e.g. Tripp v. Harryman, 613 S.W.2d 943, 949-50 (Mo.App.1981). The testimony in question was in regards to how the sisters would resolve their dispute. They also discussed what would be an appropriate interest rate. Respondent's testimony regarding the offer of compromise was not relevant nor admissible for any other purpose. "Roush vs. Sandy, 871 S.W.2d 98 (Mo. App. WD 1994). The same can be said for the findings on page 38 of the legal file which states that the parties intended to share custody of the child 50/50 which should not be held against Mother.

MOTHER ERRONEOUSLY AND SHAMELESSLY SUGGESTS TO THIS COURT THAT L.F. PAGE 56 SUGGESTS THAT JUDGE MESLE QUESTIONED SUBJECT MATTER JURISDICTION "EARLY ON." WHEN REVIEWING L.F. PAGE 56, THIS COURT WILL SEE THAT IT IS MERELY A PAGE OF THE PARENTING PLAN ATTACHED TO JUDGE TORRENCE'S AMENDED JUDGMENT ENTERED ON AUGUST 25, 2003.

ORIGINAL JURISDICTIONAL FINDINGS OF JUDGE TORRENCE

The following addresses Mother's argument about the Court's failure to make specific findings as to subject-matter jurisdiction.

Numerous cases address a Court's failure to make specific findings as to the issue of

subject-matter jurisdiction. Father clarifies that he does not agree that the Court has not made appropriate findings and simply wishes to address all issues raised by Mother's counsel.

An Appellate Court can find subject matter jurisdiction within the transcripts, pleadings and briefs filed by the parties. Even the Lallier court, cited by Mother herself, recognizes its ability to substantiate a trial court's finding of jurisdiction when it states, "There is insufficient evidence in the record for us to determine proper jurisdiction under the UCCJA," suggesting that if the record had been sufficient, it would have held jurisdiction valid based solely on a review of the record submitted. *Id. at* 190 S.W.3d 513 at 516.

In Laws v. Higgins, 734 S.W.2d 274 (Mo. App. SD 1987) the trial court failed to make specific findings of fact as to the basis of it assuming subject matter jurisdiction but the Court held that "Nonetheless, this court will examine the record to determine if there was a basis for the court's assumption of jurisdiction of the motion to modify." In Bounds v. O'Brien, 134 S.W.3d 666, 670 (Mo. App. 2004), the Court did not make express findings as to the factual basis for its jurisdiction determination, nor did it hold a hearing on the matter. It held that under those circumstances, the court observed, "remand would ordinarily be required for specific findings." *Id.* However, the Court did not remand because it was able to determine jurisdiction based upon a written judgment entered in a related proceeding.

Also, in Piedimontev. Nissen, 817 S.W.2d 260 (Mo. App. 1991) the appellate court was able to review the record for evidence of jurisdiction despite the absence of express findings. See, also, Schoenecke v. Schoenecke, 230 S.W.3d 62 (Mo. App. WD 2007), where the Court indicated its willingness to review the pleadings and transcripts for evidence of jurisdiction, but found that the parties had not submitted a transcript nor did the pleadings or briefs provide

sufficient facts to find jurisdiction without remanding for further information; but, the Court was obviously willing to find jurisdiction by a simple review of the record.

Furthermore, Mother raised the issue of subject matter jurisdiction in a motion and then voluntarily dismissed her motion without adjudication from the Court. Mother cannot argue that the Court should not have proceeded because it didn't have subject matter jurisdiction when it voluntarily dismissed its own motion challenging same, thereby suggesting to the Court that Mother no longer held the position that the Court did not have jurisdiction over custody and visitation matters.

Finally, Mother is precluded from raising the issue of subject matter jurisdiction as she failed to appeal the trial court's finding of subject matter jurisdiction in the original judgment prior to the expiration of her time to appeal. The court in Woods v. Melville, 198 S.W.3d 165 (Mo. App. ED 2006) held that "Woods did not appeal the County's dismissal and thus, the City, as a court of concurrent **jurisdiction**, was bound by the County's determination as to **subject matter jurisdiction**." See also Bachman v. Bachman et al., 997 S.W.2d 23, 25 (Mo.App. E.D.1999).

Father admits that generally subject matter jurisdiction may be raised at anytime, "even if the underlying Judgment has been in effect for an extended period of time;" however, Father further instructs that the subject can be held "res judicata" if the issue of subject matter jurisdiction is raised within the course of the litigation and, even if not directly addressed by the Court, if the Court later finds that jurisdiction existed, it is held that the issue was properly addressed and no further raising of this issue can occur.

In the Interest of S.L., 872 S.W.2d 573 (Mo. App. 1994), the Court held that, "The issue of jurisdiction, as that jurisdiction may be affected by the UCCJA, was raised prior to the

dispositional hearing, and necessarily adjudicated in the dispositional hearing. . . . Although subject matter jurisdiction cannot be established by waiver, and lack of jurisdiction can be raised at any time, the principle of res judicata prohibits re-assertion of alleged jurisdictional defects where the issue has been finally adjudicated.” In this case, Mother asserted her arguments alleging no jurisdiction but chose to voluntarily dismiss her motion. “It is enough that the issue was raised in the earlier proceeding. . . . Any other rule would mean there is no finality to any judgment in which subject matter jurisdiction may be questioned.” “It is a matter of grave concern in a case such as this that jurisdictional issues be resolved promptly.” *Id. at 576.*

The trial Court had the privilege of the Suggestions filed by each parties’ counsel on the issue of subject matter jurisdiction prior to final disposition, and, even though Mother’s Motion to Dismiss for Lack of Subject Matter Jurisdiction was voluntarily dismissed, it can be held that the trial court knew of Mother’s alleged jurisdictional defects and considered same when issuing its final judgment.

ADMINISTRATIVE PROCEEDINGS

In an attempt not to repeat discussion of the same issues, please refer to the discussions above on Pages 16 through 17 which address the specifics on subject-matter jurisdiction under UCCJA or UCCJEA or proceedings brought brought under Mo. Rev. Stat. §§454.850-454.997.

The fact that an administrative officer suggests that “additional terms would not be enforceable by this Order,” is irrelevant, not to mention completely ambiguous. Who knows what “terms” he is referring to? Furthermore, Mother’s counsel again refers to alleged evidence that is not a part of this record when she states that the hearing officer stated “verbally” that he did not believe that Missouri had subject-matter jurisdiction. Are we to simply take counsel’s word for what the officer said even when she admittedly wasn’t present at the hearing? And,

counsel suggests that the administrative order has custody or visitation provisions when, in fact, it does not.

Father suggests that it is inappropriate to mislead the Court as this averment does as the Hearing Officer made absolutely no comment as to whether the Court had subject matter jurisdiction over custody and visitation issues, but rather it is obvious that what a Hearing Officer would be referring to is that under the UIFSA statutes, only personal jurisdiction is obtained on the parties and only the issues of paternity and support can be addressed. Subject matter jurisdiction is not even a consideration in these administrative matters.

CONCLUSION

The trial court in April of 2003 held that it had subject matter jurisdiction when it rendered its Judgment. Whether it made a one-line finding or a page of findings as to this issue, an appellate court is not required to remand the case for additional evidence just to substantiate a finding of jurisdiction when an appellate court can determine the existence of subject matter jurisdiction by a review of the record. The record herein is full of evidence to suggest that at the time of Father's filing of his Petition, the only state that could and should have taken jurisdiction over the issue of custody of this minor child was Missouri. Missouri could claim jurisdiction based on a "home state" analysis as the child was only removed from Missouri for "temporary absences."

Further, the theory of "issue preclusion" or "direct estoppel" disallows Mother to argue the issue of "subject matter jurisdiction" a second time when it was fully dealt with in the initial proceeding and she chose not to appeal the Court's judgment as to the issue of subject matter jurisdiction.

II – POINT RELIED ON

THE TRIAL COURT ERRED IN FINDING THAT THE STATE OF MISSOURI HAD SUBJECT MATTER JURISDICTION OVER THE CUSTODY OF JOHNAE HIGHTOWER ON SEPTEMBER 4, 2006 BECAUSE THE FINDING WAS AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED TO SUCH A DEGREE THAT ABUSE OF DISCRETION OCCURRED IN THAT ON SEPTEMBER 5, 2006 JOHNAE'S HOME STATE WAS NEW JERSEY; IT WAS INAPPROPRIATE FOR MISSOURI TO EXERCISE JURISDICTION PURSUANT TO ANY OF THE SUBSECTIONS OF RSMO. SECTION 452.450 (2000).

Standard of Review

Point II deals with subject matter jurisdiction, and as such, this Court's review of the jurisdictional issues is *de novo*. *Gosserand v. Gosserand*, 230 S.W. 3rd 628, 631(Mo. App. 2007), *citing*, *In re the Marriage of Miller v. Sumpter*, 196 S.W. 3rd 683, 689 (Mo. App. 2006).

As this was a court tried case, on Appeal this Court should uphold the Judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2nd 30, 32 (Mo. banc 1976).

ARGUMENT

The Court “. . . based [its decision as to subject matter jurisdiction] on findings . . . substantially supported by the record.” See *Bowan v. Express Med. Transporters, Inc.*, 135 S.W.3d 452, 456 (Mo. App. 2004). The *Bowan* court states that “the standard of review for an order denying a motion for new trial is abuse of discretion. . . . A trial court abuses its discretion when a ruling is clearly against the logic of the circumstances then before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Id. at 896.*

The Court's denial of Mother's Motion for New Trial would not be against the logic of the circumstances as the Court cannot claim any state as the child's home state as the child did

not live in any state for six months prior to September 4, 2006 wherein a parent continued to live, leaving the Court with the only choice to perform an analysis under Mo. Rev. Stat. 452.450.2.

Nor, an Appellate Court could not find that the Court's finding was arbitrary and unreasonable as to shock the sense of justice. **BLACK'S LAW DICTIONARY – 6TH EDITION (1990)** defines arbitrary as “In an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power, capriciously; tyrannical; despotic; . . . Without fair, solid, and substantial cause; that is without cause based upon the law.”

In reviewing the Court's findings and decisions, it is clear that the Court made its decisions based on the evidence presented and pleadings filed and nothing more and thereafter applied the evidence to the law. There is nothing in the record that suggests that the Court made decisions based on previously formed opinions about the parties and/or facts but rather on the information and knowledge gained in trial and from the pleadings filed in the case.

On September 5, 2006, Missouri was the only state that could have possibly found subject matter jurisdiction as the child had just moved to Georgia where no information was available relating to the child except that her Mother and her boyfriend moved there, yet, Missouri had been the residence of the child's father for many years, family of the child lived in Missouri, and the child had attended summer school, and belonged to her Father's church as well as the child's Father was the only parent to provide her with dental care which could be found in the state of Missouri and, further, the statute looks to what is in the “best interest of the child” when determining which state should take jurisdiction over him/her. Clearly, it was in the best interest of the child that Missouri take jurisdiction in this situation.

The court in Payne v. Weker, 917 S.W.2d 201 (Mo. App. WD 1996) citing Levis v. Markee, 771 S.W.2d 928, 931 (Mo. App. 1989) states that, “A court **generally cannot** make a custody determination if a child has lived out of the state for more than six months.” It is important to note this because a failure to do so would be to ignore the majority of the law stated in Mo. Rev. Stat. 452.450.

Father further argues that Mother cannot claim New Jersey as the child’s home state as the statute requires that, “Mo. Rev. Stat. 452.450.1 states with clarity and in plain language that if “(1) This State: . . . (b) Had been the child’s home state within six months before commencement of the proceeding and the child is absent from this state for any reason, **and a parent or person acting as parent continues to live in this state** a state would continue to have subject-matter jurisdiction.” The testimony is clear that Mother moved from New Jersey, whether in August or on September 4, 2006, and, therefore, Mother cannot claim New Jersey as the child’s home state since she did not continue to live in New Jersey. Neither parent could be found in New Jersey on September 5, 2006 when Father filed his petition. In this case, unfortunately for Mother’s argument, she had moved from the state of New Jersey which “canceled” New Jersey out as a possible home state for the child.

The Court in Payne v. Weker addresses the situation created when the Father filed an Application for Contempt and thereafter a Motion to Modify. The original dissolution of marriage was filed in the state of Missouri where the parties had resided in lawful marriage with one another, where the minor child was born and lived for three years and, within this original litigation, the parties entered into an agreement which provided that the child move to Maryland.

NOTE: This case dealt with a duel between states about subject matter jurisdiction where the Mother took off to Maryland and decided not to bring the child back, which is what

Mother did in December of 2001 when she took the child to New Jersey and refused Father contact with the child.

Father agrees that this case is on point with ours as to the facts in January of 2002, but not September 2006. The Weker court found that Missouri was the best forum to make custody determinations for the children despite the fact that they had been taken to Maryland by the Mother and were no longer present in Missouri which are facts definitely on point with the facts in our case. However, Movant references this case for the proposition that it is on point for the facts existing on September 5, 2006, which, unfortunately for Movant, is not.

In the Weker case, the children had lived in Maryland for approximately five (5) years since the initial litigation was filed, had attended school in Maryland and made friends and such. The Missouri Court found that Maryland should take jurisdiction of the minor children, issues of custody, and relinquish its jurisdiction.

This case is not on point with ours because the child in our case had not lived in a state for a lengthy period of time, like the kids in Weker, to allow this Court to find subject matter jurisdiction in any state pursuant to the home state provision in §452.450.1. On September 5, 2007, the child lived in Georgia with her Mother for a matter of weeks, maybe days, therefore, Georgia could not be the home state as the child had not been in Georgia with her Mother for six months prior to the filing of the litigation, and the child no longer lived in New Jersey, where she did live for some time, at the time of the filing of the litigation. Clearly, the child did not have a home state at the time this litigation was filed.

This Court's only choice was to do an analysis under §452.450.2, the best interest/significant connections analysis. And, when doing such analysis, the comments in the Commissioner's notes to Subsection 2 of the UCCJA stated that "The interest of the child is

served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state. Again, on September 5, 2006, Missouri was the only state that could have met this definition.

Furthermore, the Court in Lydic v. Manker, 789 S.W.2d 129 (Mo. App. SD 1990) held that, “Where a custody decree is entered in Missouri, and the child and a parent move to another state, Missouri continues to have preferential jurisdiction to hear subsequent custody and visitation matters, so long as one parent continues to reside in Missouri.” *Citing Kruger, Jurisdiction Under the Uniform Child Custody Jurisdiction Act*, 44 J.Mo.Bar 467, 469 (1988); Bodenheimer, *Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in Conflict of Laws*, 22 Vand.L.Rev. 1229, 1237 (1969).

Lydic further cites Kumar v. Superior Court of Santa Clara Cty., 652 P.2d 1003, 1007 (Sup. 1982) which addressed this principle as follows: “Exclusive continuing jurisdiction is not affected by the child’s residence in another state for six months or more. Although the new state becomes the child’s home state, significant connection jurisdiction continues in the state of the prior decree where the Court record and other evidence exists and where one parent or another contestant continues to reside.” **NOTE:** The Lydic court chose to not use this legal principle to assert subject matter jurisdiction because it held that the facts of the case were sufficient to find jurisdiction under the significant connection analysis, which is what this Court did in its Judgment of July 25, 2007.

Mother refers to the following cases to suggest that Missouri does not have subject matter jurisdiction. Father argues contrary and addresses the following cases: Department of Social Services v. Hudson, 158 S.W.3d 319 (Mo. App. W.D. 2005), Timmings and Bounds in the foregoing paragraphs, to wit:

The Hudson case is so far off point that Father will not spend much time on it. This case is about a Mother who requested assistance from Texas Department of Social Services for support from the Father of her fifteen (15) years old son who was born in Missouri in 1988. Pursuant to the UIFSA statutes, Texas referred the case to Missouri where the Father filed a counter-claim for custody. The Court found that Texas was the child's home state for purposes of custody determinations as the child lived in Texas and had been for sometime at the time the litigation was filed and all pertinent information relating to the child would be found there.

The Timmings v. Timmings, 628 S.W.2d 724 (Mo. App. E.D. 1982) is a case with very similar facts as the Weker and Hudson case in that the child lived in the opposing state for a length of years. The child was born in Missouri and lived here for a short time and then moved to Iowa with his Mother. The Court held that Iowa was the child's home state. Again, this case is not on point as the child in our case had no home state at the time the September 5, 2006 litigation was filed.

The Bounds v. O'Brien, 134 S.W.3d 66 (Mo. App. E.D. 2004) case is not on point either. This case deals with a Mother who took her five (5) month old infant child to the Phillippines where she was born and raised, taking him from Missouri and his putative Father. She returned to Missouri two (2) months later, leaving the child in the Phillippines. On October 21, 2002, the Father filed a Petition for Paternity, Custody and Support in Missouri while the Grandparents in the Phillippines filed a Petition for Guardianship. The Missouri Court did an analysis under §452.450.2, where one parent (both in this case) continued to live in Missouri and the child no longer did and performed the "significant connection analysis."

The Court found that the Phillippinnes should have jurisdiction over the infant child because, by the time the litigation was filed in October of 2002, the child had lived in the

Phillippines for almost six (6) months with his grandparents who were significantly involved in the child's care and "most all of the information relating to the child's development or personal relationships" could be found in the Phillippines. And in so finding, the Court recognized that the important consideration in these cases is the best interest of the child and that the statute "requires a significant connection with this state on the part of *both* the child and at least one litigant."

However, in this case, the child does not have a home state and between Georgia and Missouri, the child easily had more significant connections to the state of Missouri in September of 2006, coupled with the argument that Missouri has preferential jurisdiction since the original decree was entered in this state.

Father states that Gosserand v. Gosserand, 230 S.W.3rd 628 (Mo. App. 2007) is not on point with our case as, once again, this case deals with children who have lived primarily in the state of North Carolina with their Mother, and Father was asking the Missouri Court to take subject matter jurisdiction over the case in lieu of relinquishing jurisdiction to the children's home state under the significant connections analysis. The case involved some suggestion of allegations of instability and withholding of parenting time by Mother, but the Court found that there was not sufficient evidence to find jurisdiction under the Emergency provision of the UCCJA.

This case can be further distinguished from our case in that the Mother failed to participate in the proceedings before the trial court while in this case Mother participated from the start, filing an Answer and participating in discovery exchanges. Also notable is that even though the Court raised the issue of Mother's pro se status at each case management conference

and at trial, discussing with her the benefits of having counsel, Mother still chose to represent herself in these proceedings, only hiring counsel after the Court's ruling changing custody.

Father disagrees with Mother's assessment of the Court's reason for considering Mother's move to Georgia and that it was due to her inadequate statutory notice to Father of the move. The Court made it clear that it considered Mother's move to Georgia only to compare which State was a more *appropriate* forum to determine the custody of the child. The child clearly had more significant connections to Missouri as her Father had lived in Missouri for five (5) years, the child had spent several summers in Missouri with her Father and her half-sister and step-mother, she had an established dentist in Missouri and her Father had a pediatrician well-known to her Father who had provided her care, plus the presence of extended family. The child had minimal connections to Georgia as Mother had just moved to Georgia with her fiancé, where the child had had no opportunity to make friends, join a church, establish medical and dental providers or acquire any educational history and no extended family.

Further, Father interprets the trial Court's comment about relocation to mean that the Court was recognizing that Mother's recent move caused the minor child to no longer have a "home state" for purposes of subject matter jurisdiction determination.

Father concurs with the theory held within the Laws v. Higgins case in that the Laws Court recognized that "Some of these purposes [of the UCCJA] were the avoidance of jurisdictional competition and conflict, cooperation among state courts, and the deterrence of abduction and other unilateral removals of children." *Citing Allen v. Allen*, 645 P.2d 300, 304 (1982). And, the Laws Court cited the longstanding rule that ". . . the Court's acquisition of jurisdiction over a case depends on the facts existing at the time its jurisdiction is invoked. 20 Am. Jur.2d Courts §142 (1965). This general principle is expressly stated in the statute in

respect to home state jurisdiction. §452.440-452.450.”

The Piedmonte case is not on point as the Piedmonte case deals with a Petition for Guardianship filed by a child’s grandparents in Missouri who refused to send the child back to her Mother due to allegations of abuse and neglect and the Piedmonte Court’s analysis of whether Missouri took proper jurisdiction under Mo. Rev. Stat. 452.450.3 [the Emergency Clause], and no where in the case does it talk about a child who moved with her Mother to another state and whether the previous state maintained jurisdiction despite the absence of both Mother and child from the previous state. Piedmonte v. Nissen, 817 S.W.2d 26 (Mo. App. 1991).

The Lopp case is not on point and does not even stand for the proposition suggested by Mother as the Lopp court was analyzing the procedure for determination when a Missouri court should modify a judgment of another state court, to wit:

In total, §452.505 reads as follows: If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with sections 452.440 to 452.550 or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction.

See Lopp at 671.

The Lopp Court goes on to say that, “In cases where the status of the foreign state’s jurisdiction is at issue, Missouri’s §452.450 is used to determine the foreign state’s jurisdiction.” *Id. at 671.* Again, this case is not on point as this Court is dealing with its own judgment and deciding whether it has continuing subject matter jurisdiction. Further, Movant incorrectly states that New Jersey was the home state of child on September 5, 2006.

Father argues that Mother’s attempt to use or refer to evidence that has not been entered into evidence at the trial on the matter is highly inappropriate and each proffer of such evidence

should be stricken in accordance with the finding in Reeves v. Reeves, 768 S.W.2d 649 (Mo. App. SD 1989). This Court dealt with an Appellant who attempted to introduce new evidence to the trial court through her after trial motion [as Movant attempts to do here], which was subsequently denied by the trial court, wherein the Appellant attempted to call said motion a “motion to reopen” the case in the appeal and the appellate court made the following finding: “

The characterization of the motion as a motion to reopen and receive additional evidence is a legal misnomer. **The motion prays the court to reconsider and amend its decree . . .** The motion was accompanied by an affidavit that because of the nearness of the shop to the home, the award of the shop to the husband was very offensive to the wife and would result in the loss of value to the remaining 40 acres. The affidavit was accompanied by pictures to demonstrate the location of the home and shop. **However, there is no prayer to reopen the case. The affidavit was merely an ineffective attempt to place additional evidence before the court. The motion was, as stated in the point and established by its terms, purportedly an after-trial motion to amend or for a new trial or both authorized by Rule 73.01(a)(3). Emphasis added.**

Mother, as the Appellant in the Reeves case, makes no prayer or request to reopen this matter to accept additional information.

CONCLUSION – POINT II

Father argues that the trial court’s assertion of subject matter jurisdiction in its July 31, 2006 judgment was not against the weight of the evidence and was not an abuse of the trial court’s discretion nor was it inappropriate for the trial court to exercise jurisdiction and New Jersey was clearly not the child’s home state on September 5, 2006.

III-POINT RELIED ON

THE TRIAL COURT ERRED IN FINDING THAT THE PARTIES IN THIS CASE HAD EXPERIENCED A CONTINUING CHANGE IN THEIR CIRCUMSTANCES SO SUBSTANTIAL THAT A MODIFICATION WAS NECESSARY TO SERVE THE BEST INTERESTS OF JOHNAE HIGHTOWER BECAUSE MANY OF THE TRIAL COURT'S FINDINGS AND JUDGMENTS CONCERNING CUSTODY WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, WERE AGAINST THE WEIGHT OF THE EVIDENCE, OR WERE A RESULT OF THE TRIAL COURT'S MISAPPLICATION OF THE LAW IN THAT A CHANGE IN JOHNAE HIGHTOWER'S RESIDENTIAL CUSTODY FROM MOTHER TO FATHER WAS BOTH UNNECESSARY AND NOT IN HER BEST INTEREST

STANDARD OF REVIEW

The Court “. . . based [its decision as to subject matter jurisdiction] on findings . . . substantially supported by the record.” See Bowan v. Express Med. Transporters, Inc., 135 S.W.3d 452, 456 (Mo. App. 2004). Further, “the standard of review for an order denying a motion for new trial is abuse of discretion. . . . A trial court abuses its discretion when a ruling is clearly against the logic of the circumstances then before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Id. at 896.*

“If reasonable minds can differ about the propriety of the trial court’s ruling, there was no abuse of discretion.” Hatchette v. Hatchette, 57 S.W.3d 884 (Mo. App. W.D. 2001). When a trial court’s rulings are reviewed by a higher court, “the evidence is viewed in the light most favorable to the decree.” In re the Marriage of Lawry, 883 S.W.2d 84 (Mo. App. S.D. 1994).

The Court in Michel v. Michel, 142 S.W.3d 912 (Mo. App. SD 2004) held that “the standard for reviewing a decree of dissolution is the same for reviewing any court-tried action.” *Citing* Bullard v. Bullard, 929 S.W.2d 942 (Mo. App. E.D. 1996). The decree 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 (Mo. Banc 1976).

In reviewing the evidence, the appellate court gives deference to the trial court's determination of the credibility of witnesses, because “[t]he trial judge is in a better position than this court to determine the credibility of the parties, their sincerity, character and other trial intangibles which may not be shown by the record.” Williams, 922 S.W.2d at 423.

In Patterson v. Patterson, 207 S.W.3d 179 (Mo. App. S.D. 2006), the Court held that, “The evidence and all inferences drawn therefrom are viewed in the light most favorable to the judgment.” Citing Hall v. Hall, 53 S.W.3d 214, 217 (Mo.App.2001). Deference is granted to the trial court's determinations regarding the credibility of witnesses. Id.

The Court in STEWART v. MANOR BANKING COMPANY, 397 S.W.2d 377 (Mo. App. WD 1965), held that, ‘It is well settled that a party who seeks a new trial on such ground [new evidence] should (to obtain such relief) be required to show: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that it did not come sooner; (3) that it is so material that it would probably produce a different result if the new trial were granted; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be produced, or its absence accounted for; and (6) that the object of the testimony is not merely to impeach the character or credit of a witness. Citing Young v. St. Louis Public Service Co., Mo.Sup., 326 S.W.2d 107, 111..

The Court in King, et. al. v. Gilson, et. al., 90 S.W. 307 (Mo. Banc 1907) the Court held that when attempting to enter new evidence within a Motion for New Trial, “The application must show, first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial were granted; fourth, that it is not cumulative; fifth, that the affidavit of the witness, himself, should be produced, or his absence

accounted for; sixth, that the object of the testimony is not merely to impeach the character or credit of a witness.”

“The law requires such evidence to be set out in the motion; and the mere fact that it is so stated does not prove it to be true, and for that reason its truthfulness is required to be established by affidavits.” *Id. at 30.*

Father again prays that this Court strike and ignore any evidence which Mother attempts to inappropriately introduce to the appellate court and consider only that evidence which was presented at the trial in the matter.

ARGUMENT

Mother implies that if the Court does not make findings under each of the eight (8) factors under Mo. Rev. Stat. 452.375.2 (1) through (8), then a Judgment dealing with custody is void. The Weiss court specifically addressed this very issue when it held that “Section 452.375.6 does not mandate written findings on all of the factors listed, but the relevant factors must be detailed.” Weiss v. Crites, 169 S.W.3d 888 (Mo. App. E.D. 2005).

Father agrees with the general proposition cited in Wilson v. Wilson that a “custodial parent is presumed to be suitable,” however, this presumption can be overcome and shown to be inaccurate” through the evidence presented at trial which is what Father did. *Id.* at 873 S.W.2d 667 (Mo. App. 1994).

Father’s interpretation of the Wilson case is that this case deals solely with the interpretation of the relocation statute, Mo. Rev. Stat. 452.377 RSMo, and the considerations that a Court must make in deciding whether the moving party should be allowed to relocate. Mother ignores that this case is distinguishable in at least one very important way – the Mother in the Wilson case was seeking **permission** to move the child to another state rather than in our case where Mother made that decision on her own, in violation of Mo. Rev. Stat. 452.377 and the

joint legal parenting plan which required Mother to communicate with Father about the child's living arrangements. Mother had already moved to Georgia thereby denying Father and this Court the opportunity to determine whether the move was in the best interest of the child.

Father agrees that all decisions made by a trial court relating to the care and custody of a minor child should be made only if the Court finds it to be in the best interest of the child to make changes in the custody of the child.

Father agrees that the court in Ijames v. Ijames, 909 S.W. 2d 378 (Mo. App. S.D. 1995) stated that, "The change in circumstances must be such as to give definite promise that the custody change will substantially benefit the child." *Id at 380*. Again, Mother attempts to lend a meaning to the words of the trial court not intended by the Court, as is here with the words of the Ijames court. Mother suggests that the Ijames court meant that a trial court changing custody must, somehow, ensure or declare that it binds itself to its ruling that the Court's change in custody will result in a superior existence for the child by changing custody which was not the intended meaning by this Court.

What the Ijames court meant when it said, "The change in circumstances must be such as to give definite promise that the custody change will substantially benefit the child," is that the changes in the circumstances of the child and/or the custodial parent are "substantial and continuing" which is a required threshold determination for a Court before it can determine whether a change in custody is in the child's best interest and "will substantially benefit the child."

I - PREFERENCE OF CHILD

Father states that Sanders v. Bush, 123 S.W.3d 311 (Mo. App. WD 2003) did not stand for the proposition that a guardian ad litem should be appointed for an eight (8) year old child,

but rather, if a Court is not going to interview a child of sufficient age [in this case the child was thirteen (13) years old], then the court must consider the wishes of the child either through other evidence submitted or by appointing a guardian ad litem to speak for the child.

The Sanders court did remand for the child's wishes; however, the child was thirteen (13) years of age, an age sufficient to make his wishes known, not eight (8) years old like the child in this case. The Court further stated that, "If the child is of sufficient age to form and express an intelligent preference as to custody, the child should be permitted to do so, and the Court should consider that preference along with the other facts and circumstances before it." *Id. at 312.*

Father simply states that Mother had statutory law available to her which allowed her to file a motion asking the Court to determine the child's competency to testify on her own behalf and she failed to do so. Further, Mother's counsel knows that it is not customary for any party to ask a Court to interview an eight (8) year old child. *See Mo. Rev. Stat. 452.385.*

II – MOTHER'S CREDIBILITY

Father states that Mother misstates the Court's findings and holdings when she states that the Court's judgment was erroneous in that its judgment was based mainly on issues of credibility of witnesses; however, Mother, herself, provided much of the testimony that the Court based its decision on; and, Mother does not understand that just by saying something, does not make it so.

Father asserts that mere assertions or conclusory statements in a Motion for New Trial should not be the basis for a Court granting same. *See King, et. al. v. Gilson, et. al., 90 S.W. 307 (Mo. Banc 1907),* wherein this Court held that "The law requires such evidence to be set out in the motion; and the mere fact that it is so stated does not prove it to be true, and for that reason its truthfulness is required to be established by affidavits." *Id. at 30.*

The Court's suggestion that Movant's ". . . truthfulness on this [her marriage] and other

issues concerning her current living and financial status was questionable,” was referring not to whether or not she was or was not married or employed as she testified to, but rather to the reasons why she married six (6) days prior to the hearing date and as to how much she earned at her employment. When reviewing the document purported to be a Marriage License it states that the marriage was performed by a Judge in Dallas County, Georgia suggesting that the marriage, if authentic, was an impulsive act and not well-thought out or planned; and, again, at least the purported Application for Marriage License was available prior to trial and available to present to the Court as well as the paystubs which Mother now attempts to belatedly place before the Court.

EXAMPLES OF MOVANT’S LACK OF CREDIBILITY: Mother was compelled to marry Benjamin Napper prior to trial as she had referred to Mr. Napper numerous times as her spouse prior to trial, knowing that this was not true. *See Tr. Page 66, Lines 13-14 and Page 67, Lines 1-7.* She suggested that she and Mr. Napper owned real estate together, as husband and wife, which was not true. *See Tr. Page 37, Lines 8-25, Page 38, Lines 1-6.* However, Mother would pick and choose when to call him a spouse as she failed to acknowledge his financial assistance in her Form 500 submitted to the Division of Family Support in August of 2006. Further, at trial, Mother testified that her income was \$1,236 per month, but the letter submitted by Mother in her Motion for New Trial indicates her salary at \$32,000 per year or \$2,666 per month. This information would have resulted in a higher child support obligation for Mother if provided as requested in Father’s discovery requests. This letter could have been provided in her discovery prior to trial; however, Mother failed to provide her discovery to Father until after the trial in this matter. Mother postmarked her discovery responses on June 4, 2007, from Roswell,

Georgia, two days before trial. Mother had at trial her Income and Expense and Asset and Debt Statements with her.

An important credibility issue arose when Mother insisted that she had a legal right to reside in the residence she lives in in Georgia and submitted a Lease Agreement that included her signature on it, but did not state her name as a Tenant in the beginning recitals of the Lease, only Mr. Napper's name. When Mother was confronted with possible phone testimony by the sellers' Georgia realtor and a copy of the Lease from the sellers' realtor, showing the absence of the Mother's signature on the lease [contrary to her testimony that she did sign the lease], a strong case was made that Mother was fraudulently attempting to create or manipulate evidence to benefit or bolster her position.

Father argues that none of the information which Mother attempts to offer within her New Trial motion, specifically Exhibits 34 and 35, are not material to the Court's determination and would not change the Court's decision in that these documents do nothing to change Mother's repeated and intentional withholding of Father's parenting time, are cumulative as Mother testified to her work and marital status at trial, and all of this information was available to Mother prior to trial and, therefore, available to use as evidence in trial.

Father states that Mother's pro se status is wholly irrelevant to her Motion for New Trial as the Court gave Mother ample opportunity and several recommendations that she obtain counsel as Mother would be held to the same standards as an attorney, but even despite these recommendations made by the Court, Mother was resolved to represent her own interests.

In support of the above, Father cites In Re the Marriage of Garrison, 158 S.W.3d 336, 338 (Mo. App. S.D. 2005) which holds that "**Pro se litigants** must satisfy all of the relevant rules of procedure and this Court cannot hold a **prose litigant** to a lower standard of performance

than a **litigant** who is represented by counsel. *Speer v. K & B Leather Co.*, 150 S.W.3d 387, 388 (Mo.App. S.D.2004). We explained the justification for this rule in *Lane v. Elliott*, 102 S.W.3d 53 (Mo.App. S.D.2003):

We recognize that Appellant is appealing as a **pro se litigant**, however, **pro se litigants** are still bound by the same rules of procedure as attorneys. ‘While this court recognizes the problems faced by **pro se litigants**, we cannot relax our standards for non lawyers.’ This refusal to relax the standards for an appeal for **pro se litigants** is not due to a lack of sympathy, but rather ‘it is necessitated by the requirements of judicial impartiality, judicial economy and fairness to all parties.’ *Lane*, 102 S.W.3d at 55 (quoting *Sutton v. Goldenberg*, 862 S.W.2d 515, 517 (Mo.App. E.D.1993)).”

III – SCHOOL RELATED FINDINGS

Father further argues that Mother attempts to proffer new evidence to this Court, but has failed to properly allege that the new evidence eluded to, specifically the information dealing with the child’s school performance while in her custody, did not exist prior to the trial; that she used due diligence in trying to obtain same and still could not; that said evidence is material and would result in the trial court changing its ruling; and that said evidence is not cumulative in that Mother did testify at trial about the child’s education history.

Father argues that Mother has failed to properly allege that the new evidence eluded to, specifically evidence to impeach or attack Father’s credibility that when Father allegedly testified that the child had disciplinary problems in Georgia that his testimony was untrue, in that she failed to prove that such evidence did not exist prior to the trial; that she used due diligence in trying to obtain same and still could not; that said evidence is material and would result in the trial court changing its ruling; and that said evidence is not cumulative in that Mother did testify

at trial about the child's education history. And, the Court shall not grant a motion for new trial based on evidence offered to simply impeach or discredit a witness.

Father suggests that the fact of when this behavioral incident occurred is less important to the Court than the fact that the child actually did experience the behavioral problems testified to by Father, which supports Father's assertion that Mother refused to jointly parent the child as she refused to provide any education information to him. Whether the child stabbed a teacher's hand in 2004 or 2006, the child's behavior is still extremely worrisome and, significantly, occurred on Mother's parental watch.

Father suggests that Mother places far too much emphasis on the Court's findings relating to the child's school experiences as the Court's judgment places much more emphasis on Mother's unwillingness to cooperate with Father to allow him to exercise his joint legal and physical custody rights and her direct and intentional acts to deny Father his custodial parenting time.

Mother has failed in her attempts to properly submit new testimony by Mother and documentation concerning the child's educational experience while in her physical custody. Mother attacks Father's credibility with respect to his testimony involving the child's numerous changes in school and her adjustment to the school in Georgia by referring this court to additional testimony by mother and additional documentation and the purpose of trying to get the Court to consider the evidence is to attack the credibility of the Father which is not appropriate or allowed pursuant to STEWART v. MANOR BANKING COMPANY, 397 S.W.2d 377 (Mo. App. WD 1965).

IV-VISITATION PERIODS

Mother's confesses that she withheld Father's parenting time Christmas 2005.

Father disagrees with Mother's interpretation and suggests that the logical and common sense interpretation of the words "generally, while the minor child requires a chaperone" refers to the age prior to when a child is allowed to fly alone by industry regulations and not the age that Mother determines arbitrarily that the child is old enough to fly alone. Father further states that he testified at trial that he tried to discuss this issue with Mother to no avail. Also, the parties must assume that the Court considered the Parenting Plan in her deliberations and more specifically the language dealing with transportation. Mother was given an opportunity to testify to this issue, and admitted that Father attempted to discuss the issue with her, but Mother made it clear that she did not think the child could fly alone and that she wouldn't believe she was old enough until she was a teenager. Clearly, the court found Mother's position unreasonable.

Father again must clarify the holding in Sumnicht v. Sackman as this case does not stand for the proposition Mother contends it does. What the Sumnicht court found was that the record presented to it did not show sufficient evidence to support a change in custody. It held that "This Court, on review, held that the evidence did not support findings a, b and e . . . " which found that (1) the father has become the more likely of the two parents to allow the child frequent and meaningful contact with the other parent; (2) the mother minimized the contact of the child with his father; and (3) the mother has refused to allow the child to spend time with this father unless specifically required by the visitation order of July 5, 1984 . . . " and the Court stated that the evidence actually showed that the Father was upset because Mother would not give him extra parenting time – not that she was withholding scheduled parenting time. The court writes, "Father does not claim that Mother has violated the schedule; rather, he complains he has not received extra time with Liam lately when he has requested it."

The facts of this case are clearly not on point with this case and are distinguishable in that Father and the child live far apart, do not have the ability to have every other weekend with the child as the Father in the Sumntich court did, and Father alleges denial of what little parenting time he had with the child under the parties' parenting plan. In fact, this Court recognized that Father has not had a Christmas with his daughter in four (4) years.

Father disagrees with Mother's interpretation of "make-up time" as extra time arguing that these two words are oxymorons, suggesting the opposite meaning of each other; and, further states that Mother did deny new time to make up for those times Father missed with his child.

Father argues that the statements averred by Mother dealing with the number of days under the Parenting Plan given to Father is irrelevant to issues at hand in this matter as the issue is not what parenting time was granted to Father under the Parenting Plan, but rather what time did Father get to actually spend with the child and how much time was denied him under the Plan. Father's statement that he spent 75 days with the child in the last twelve months included those days spent with the child in the Summer of 2006 and 2005 which would equal five (5) weeks or so with the child each summer. Father argues that this proposed evidence is irrelevant and cumulative in nature.

Father states that Mother attempts to offer additional oral testimony that should have been testified to at the time of trial if she so desired as the information Mother is trying to offer to the Court was within the knowledge of the Mother and she cannot now attempt to suggest additional information to bolster her case or to counter the Court's findings after the fact; and, the information offered in said paragraph is immaterial and unimpressive considering Mother can only state two (2) possible weekend visits in the last four (4) years given to Father by Mother voluntarily as the 2007 visit was strongly encouraged by this Court.

Mother gave testimony at trial that Father did not “consistently utilize” his allotted visitation but laments that the Court has determined that it is more likely that Mother denied Father his parenting time rather than Father turning it down, therefore, this paragraph is simply cumulative in nature and immaterial to this Court’s rulings. This is simply an issue of credibility.

Father states that the Stevens case is a case more about the parties leveling allegations of abuse and neglect against each other which is why a guardian ad litem was appointed. Because of the allegations of abuse and neglect, a guardian ad litem was appointed which, in this case, assisted the court in determining the veracity of the parties. In this case, the Court found no need for a guardian ad litem and the Court’s determination of the Mother’s tendencies to withhold the child were based on the evidence and testimony presented by the parties. Stevens v. Stevens, 977 S.W.2d 305 (Mo. App. 1998).

Father points out Mother’s blatant misstatement of Father’s testimony when on Page 75 of her brief she states that, “Father concedes that . . . she had voluntarily provided him with parenting time in excess of that ordered by the Court in 2003.” Tr. at 128. Father never made such a statement.

V-MOTHER’S RELOCATION

Father addresses the case, Humphrey v. Humphrey, 888 S.W.2d 342 (Mo. App. ED 1994) which the Mother cites for the proposition that an opponent of a party’s move must prove a negative impact from the move. Father clarifies for the Court that what the Humphrey Court held was that the custody of a child should only be changed when “the welfare of the child requires that custody should be transferred.” Father argues that the Court had sufficient evidence to find that it was in the child’s best interest to be placed in her Father’s custody as Mother had a

history all the way back to December of 2001 of fleeing with the child and thereafter denying Father contact with the child.

In the initial litigation, the Court heard evidence that the Mother took the child in December of 2002 and denied Father contact with the child for eight (8) months until the Court strongly suggested that parenting time be given to Father. This pattern has continued since the entry of the initial judgment as the Mother has withheld, at a minimum, two Christmases and a spring break from Father in the three (3) years she had custody of the child.

Finally, Father suggests that a party cannot take his/her bad acts and argue that it made things better so it doesn't matter that she refused to follow the law. Mother wants to argue that because she moved the child to Georgia it is so much better for Father so he can't complain. On the contrary, the logistics of the move are not the point. What is important is that Mother continues, year after year, to attempt to preclude or minimize Father's contact and involvement with the minor child including making sole decisions about the child's residence and education.

Father did not receive notice of Mother's move as alleged by Mother. Mother's allegations that Father had evil motives in filing his Motion to Modify because his signature was verified on the 25th of August, ten (10) days before the motion was filed and that the motion included facts that occurred after the 25th date is not evidence that he had actual knowledge of Mother's intent to move.

Father never testified that that he had no suspicions that Mother might be contemplating another move as he testified that when he returned the child in July of 2006, Mother picked the child up at the airport with a trailer attached to a SUV. Father inquired of Mother as to what was going on and Mother told Father that she and her boyfriend were moving some things to her

boyfriend's brother's garage. Father testified that he confronted Mother, face to face, with the possibility of her moving to which Mother denied she had any intentions of moving.

Father came to his counsel's office on the 25th of August, 2006, and pursuant to this office's routine, Father signed a verification page intended to be attached to the final motion which is done by this office to avoid the client having to come to counsel's office *to review the final version* of the motion. Father did not sign a blank affidavit as suggested by Mother's counsel, he signed an affidavit after reviewing the motion which was in a completed state minus the name of the state the child was moved to, the date the Father learned of the move, and the mother's failure to enroll the child in school in a timely manner. Father's counsel e-mailed the final draft to Father a day before the filing of the motion. Father's Motion was filed on the 5th of September. The ten (10) days between the date of filing and date of counsel's meeting with Father as it relates to his motivations and what knowledge he had on the 25th of August versus the 5th of September have no relevance at all except that Father learned with some certainty on the 1st day of September what Mother's intentions were that she intended to relocate to another state. The only additions to the pleading were to Paragraph 4(a), (b), (c), and (d) and (5) to include the state the child was moved to as Father testified that he had suspicions of Mother's intent to move the child but didn't know when or where until September 1, 2006, and to Paragraph 4(e) which indicated Mother's failure to enroll the child in school in a timely manner, which Father only learned after he was informed by Mother of where she was moving the child.

Mother's counsel again twists and manipulates the facts and holdings of a case to suit her needs. The Court in In re the Marriage of Dunn, 650 S.W.2d 638 (Mo. App. 1983) does not deal with contemporaneous verification of pleadings but rather holds that, "Appellant-petitioner testified with respect to the dissolution petition that he did not sign the petition; that it was read

to him on the telephone and that he confirmed the facts as read, to be right; that he did not sign it before a notary (or any other person authorized to take oaths). It was not a verified petition. Respondent filed an answer but did not file a verified counterclaim.” Father signed his affidavit *after* reviewing the contents of the pleading and verified its contents before a notary.

Unfortunately, Mother continues to attempt to defer any responsibility for her willful refusal to allow Father’s visitation with the child by suggesting that Father’s assertion of his right to oppose the move of his child to Georgia is only to avoid increased child support when Father has never missed a child support payment since the entry of the Judgment in 2003. Mother has yet to make one payment for support of the child since the entry of the July 31, 2007 judgment.

MOTHER’S FINANCES

Father addresses Mother’s allegations that the Court inappropriately considered the amount of money the Mother made compared to Father, and Father argues again that Father attempts to manipulate her interpretations of the Court’s findings to bolster her position and is attempting to do so again by suggesting that the Court is trying to state that Father is a more appropriate custodian because he makes more money. The Court made no reference to the parties’ earnings in Paragraph 9 of its Judgment, and in Paragraph 8 the Court refers only to Mother’s *stability* in her employments and not what her earning ability is. It is important for a Court to consider a party’s stability and ability to provide for a child and to maintain consistency in the child’s life. However, merely determining that a party is competent and has the qualities necessary to provide a stable home and income does not mean the Court believes the party with more money is the better parent, only that the parent shows an ability to maintain consistency and stability if the party can show same in his/her work history.

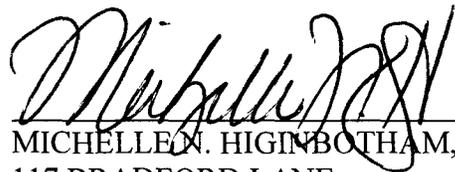
CONCLUSION-POINT III

The trial court's Judgment in this case should not be reversed as its Judgment is supported by substantial evidence and is not against the weight of the evidence; and the trial court properly applied the law when it reached its conclusion to change Johnae's residential custodian from Mother to Father. In Patterson v. Patterson, 207 S.W.3d 179 (Mo. App. S.D. 2006), the Court held that, "The evidence and all inferences drawn therefrom are viewed in the light most favorable to the judgment." *Citing Hall v. Hall*, 53 S.W.3d 214, 217 (Mo.App.2001). Deference is granted to the trial court's determinations regarding the credibility of witnesses. *Id.*

This trial court had the benefit of viewing the witnesses as they testified and to review the evidence as it was admitted in conjunction with the testimony and the Court made its determinations based on its unique position to review same as it occurred – not months or a year later and with biased proffers of unsubstantiated evidence and testimony after the fact; therefore, the trial court's judgment should not be overturned and deference should be given to its determinations herein.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

C E R T I F I C A T E

State of Missouri)
) ss.
County of Jackson)

Michelle N. Higinbotham, having first been duly sworn upon her oath, states that on the 18th day of July, 2008, she delivered one (1) copy of the above Reply Brief, together with a floppy disk which is virus-free, which contains the text of this Brief in Word format and which complies with the requirements of Rule 84.06(g) via U.S. Mail, postage prepaid, to Sandra Grant Hessenflow, 1102 Grand Blvd, Ste 800, Kansas City, Missouri 64106, Attorney for Melissa Ann Myers.

Further, pursuant to Rule 84.06(c), she states the following:

- (a) This brief includes the information required by Rule 55.03;
- (b) This brief complies with the limitations contained in Rule 84.06(b); and
- (c) This brief contains 16,917 words;
- (d) Accompanying this brief is a floppy disk which is virus-free, which contains the text of this Brief in Word format, and which complies with the requirements of Rule 84.06(g).

Michelle N. Higinbotham

Michelle N. Higinbotham

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 18th day of July, 2008.

Angela M. Shapiro-McCoy

Notary Public

My Commission Expires
January 21, 2011

