

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

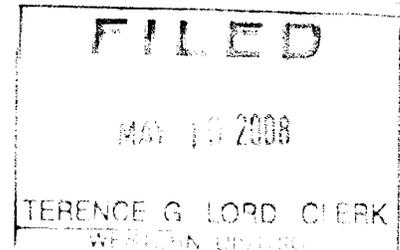
89951

W.D. NO. 69095

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 APPELLANT

Sandra Grant Hessenflow #40346
1102 Grand, Suite 800
KCMO 64106
(816) 471-1060 phone
(816) 471-1066 fax
ATTORNEY FOR APPELLANT

**SERVICE BRIEF
DO NOT REMOVE
FROM FILE ROOM**

SCANNED

TABLE OF CONTENTS

I.	JURISDICTIONAL STATEMENT.....	3
II.	TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED.....	4
III.	STATEMENT OF FACTS.....	6
IV.	POINTS RELIED ON.....	8
V.	ARGUMENT.....	10
	a. Appellant's First Point Relied On.....	10
	b. Standard of Review - Point I.....	10
	c. Argument - Point I.....	10
	d. Appellant's Second Point Relied On.....	29
	e. Standard of Review - Point II.....	29
	f. Argument - Point II.....	30
	g. Appellant's Third Point Relied On.....	57
	h. Standard of Review - Point III.....	58
	i. Argument - Point III.....	58
VI.	CONCLUSION.....	87
VII.	CERTIFICATE.....	89

Page

JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Modification of child custody, visitation, and child support of July 25, 2007, entered by the Honorable Sandra C. Midkiff, Judge of Division 1 of the Circuit Court of Jackson County, Missouri. At issue is whether or not the trial court erred in finding that the State of Missouri had subject matter jurisdiction over the minor child such as to be able to enter a custody, visitation and paternity Judgment in 2003; erred in finding that the parties, in 2003, were able to consent to subject matter jurisdiction over the minor child; erred in finding that Missouri had subject matter jurisdiction to entertain Father's Motion to Modify Custody, Visitation, and Support in 2006; erred in finding that the State of New Jersey, which had been the child's home State since 2001, did not need to decline jurisdiction in favor of Missouri before a Missouri Court could proceed; erred in finding that a transfer of residential custody from Mother to Father was supported by the evidence and was in the child's best interests; and, erred in finding that there was substantial and continuing change in the minor child's circumstance warranting a change in residential custody.

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)*. This appeal does not fall within the category of cases over which the Supreme Court of Missouri has exclusive jurisdiction; and therefore, general appellate jurisdiction lies in the Missouri Court of Appeals, Western District of Missouri, under *Article V, Section 3, Missouri Constitution, 1945, as amended*.

**TABLE OF CASES, STATUTES,
AND OTHER AUTHORITIES CITED**

<u>Statutes and Rules</u>	<u>Page</u>
<i>RSMo. Sec. 210.829</i>	11
<i>RSMo. Sec. 210.843</i>	12
<i>RSMo. Sec. 452.375</i>	Throughout
<i>RSMo. Sec. 452.450</i>	Throughout
<i>RSMo. Sec. 452.445</i>	44, 45
<i>Mo. Sup. Ct. Rule 55.33(c)</i>	14
<u>Cases</u>	
<i>Allen v. Allen</i> , 645 P .2d 300 (1982).....	39
<i>Bounds v. O'Brien</i> , 134 S.W.3d 666 (Mo. App. 2004)	23, 52
<i>Div. of Ch. Sup. Enfr. v. Hudson</i> , 158 S.W.3d 319 (Mo. App. 2006) ...	Throughout
<i>In Re the Marriage of Dooley</i> , 15 S.W.3d 747 (Mo. App. 2000).....	11, 51, 55
<i>In Re the Marriage of Dunn</i> , 650 S.W.2d 638 (Mo. App. 1983)	83
<i>Gosserand v. Gosserand</i> , 230 S.W.3d 628 (Mo. App. 2007)	Throughout
<i>Humphrey v. Humphrey</i> , 888 S.W.2d 342 (Mo. App. 1994)	81
<i>Ijames v. Ijames</i> , 909 S.W.2d 378 (Mo. App. 1995)	59
<i>Kell v. Kell</i> , 53 S.W.3d 203 (Mo. App. 2001)	83
<i>Lallier v. Lallier</i> , 190 S.W.3d 513 (Mo. App. 2006)	25
<i>Loebner v Loebner</i> , 71 S.W.3d 248 (Mo. App. 2002)	84
<i>Lydic v. Manker</i> , 789 S.W.2d 129 (Mo. App. 1990)	23, 31, 53
<i>Krasinski v. Rose</i> , 175 S.W.3d (Mo. App. 2005)	Throughout
<i>McCubbin v. Taylor</i> , 5 S.W.3d 202 (Mo. App. 1999)	76

<i>In re Miller v. Sumpter</i> , 196 S.W.3d 683 (Mo. App. 2006)	Throughout
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. banc 1976)	10, 29, 58
<i>Payne v. Weker</i> , 917 S.W.2d 201 (Mo. App. 1996)	Throughout
<i>Piedmonte v. Nissen</i> , 817 S.W.2d. 26 (Mo. App. 1991)	47, 48, 56
<i>Ray v. Ray</i> , 820 S.W.2d 341 (Mo. App. 1991)	56
<i>Reeves v. Reeves</i> , 768 S.W.2d 649 (Mo. App. 1989)	44
<i>In Re of S. E. P. v. Petry</i> , 35 S.W.3d 862 (Mo. App. 2001)	85
<i>State ex. rel. Laws v. Higgins</i> , 734 S.W.2d 274 (Mo. App. 2002)	Throughout
<i>State ex. rel. Lopp v. Munton</i> , 67 S.W.3d. 666 (Mo. App. 2002)	46
<i>In Re S.M.</i> , 938 S.W.2d 901 (Mo. App. 1997)	14, 21
<i>Sanders v. Bush</i> , 123 S.W.3d 311, 312-314 (Mo. App. 2003).....	61, 62
<i>Stevens v. Stevens</i> , 977 S.W.2d 305 (Mo. App. 1998)	77
<i>Stewart v. Stewart</i> , 905 S.W.2d 114 (Mo. App. 1995)	83
<i>Stowe v. Spence</i> , 41 S.W.3d 468 (Mo. banc 2001)	83
<i>Straight v. Straight</i> , 195 S.W.3d 461 (Mo. App. 2006)	12, 13, 31, 51
<i>Sumnicht v. Sackman</i> , 906 S.W.2d 725 (Mo. App. 1995)	74
<i>Taylor v. Taylor</i> , 908 S.W.2d 361 (Mo. App. 1995)	58
<i>Timmings v. Timmings</i> , 628 S.W.2d 724 (Mo. App. 1982)	48, 50, 53
<i>Weaver v. Kelling</i> , 53 S.W.3d 610 (Mo. App. 2001)	85
<i>Weiss v. Crites</i> , 169 S.W.3d 888 (Mo. App. 2005)	59
<i>Estate of Williams</i> , 922 S.W.2d 422, 423 (Mo. App. 1996)	58
<i>Wilson v. Wilson</i> , 873 S.W.2d 667 (Mo. App. 1994)	59, 68

STATEMENT OF FACTS

On 8/16/1999, Johnae Paige Hightower was born in Kansas City, Wyandotte County, Kansas. *L.F. at 231*

Petitioner, John Hightower (hereafter "Father"), and Respondent, Melissa Ann Myers (Napper) (hereafter "Mother"), were not married at the time of Johnae's birth. *L.F. at 1.*

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.*

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.

In January 12, 2002, Father filed a Petition for Determination of Child Custody, Visitation, and other Relief.

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.

On October 15, 2002, Father was served with the Division of Child Support Enforcement's Notice and Finding of Financial Responsibility. *L.F. at 37-41,43*

On March 6, 2003, the Division of Child Support Enforcement issued an Order of paternity, child support, and financial support, which was subsequently filed with the Circuit Court of Jackson County; this Judgment contained only paternity establishment and financial provisions, it did not contain any provisions regarding custody or visitation.

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.*

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

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***

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.***

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.

On July 25, 2007, the Honorable Sandra Midkiff conducted a trial on the Father's Motion to Modify Custody and granted said Motion, thereby transferring residential custody from Mother to Father. ***L.F. at 129-134***

Mother subsequently filed a Motion for New Trial and a Request to Amend the Judgment, and the Court overruled Mother's Motion and issued Additional Findings of Fact and Conclusions of Law on November 19, 2007. ***L.F. at 145***

This appeal follows.

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

Gosserand v. Gosserand, 230 S.W. 3d 628 (Mo. App. 2007)

In re the Marriage of Miller v. Sumpter, 196 S.W. 3d 683 (Mo. App. 2006)

Krasinski v. Rose, 175 S.W.3d 202 (Mo. App. 2005)

Div. of Child Sup. Enfr. v. Hudson, 158 S.W.3d 319 (Mo. App. 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).

RSMo. Sec. 452.455

RSMo. Sec. 452.450

Gosserand v. Gosserand, 230 S.W. 3d 628 (Mo. App. 2007)

In re the Marriage of Miller v. Sumpter, 196 S.W. 3d 683 (Mo. App. 2006)

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

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

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

Ijames v. Ijames, 909 S.W.2d 378 (Mo. App. 1995)

Stevens v. Stevens, 977 S.W.2d 305 (Mo. App. 1998)

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

It is Mother's position that Missouri has never had subject matter jurisdiction over Johnae's custody or visitation; not in January of 2002, when Father filed his original paternity case; not in 2003, when the initial paternity, custody, and visitation Judgment was entered; not in September of 2006, when Father filed his Motion to Modify the Judgment of 2003; and not in 2007, when the trial court entered its Judgment of Modification. *L.F. at 1,43,96,129*.

It is Mother's position that she still has, by operation of law, the sole legal and physical custody of Johnae, and that if Father wishes to assert his rights to custody or visitation, he must file the appropriate Motion in the proper jurisdiction.

Missouri has several different standards that apply in order for a Missouri court to assume jurisdiction over a child for the purpose of paternity, for the purpose of entering a child support

order, or for the purpose of entering custody or visitation orders. ***State ex. rel. Laws v. Higgins*, 734 S.W.2d 274, (Mo. App. 1987).**

In order to fully understand Mother's jurisdictional arguments, it is necessary to briefly review Missouri's standards for each type of jurisdiction.

To enter a paternity and/or child support Judgment, a Missouri court must first have personal jurisdiction over the parties **RSMo. Sec. 210.829.3** (which Missouri did have in 2002 when the Division of Child Support Enforcement entered its Notice and Finding of Financial Responsibility in this case, in that both parties participated in the administrative process and personally submitted to the personal jurisdiction of the Missouri courts; and, both parties voluntarily appeared, and participated in the circuit court paternity case as well). ***L.F. 37-41, 43.***

To issue a paternity Judgment or child support order, a Missouri court must also have jurisdiction over the *res* of the case pursuant to **RSMo. Section 210.829.4**, which also existed in this case in that Johnae and Mother resided in Missouri from June of 2000 until May of 2001, and Father still resided in Missouri when his Motion for Paternity was filed here in January of 2002. ***L.F. at 2.***

As such, those provisions of the trial court's original Judgment of 2003, which relate to paternity and financial support, are proper and the trial court had jurisdiction to enter a Judgment regarding parentage and financial support at that time.

However, in Missouri, the jurisdiction to establish provisions regarding the custody of visitation with a child is governed by a different statute, namely **RSMo. Section 452.450**.

In order to establish custody or visitation provisions for a child, a Missouri court must not only have jurisdiction over the *res* needed to establish paternity or to order financial support, and personal jurisdiction over the parents themselves, but a Missouri court must also have subject matter jurisdiction over the child, which Mother contends has not existed in the State of Missouri since November of 2001 (six months after she and Johnae permanently moved to New Jersey in May of 2001). ***L.F. at 8. See also, In re the Marriage of Dooley, 15 S.W.3d 747, 757 (Mo. App. 2000.)***

Both the Division of Family Support (formerly Division of Child Support Enforcement, hereinafter "Division") and any parent seeking to establish paternity in Missouri (as Father did when he filed his Motion in January of 2002), must file for paternity pursuant to the provisions of Missouri's version of the **Uniform Parentage Act**.

It is not unusual for the Division or for a parent to file a paternity case in Missouri where the Father lives, even though the Mother and child live outside of Missouri, resulting in Missouri having jurisdiction over the issues of parentage and financial support, but not over the issues of custody and visitation.

This bifurcated jurisdiction is precisely what existed in this case in 2002, when the Division brought a paternity and child support action under the UPA here in Missouri where the Father lived (even though the Mother and Johnae had by then been living in New Jersey for 16 months by October of 2002) *L.F. at 37*; and when Father filed his paternity action in Missouri in January of 2002 (some 8 months after Johnae moved to New Jersey with Mother). *L.F. at 8*.

Courts have recognized that although, pursuant to **RSMo. Section 210.843**, a judgment of paternity *may* include custody and visitation provisions, this statute simply authorizes their inclusion in cases where a court also has independent subject matter jurisdiction pursuant to **RSMo. Section 452.450**.

The inclusion of custody provisions in a paternity judgment, absent subject matter jurisdiction over the child, results in the custody provisions of that Judgment being void, while the paternity and financial provisions remain intact, which is what occurred in the case of ***Krasinski v. Rose*, 175 S.W.3d 202 (Mo. App. 2005)** (where the father filed a motion to have the mother held in contempt of court for failing to abide by the custody provisions found in a Missouri paternity and custody Judgment). ***Krasinski at 203-204***.

In ***Krasinski***, as in our case, the mother and child were not living in Missouri when the Division brought a paternity action on their behalf, but the resulting paternity Judgment included provisions regarding custody and visitation. ***Id. at 203***.

The mother in that case never raised the issue of subject matter jurisdiction until a Missouri court had issued an order finding her in contempt for violating the Judgment's custody provisions, but the Eastern District held that since Missouri did not have subject matter jurisdiction over the issues of custody and visitation, the trial court's custody provisions were, by operation of law, a nullity; and further, that the father would have to bring suit in the child's home state if he wanted to acquire any custody or visitation rights. ***Id. at 204-205***.

Recently, the Western District, in ***Straight v. Straight*, 195 S.W.3d 461 (Mo. App. 2006)**, bemoaned the conflict created by Missouri's failure to enact the UCCJEA 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. *Id.* at 466-467.

However, the *Straight* Court went on to make it clear that just because the result is “awkward,” Missouri courts will not confer subject matter jurisdiction where it does not exist. *Straight* at 467.

There is no exception that allows a Missouri court to find jurisdiction when it does not exist simply for judicial economy or the convenience of the parties. *Straight* at 467.

Mother asserts that in 2003, the trial court had jurisdiction to enter judgments of paternity and child and medical support, because Missouri had personal jurisdiction over both parties, as set forth above.

Missouri did not, however, possess subject matter jurisdiction over Johnae in 2003 (or in 2002 when Father first filed his Motion for custody in Missouri), in that New Jersey had been the Johnae’s home state since May of 2001.

It is undisputed that until a father legalizes his relationship with an illegitimate child under the Missouri’s version of the UPA, the biological Mother is the child’s sole legal custodian. *See, Division of Child Support Enforcement v. Hudson*, 158 S.W.3d 319, 323 (Mo. App. 2005).

The procedural history surrounding the entry of the original custody Judgment in 2003 is as follows.

Since Mother had full legal and physical custody of Johnae when she moved to and became a permanent New Jersey resident on May 13, 2001, Johnae, also by operation of law, moved to and became a permanent resident of New Jersey. *Hudson* at 323; *See also, In Re the Marriage of Miller v. Sumpter*, 193 S.W. 3d 683, 687 (Mo. App. 2006)

Mother and Johnae’s move to New Jersey to live with relatives was never intended to be a temporary absence from Missouri; in fact, Johnae and Mother resided in New Jersey from May 2001 up until September 5, 2006, when they moved to the State of Georgia, and at no time from May 13, 2001 forward, did Johnae or Mother ever return to live in the State of Missouri. *Tr.* at 92-93.

After Mother’s move, it was impossible for the Father to have had custody, formal periods of “parental custodial time,” or anything other than visits voluntarily provided to him by the Mother, in that up until January 12, 2002, he had never filed any cause of action in Missouri

or any other State to establish his paternity of Johnae or to seek any custody or visitation rights. **Hudson at 323.**

On August 16, 1999, Johnae was born in Kansas, not Missouri (as the trial court incorrectly finds ***L.F. at 231***), and she resided with both her Father and Mother in Missouri only from June of 2000 until May 13, 2001, when Father drove Mother and Johnae to New Jersey to live with Mother's relatives. ***L.F. at 10-11, Tr. at 7.***

By the time Father filed his Motion for Paternity in Missouri on January 12, 2002, Johnae and Mother had been permanent legal residents of the State of New Jersey for 8 months, and the only time that Johnae spent in Missouri during those 8 months consisted of two visitations with her Father. ***L.F. at 10-11, 15-16; Tr. at 7-8, 83.***

It is undisputed that Mother voluntarily gave Father two visitations with Johnae between May of 2001 and January of 2002; but while Mother provided the two visits, she and Johnae both continued to reside in New Jersey, and since Johnae had been living in New Jersey for more than six months when Father filed his first motion in Missouri, New Jersey was Johnae's home state and it had exclusive subject matter jurisdiction over her custodial arrangements. ***RSMo. Sec. 452.450.1(1)(a)and(b).***

In his Motion of January 12, 2002, Father tried to establish that Missouri was still Johnae's home state because of her two periods of visitation in Missouri between May of 2001 and January of 2002. ***L.F. at 2.***

Mother had sole legal and physical custody of Johnae during this time; Johnae's temporary absences from New Jersey, after May 13, 2001, were specifically to allow Johnae to visit with her Father, and since neither Johnae or Mother ever moved back to Missouri, the two temporary absences from New Jersey did not effect Johnae's status as a resident of New Jersey. **See In Re S.M., 938 S.W.2d 901, 917 (Mo. App. 1997).**

On July 8, 2002, Father filed his First Amended Petition for paternity and child custody, along with a request for habeas corpus relief.

The filing date of Father's First Amended Petition for Paternity relates back in time to the date of the filing of his original Motion in January of 2002. ***Mo. Sup. Ct. Rule 55.33(c).***

Johnae had been a resident of the State of New Jersey for almost 13 months when Father filed his First Amended Petition, and Johnae had been a permanent resident of New Jersey for over a year and a half when Mother was served with Father's First Amended Petition.

On page 3 of his Motion, Father attempts to establish that Missouri had jurisdiction to determine the issue of custody and to order the return of Johnae to Missouri because he believed that Missouri was Johnae's home state based upon her visitations with her Father in Missouri between May 13, 2001 and the date of the filing of Father's initial Petition on January of 2002, a proposition which, as shown above, is incorrect. *L.F. 10-11.*

On November 25, 2002, the Mother, through counsel, filed a Motion to Dismiss Father's pleadings for Lack of Jurisdiction. *L.F. at 7.*

Mother's basis for her jurisdictional objection was that the minor child had lived in New Jersey since May of 2001, and New Jersey was Johnae's home State when Father filed his initial Petition in Missouri. *L.F. at 8.*

Analysis of the Visitations in Missouri after May 13, 2001

The date that the Mother claims she and Johnae moved permanently to New Jersey, namely May 13, 2001, has never changed, and both Mother and Father have been entirely consistent in all of their testimony and pleadings that Mother and Johnae moved to New Jersey on May 13, 2001, and further that Mother moved there with no intension to return to Missouri to live permanently at any time in the near future. *Tr. at 92-93.*

On January 6, 2003, Father filed a response to Mother's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and an accompanying Affidavit, asking the trial court to accept jurisdiction both as Johnae's home state, and also based upon the significant connections provisions of **RSMo. Sec. 452.450.1.(2) (a) and (b)**; *L.F. at 10-22.*

In his signed and sworn Affidavit of December 23, 2002, Father agrees that Mother moved to New Jersey on May 13, 2001 and that Johnae resided with her thereafter; however, Father also indicates that Johnae continued living with him as well. *L.F. at 10-11.*

Whether Johnae's time spent in Missouri after May 13, 2001 was for visitation or were actual changes in residency (or that Johnae had some sort of "duel residency") remains disputed, but both parties agree that Johnae came to stay with Father for two weeks from June 23rd until the first part of August of 2001, *L.F. at 7*; although Mother believes that Johnae was already back in New Jersey by August 10, 2001, and Mother has daycare receipts showing that Johnae

was back attending daycare in New Jersey as of August 10, 2001 (these receipts would be available should this Court remand this issue for a full evidentiary hearing in the trial court).

Father and Mother are also in agreement that after Johnae returned to New Jersey in August of 2001 (although as stated above, there is a discrepancy of a few days as to what each believes to be her date of return to New Jersey); Johnae then stayed with Mother in New Jersey until November 17, 2001, when she went to Kansas City to stay with Father. *L.F. at 11.*

Further, there is a substantial discrepancy between Father and Mother as to when, after going to Kansas City to stay with Father on November 17, 2001, Johnae returned thereafter to New Jersey.

In his Affidavit of December 23, 2002, Father alleges that Johnae stayed with him from November 17, 2001 through December 23, 2001; and that from December 23, 2001 up until the date the Judgment was entered, Johnae was with Mother in New Jersey. *L.F. at 11.*

Mother contends that Johnae only stayed in Missouri for a few weeks in November of 2001 and then returned with her to New Jersey. *Tr. at 85.*

While neither party states a specific date, there was a great deal of testimony at trial that sometime between November 17, 2001, when Johnae came to stay with Father in Missouri, and the end of November of 2001, Mother and Father had an argument about the expected date for Johnae's return to New Jersey, so Mother left Missouri with Johnae and returned to New Jersey, as set forth below.

The following exchange occurred between Ms. Higginbotham 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.*

The following is another exchange between Judge Midkiff and Mother:

THE COURT: When were those visits, after August -- August of 2001, when else did you bring her to him?

THE WITNESS: He had her in November -- it was November. So it was September, October, November --

THE COURT: So there was one visit in August of '01; is that right?

THE WITNESS: Yes.

THE COURT: And then the next one was in November of '01?

THE WITNESS: I believe so.

THE COURT: And then when was the next -- then what happened after that?

THE WITNESS: That is when I tried to see Johnae while I was here for court, and Mr. Hightower refused to let me see her.

THE COURT: How long had she been with him?

THE WITNESS: For -- I don't know. I think it was a month.

THE COURT: In November of '01.

WITNESS: That is correct. *Tr. at 84,85.*

The following exchange was also between Judge Midkiff and Mother:

THE COURT: But what you do know is that you didn't allow him anymore visits after November of '01 until you had a judgment.

THE WITNESS: I believe he did see her but he did not take her to Missouri, no. *Tr. at 86.*

The following exchange is also between Judge Midkiff and Mother:

Q. Ms. Myers, you said that he -- you keep referring to the fact that Mr. Hightower drove you and Johnae to New Jersey --

A. That is correct.

Q. -- in 2001.

A. That is correct.

Q. What was going on then?

A. Basically we separated.

Q. Okay. And did he take you there against your will?

A. No, he did not.

Q. So that was an agreement? You were in agreement?

A. Between both of us; correct.

Q. And what was the plan for how long you were going to stay there?

A. He knew that I was planning to live there. *Tr. at 92-93.*

During the trial, both parents testified from their recollection, and since their testimony matches, Mother contends that the testimony entered on the record during trial was correct, and that Father's assertion in his Affidavit of December 23, 2003 that his second visit with Johnae was from November 17, 2001 to December 23, 2001, was simply a typo. *L.F. at 11.*

As such, from the date that Johnae moved to the State of New Jersey, up through the date that Father filed his Motion on January 12, 2002, Johnae had spent approximately 6-7 weeks, depending upon her return date in August of 2001, with Father, and approximately 2-4 weeks with Father in Missouri in November 2001; however, between May 13, 2001 and the date of Father filing his petition in January of 2002, Johnae had spent at least 25 weeks, or approximately 75% of her time, with Mother in New Jersey. *L.F. at 11-12; Tr. throughout.*

By the time the trial court entered its first Judgment on April 3, 2003, Johnae had been residing in the State of New Jersey for a month shy of two years, and by the time Father filed his Motion to Modify on September 5, 2006, Johnae had been living in the State of New Jersey for over 5 years. *L.F. at 43, 96.*

The evidence supporting Father's belief that Missouri remained Johnae's home state after May 13, 2001 and that Johnae was simply visiting New Jersey, rather than Mother's belief that Johnae relocated permanently with her in May 2001 and was simply visiting with her Father in Missouri thereafter, is found in the Transcript, where Father testified at trial regarding an agreement he believed was in place before Mother's move on May 13, 2001. *Tr. 141-142.*

However, Father's trial testimony contradicts Father's own pleadings in that in several places in his pleadings from the original paternity case, Father stated that Mother refused to enter into a paternity agreement or to finalize any parenting arrangements with him. *L.F. at 11-12, 16.*

Father's belief that he had a joint custody agreement already in place when Mother and Johnae moved to New Jersey is also contradicted by the letters his own attorney introduced into evidence during original presentation of his case to Judge Torrence, which state unequivocally that Father and Mother did not have even an informal parenting arrangement before she moved, and that she was refusing voluntarily to do so. *L.F. at 31-36.*

Father also indicated that he believed there was a parenting agreement for Johnae's home state to remain Missouri, even after she moved with her Mother to New Jersey, as is set forth in his original Petition of January 12, 2002, in paragraph 11. *L.F. at 2*; however, Father also indicates repeatedly in his pleadings that Mother refused to enter into a parenting plan or any formal parenting arrangements, undermining Father's position that an agreement existed even after Mother moved, and let alone that it was in effect from May 13, 2001 thru the time that he filed his Petition for Paternity on January 12, 2002. *L.F. at 2, 12, 16.*

Also, contrary to Father's testimony at trial, as part of the presentation of his case to Judge Torrence on 3/26/03, Father offered, marked as Petitioner's Exhibit 2, a letter from his then attorney, Michael Whitsitt, to Mother dated June 14, 2001; this letter in particular merits some consideration. *L.F. at 36.*

In this letter, Mr. Whitsitt indicates that after Mother and Johnae's move on May 13, 2001, Father made two contacts with Mother and Mother had been unwilling to offer him any type of visitation or parenting time. *L.F. at 36.*

This letter is clearly not seeking to arrange for visitations in New Jersey for Johnae and Mother, but for visitations with Father in Missouri. *L.F. at 36.*

The letter goes on to state that if Mother does not make "Johnae available to John under reasonable transfer parenting time," they would file a lawsuit in Jackson County to obtain that parenting time. *L.F. at 36.*

In the last paragraph of that letter, Mr. Whitsitt invites Mother to contact him to schedule a visitation and indicates that if she doesn't, he will advise Father to file a suit "to obtain physical custody of Johnae"; indicating that even Father's attorney believed that Mother had physical custody of Johnae and that court action would be necessary to change that status to require Johnae to come to Missouri and/or to obtain parenting time, again indicating that any arrangements made thereafter were specifically for Father's visitation. *L.F. at 36.*

After Mother received the letter, she contacted Mr. Whitsitt and arranged to have Johnae go to visit her Father on June 23rd, which was within the 10 day deadline set by Mr. Whitsitt, so according to the terms of Father's attorney's letter, the two trips back to Missouri were clearly for visitation with Father. *L.F. at 36.*

Nothing in that letter would have led Mother to believe that Johnae remained a resident of the State of Missouri or that she was the one exercising or seeking visitation with Johnae in New Jersey. *L.F. at 36.*

The correspondence from Father's own attorney during the original case lends credibility to Mother's assertion that once she and Johnae moved to New Jersey, any time Johnae spent with Father in Missouri after May of 2001, was for the purpose of Father receiving visitation and parenting time, and not the reverse. *L.F. at 36.*

It is clear that not only did Mother believe that Missouri did not remain Johnae's home state after her move, but even Father and his attorney acted in a manner, and their correspondence shows that they proceeded in a manner, which reinforced Mother's assertion that Johnae's home state as of May 13, 2001 was New Jersey, and not Missouri.

Mother contends that Johnae's absences from New Jersey for visitation with Father in Missouri were temporary absences from her home state; the *S.M.* decision defines what Missouri considers to be a temporary absence:

"In other jurisdictions, one court has focused on the length of the absence in determining if the absence was temporary, *In re Marriage of Schoeffel*, 268 Ill.App.3d 839, 206 Ill.Dec. 59, 61, 644 N.E.2d 827, 829 (1994); while other courts have focused on whether the parties intended the absence to be temporary or permanent. *Walt v. Walt*, 574 So.2d 205, 216 (Fla.App.1991); *Koons v. Koons*, 161 Misc.2d 842, 615 N.Y.S.2d 563, 567 (Sup.1994). Still other courts don't refer specifically to the length of the absence or the intent of the parties, but look to the totality of the circumstances. *Jones v. Jones*, 456 So.2d 1109, 1113 (Ala.App.1984); *In re Marriage of Richardson*, 255 Ill.App.3d 1099, 193 Ill.Dec. 1, 3-4, 625 N.E.2d 1122, 1124-25 (1993); *Joselit v. Joselit*, 375 Pa.Super. 203, 544 A.2d 59, 63 (1988). In comparing the different approaches to resolving the temporary absence issue, the totality of the circumstances test is best suited to adequately deal with the variety of situations which occur, is consistent with prior Missouri decisions, and will be adopted by this court. *S.M.* at 918.

Since Missouri has determined to utilize the totality of circumstances test, the trial court should have found that Johnae's absences from New Jersey were temporary, because they were of short duration and occurred approximately every three months, further indicating that the

absences from New Jersey were for purposes of allowing Father to see Johnae on a regular basis.

On pages 4 and 8 of Father's Response, in paragraph 21, he also attempted to have Missouri exercise jurisdiction under **RSMo. Section 452.450.2.(2)** and to determine that it was in Johnae's best interests that Missouri assume jurisdiction because Father and child had significant connections with Missouri and there was available in Missouri substantial additional evidence concerning the child's present or future, care, protection, training and personal relationships. *L.F. at 3.*

The only other provision under which the trial court could have exercised jurisdiction in 2002, was **RSMo. Sec. 452.450.2.(2)**, but there is no record of any testimony before the trial court during the hearing in 2003 alleging that any party sought jurisdiction based upon this provision. *L.F. at 21-22.*

In dealing with completing bases for jurisdiction under Missouri's version of the UCCJA, the comments make it clear that the bases for jurisdiction set out in **Subsections (1-4)** of **RSMo. Sec. 452.450.1** are in descending preferential order. *See Miller at 690; See Gosserand at 632.*

Jurisdiction under the significant connections provisions of **Subsection 2** can only supersede home state jurisdiction authorized under **Subsection 1**, if both the child and her family have equal or stronger ties with Missouri. *Miller at 691; Gosserand at 632.*

The UCCJA vests jurisdiction in Missouri only if it is the state with the greatest access to relevant information about a child and family; as a general rule, the state with access to the most relevant information is usually the child's home state, and Missouri will only find subject matter jurisdiction pursuant to **RSMo. Section 452.450.1 (2)** in unusual circumstances. *Gosserand at 633.* (Because the *Gosserand* decision so closely mirrors the facts in the present case, the *Gosserand* opinion is discussed in detail in Point II of Appellant's Brief).

The *Gosserand* court was also careful to point out that jurisdiction only exists to serve the interests of the child, and not merely the interests or convenience of the feuding parties to determine custody in a particular State. *Hudson at 327.*

The *Gosserand* court held that there must be maximum, rather than minimum, contacts in that Missouri, and courts will not find jurisdiction pursuant to **Subsection 2** in circumstances

where a child and her family have equal or stronger ties with another State. Miller at 692; Gosserand at 633.

With that being said, **RSMo. Sec. 452.450.2.(2)** would not have been a valid basis for jurisdiction in 2002, because if that were the case, Missouri could assume jurisdiction in any case where one parent resided in and received visitation in Missouri. See *Bounds v. O'Brien*, 134 S.W.3d 666, 670 (Mo. App. 2004).

Judge Torrence did not hear any evidence, nor was there any evidence in the record below for Judge Torrence to have found that the provisions of **RSMo. Sec. 452.450.1(2)** conferred subject matter jurisdiction in Missouri; however, should this Court determine that there is a jurisdictional issue which requires an evidentiary hearing before the trial court, if Father has any such evidence, he may certainly present it then. Gosserand at 634.

It is important to note that there was no pending litigation, no objection from Father, and certainly no paternity, custody, or visitation Judgment in effect when Mother moved with Johnae to New Jersey in May of 2001, and as such, Mother's move did not violate any existing Court Order. See generally, *Lydic v. Manker*, 789 S.W.2d 129, 130-132 (Mo. App. 1990).

The trial court did not have jurisdiction pursuant to **RSMo. Sections 452.450.1, (3) or (4)** either, since they both require the physical presence of the child in the state, and Johnae was not in Missouri when Father filed his Motion in January of 2002, or when he filed his Amended Petition on July 8, 2002, because Johnae was at home with her Mother in New Jersey on both of those days.

Further, New Jersey never made a finding that it was divesting itself of jurisdiction in favor of Missouri either because the decisions regarding Johnae's custody should be made here or because Missouri was a more convenient forum; and as such, **Subsection (2)** is the only provision under which a Missouri court could have possibly assumed jurisdiction over Johnae's custody in 2002.

In reviewing the underlying record in this case, most alarming is the fact that the lack of subject matter jurisdiction over Johnae's custody and visitation was properly raised in the original proceedings in 2002, but the issue was never fully litigated, even though jurisdictional Motions were filed by both Mother and Father. *L.F. at 7,14.*

In fact, on 7/01/02, the Honorable Ann Mesle, who presided over this case early in the proceedings, found that there was a problem with jurisdiction because the child was presently in New Jersey and there was no existing paternity order *L.F. at 56*.

Even though Judge Mesle noted that there was a jurisdictional problem, both parties dismissed their jurisdictional pleadings after they reached an agreement regarding custody, visitation and support; and since the case was already pending here, for convenience, the parents decided to proceed here and to waive any jurisdictional arguments.

Nowhere in the record does it appear that either Judge Mesle or Judge Torrence ever ruled on the subject matter jurisdiction Motions; heard any jurisdictional evidence; or made any specific findings concerning subject matter jurisdiction prior to entering a Judgment containing custody provisions. *L.F. throughout*.

Administrative Proceedings

While subject matter jurisdiction was still being disputed in the Circuit Court case, the Division of Child Support Enforcement issued a Notice and Finding of Paternity and Financial Responsibility, on October of 2003, in administrative case no. 10921395.

After both Mother and Father were served with the Division's Notice, a Hearing Officer proceeded to render an Order of Paternity, Child Support and Financial Support on February 20, 2003. *L.F. at 27-42*.

Father was represented by counsel at the Administrative Hearing, Mother was *Pro Se*.

During the Administrative Hearing on January 21, 2003, both parents indicated that they had reached an agreement on some parenting provisions, and that they wanted those provisions included in the Administrative Order. *L.F. at 38-39*.

The Hearing Officer, both verbally on the record, and in his subsequent written Order, notified Father's counsel and both parents that he did not believe that Missouri had subject matter jurisdiction over custody and visitation issues, and that if Father and Mother wanted to place any provisions concerning custody or visitation on the record, he wanted to make it clear to both parties that those provisions were not enforceable and would not become enforceable simply because they were included in the Hearing Officer's Decision and Order. *L.F. at 38-39*.

The Administrative Hearing Officer's Order of February 20, 2003, was the first legal finding of paternity ever issued in any legal proceeding, and by that time, Johnae had been living with her Mother in New Jersey for almost two years. *L.F. at 37.*

Original Jurisdictional Findings of Judge Torrence

Even in cases where subject matter jurisdiction is not raised, but particularly in this case where both parties filed motions regarding the trial court's subject matter jurisdiction, a trial court is required to make an initial determination regarding subject matter jurisdiction by express Findings of Fact and Conclusions of Law, before it is allowed to enter any findings concerning custody or visitation. *Lallier v. Lallier* 190 S.W.3d 513, 516 (Mo. App. 2006).

The first Circuit Court Judgment to include custody provisions for Johnae was the one entered by the Honorable John Torrence on April 3, 2003. *L.F. at 43-51.*

The total findings of Judge Torrence regarding jurisdiction in his April 3, 2003 Judgment, consist of the following:

- “1. The court has jurisdiction over the parties and the subject matter.
2. The court has jurisdiction to make a child custody determination pursuant to RSMo. Section 452.450 (2000). Further, pursuant to RSMo. Section 210.840.3 (2000), the Judgment of the Court after determining the existence of the parent and child relationship may contain provisions concerning custody, visitation or any matter in the best interest of the child.” *L.F. at 43-44.*

Judge Torrence issued an Amended Judgment and Order of Paternity, Parenting Time and Child Support on August 25, 2003. *L.F. at 52-61.*

Judge Torrence's findings regarding subject matter jurisdiction in his Amended Motion were also found in paragraphs 1 and 2, and they were the identical to those set forth above from the original Judgment of April 3, 2003. *L.F. at 52-53.*

Neither of the initial Judgments of the trial court set forth any specific facts upon which the trial court could have assumed subject matter jurisdiction over Johnae. *Lallier at 516.*

As in *Lallier*, Judge Torrence simply found that Missouri had subject matter jurisdiction, yet provided no analysis of the issue and did not indicate which sections of RSMo. Sec. 452.450 he relied upon in determining that jurisdiction existed. *L.F. at 43-61; Id. at 516.*

A Judgment that contains a conclusive statement of jurisdiction alone, as exists in Judge Torrence's Orders of April 3, 2003 and August 25, 2003, is insufficient and will not stand. **See Gosserand at 634, and Krasinsky at 204.**

In 2003, the trial court failed to make an initial determination of jurisdiction by express findings of fact before it proceeded to decide the issue of custody, which is improper and renders its custody Judgments a nullity. **See Hudson at 323; Miller at 689.**

Mother is fully aware that neither she nor Father pressed the trial court to rule on the issue of subject matter jurisdiction in 2003, and they both consented to the entry of their agreed-upon custody and visitation provisions. **L.F. at 52.**

Even though both consented, the requirement that a trial court determine subject matter jurisdiction may not be waived and may not be conferred by the consent of the parties; it may only be based upon the facts and circumstances existing at the time the jurisdiction is invoked. **Hudson at 323.**

Further, if at anytime, even on a subsequent motion for contempt, motion to modify or other motion for enforcement, subject matter jurisdiction over the initial or any subsequent preceding is raised, it may be reviewed, even if the underlying Judgment has been in effect for an extended period of time. **Hudson at 32; Miller, at 689; Gosserand at 631.**

Additional Findings Concerning the 2002 Subject Matter Jurisdiction

After Mother filed her Motion for New Trial and Father filed his Responsive pleadings thereto, the Honorable Sandra Midkiff issued two additional Orders on November 19, 2007; one was an Order Overruling Respondent's Motion for New Trial, and the second was Additional Findings of Fact and Conclusions of Law Concerning Issues of Child Custody Jurisdiction. **L.F. at 231-238.**

The trial court's supplemental Findings regarding the existence of subject matter jurisdiction during the underlying proceeding are set forth and discussed below:

"This court, in reviewing the record before Judge Torrence, finds that there was an adequate basis for Judge Torrence to assume subject matter jurisdiction in 2003. To issue a paternity finding or child support order, a Missouri court must have jurisdiction over the parties and over the res of the case, under 210.829.2 RSMO. Judge Torrence had both personal and subject matter jurisdiction in the 2003 paternity proceedings. Both parents submitted to the

court's personal jurisdiction. Johnae was born in Missouri. Petitioner resides in Missouri. That jurisdiction is sufficient for the action which established the parenting relationship of Johnae and the Petitioner. Respondent admits this in her motion and suggestions. (Respondent's Motion for New Trial, p. 2, Paragraph 5, 6, and 20). The Judgment of paternity is valid and is not subject to any attack for lack of jurisdiction." *L.F. at 231-232.*

Mother agrees with the Judge's conclusion that Missouri had jurisdiction to establish paternity because the Father resided in Missouri in 2003; however, she is incorrect in finding Johnae was born in Missouri, Johnae was born in the State of Kansas. *L.F. at 15.*

"Respondent argues that 2003 custody proceedings and establishment of a parenting plan (and joint custody) required more—specifically jurisdiction under 452.450 R.S.Mo. In reviewing the record, this court finds that the court made a specific finding that subject matter jurisdiction was based upon 452.450." *L.F. at 232.*

Mother disagrees with Judge Midkiff's conclusion in this finding, in that Judge Midkiff finds that the original Judgment in 2003 contained "a specific finding that subject-matter jurisdiction was based on **RSMo. 452.450**", and although Mother agrees that finding exists in both of Judge Torrence's original Judgments, those findings were simply a recitation of the jurisdictional requirements, and neither Judgment contained any specific findings as to why **RSMo. Section 452.420** specifically applied to this case. *L.F. at 43-61.*

"Respondent had previously agreed that this court had subject matter jurisdiction under Section 452.450.1(2) in prior proceedings (by agreed entries and proposed findings)." *L.F. at 236.*

Mother has never indicated that she did not consent to the entry of the original Judgment; however, parents may not consent to subject matter jurisdiction. *Miller at 689.*

"In 2003 the Jackson County Circuit Court had personal jurisdiction over both parents, sufficient to support judgments of paternity, child and medical support. The court had personal jurisdiction over both parties and Johnae was born in Missouri." *L.F. at 237.*

Mother agrees that in 2003, Jackson County had personal jurisdiction over the parents and the *res* of the case sufficient to support the trial court's judgments of paternity, child, and medical support; however, Johnae was not born in Missouri, and personal jurisdiction does not

also automatically convey subject matter jurisdiction over issues of custody and visitation, as outlined above.

“In 2003, the Court had subject-matter jurisdiction over Johnae under 452.450. There is no basis for this court to look behind or challenge the findings contained in Judge Torrence’s Judgment. The subject-matter custody over the 2003 proceedings is not, however, dispositive or determinative of this court’s child custody jurisdiction.” *L.F. at 237.*

Mother also agrees that whether subject matter jurisdiction existed in 2003 is not dispositive as to whether or not there was jurisdiction for Judge Midkiff to assume subject matter jurisdiction in 2006; however, whether or not the original Judgments of 2003 are valid does bear upon her decisions related to the enforcement of those Judgments, and because Judge Midkiff relied upon the 2003 Judgments as being valid Judgments in her subsequent Judgments of July and November of 2007, if this Court agrees that the custody provisions in the 2003 Judgments were null and void, then all of Judge Midkiff’s findings and conclusions based thereon must be revisited; in addition, it is entirely appropriate not only for Judge Midkiff, once Mother filed her Motion for New Trial, to review and evidence and arguments regarding subject matter jurisdiction, but also for this Court to do so, since jurisdictional defects may be raised at anytime. *Supra.*

None of Judge Torrence’s findings in his original Judgments in 2003 were sufficient to convey subject matter jurisdiction over Johnae’s custody or visitation; and none of Judge Midkiff’s subsequent Findings of Fact and Conclusions of Law regarding the original jurisdiction, as discussed above, were sufficient to do so, because the totality of Judge Midkiff’s supplemental Findings of Fact and Conclusions of Law regarding the 2003 paternity proceedings rely either upon the fact that Johnae was born in Missouri, which is not true, or the fact that Father resided in Missouri in 2002, which was true; but both of those are factors which would establish a jurisdictional basis for paternity and child support orders only, and neither is sufficient to convey subject matter jurisdiction.

Conclusion – Point I

Missouri never had subject matter jurisdiction over Johnae’s custody or visitation, and even if it did, because of the trial court’s failure to make the appropriate Findings of Fact and Conclusions of Law, as is required anytime subject matter jurisdiction is an issue before the

court, any custody or visitation provisions in both the original Judgment of April 3, 2003 and the Amended Judgment of August 25, 2003, are null and void.

Accordingly, by operation of law, even after the entry of the Amended Judgment on August 25, 2003, Mother continued to have sole legal and physical custody of Johnae, and New Jersey continued to be her home state.

Mother asks this Court to find that Missouri did not have subject matter jurisdiction over the issues of Johnae's custody or visitation in 2003, and asks that the original Judgments be reversed with instructions to dismiss Father's custody pleadings for lack of subject matter jurisdiction.

An appropriate alternative remedy is to reverse the Judgment and remand the case to the trial court to conduct an evidentiary hearing, during which Judge Midkiff can hear all of the evidence relevant to the determination of jurisdiction, and if she does find that jurisdiction exists, Judge Midkiff can then issue complete and accurate Findings of Fact and Conclusions of Law regarding Missouri's original jurisdiction. See Gosserand at 634.

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

Mother has already established that a trial court must make an initial determination of jurisdiction by express Findings of Fact prior to addressing any substantive custody issues; that subject matter jurisdiction may not be waived; may not be conferred by consent of the parties; must be based upon the circumstances existing at the time the jurisdiction is invoked; and it may be raised at anytime. *See Point I throughout; Hudson at 323; Miller at 689.*

Since subject matter jurisdiction to modify custody also attaches when the motion is filed, just as in an original proceeding, the trial court must first look to the bases upon which Father asserted jurisdiction when he filed his modification Motion on September 5, 2006.

Only two paragraphs of the Father's Motion to Modify relate to the jurisdiction of the trial court, namely paragraphs 15 and 16; those paragraphs are set forth below in their entirety:

“That, Missouri is the home state of the minor child, pursuant to Mo. Rev. Stat. 452.450, RSMo, which 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: . . . (2) It is in the best interest of the child that a court of this state assume jurisdiction because: (a) . . . 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; . . . and (4) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (1), (2), or (3), . . . it is in the best interest of the child that this court assume jurisdiction.” *L.F. at 100.*

That, the Missouri Uniform Child Custody Jurisdiction Act do not require the presence of the child in order to take jurisdiction over a matter, as Mo. Rev. Stat. 452.420.3 states that “3. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.”” *L.F. at 100.*

In addition, in determining whether or not the trial court made the required findings in its Judgment of July 25, 2007, the trial court's jurisdictional findings must be examined as well; the complete jurisdictional language from the original Judgment of 7/25/07, is found in paragraph 6 on page 2 of the Judgment, and is set forth below in its entirety:

“This court has jurisdiction over all custody issues involving the minor child, under the UCCJA, RSMo. 452.450(2)., in that it is in the best interest of the child that this court assume jurisdiction because the minor child and Petitioner have a significant connection to this state and there is available in this state substantial evidence concerning the child’s present or future care, protection, training and personal relationships. In addition, this state is the more appropriate forum to determine custody of the child, based on the Respondent’s recent relocation from the State of New Jersey to the State of Georgia without proper notice being given to Petitioner. There is no other custody litigation pending and no person other than the parties to this action make any claims to custody of Johnae Paige Hightower.” *L.F. at 130.*

As this Court is aware, since Missouri has enacted the UCCJA and not the UCCJEA, an initial determination of subject matter jurisdiction must be made each time a Missouri court considers entering either initial or subsequent custody or visitation orders. *RSMo. Sec. 452.450.*

Under Missouri’s statutory scheme, it is entirely possible that even if the trial court had jurisdiction to enter the original custody decree in 2003, which Mother disputes as set forth above, Missouri could no longer have had subject matter jurisdiction over Johnae in 2006; or in the converse, even if Missouri did not have subject matter jurisdiction over Johnae in 2003, it is possible that Missouri had since acquired subject matter jurisdiction by September of 2006. *Straight at 466-467.*

In modification cases, it is also clear from Missouri case law that once Missouri has entered a valid custody Judgment, Missouri continues to have preferential jurisdiction to hear any subsequent custody and visitation matters; however, Missouri loses this jurisdiction if it is determined that the child who is the subject of the existing order has lived out of the state for more than six months. *See Payne v. Weker, 917 S.W.2d 201 (Mo. App. 1996); Lydic v. Manker, 789 S.W.2d 129, 131 (Mo. App. 1990).*

Home State Jurisdiction

It was undisputed by the parties at trial that Johnae moved permanently from New Jersey to Georgia on September 5, 2006; it is also undisputed that Father filed his Motion to Modify that same day in Jackson County, Missouri. *L.F. at 96.*

All trial testimony presented by Mother concerning the actual date of the move from New Jersey to Georgia is set forth below.

The following exchange took place between Mother and Ms. Higinbotham:

- Q. And the last pay stub from Rustelle's was for a period ending August 5, 2006; is that right?
- A. That is correct.
- Q. Is that the last pay period that you worked for them?
- A. No, it isn't.
- Q. Okay.
- A. Actually my last day was -- I believe it was Memorial weekend. It was two days before we left and moved to Georgia. *Tr. at 18.*

The following exchange took place between Mother and Ms. Higinbotham:

- Q. (By Ms. Higinbotham) Now Ms. Myers, you said in September of 2006 you moved to Georgia?
- A. That is correct. *Tr. at 22.*

The following exchange took place between Mother and Ms. Higinbotham:

- Q. Okay. Your last day at your employment was what, August 31 of 2006?
- A. Actually I think it was the beginning of September, September 1, September 2, something like that. *Tr. at 24.*

The following exchange took place between Mother and Ms. Higinbotham:

Q. How do we know that that isn't for Mr. Napper?

A. He already lived in Georgia. He resided in Georgia. He started employment in July of '06.

Q. All right, but Ms. Myers, this lease agreement doesn't begin until September of 2006.

A. Correct. He --

Q. Okay.

A. As I stated, he lived -- he moved here in July of 2006 and lived with a cousin until our paperwork was finalized on our house. *Tr. at 26*

The following exchange took place between Mother and Ms. Higinbotham:

Q. (By Ms. Higinbotham) So at the time that you moved in September of 2006 you had no job to go to; did you?

A. No, I didn't. *Tr. at 31.*

(The following exchange took place between Mother and Ms. Higinbotham:)

A. Actually in New Jersey school started on September 8.

Q. She didn't start school in New Jersey; did she?

A. No, she didn't.

Q. Okay. Where did she start school?

A. She started school in Douglasville, Georgia.

Q. All right. And when did she start school there?

A. September 6. *Tr. at 40.*

The following exchange took place between Mother and Ms. Higinbotham:

Q. And if you will look at the early part of August, when does it say that school started at Connie Dugan?

A. August 7th.

Q. All right. So you took Johnae to Georgia in the early part of September and enrolled her in school 30 days late; is that right?

A. That is correct. *Tr. at 41.*

The following exchange took place between Mother and Ms. Higinbotham:

A. Okay. I had no choice but to enroll her into school late.

Q. Why is that?

A. Because of the transition from moving from New Jersey to Douglasville, Georgia.

Q. You just told me that Mr. Napper was living down there in July.

A. Okay.

Q. Why didn't you go in July and get your child started in school in the early part of August?

A. Because we did not sign the paperwork on our house

yet and nothing was finalized. *Tr. at 41-42.*

Not only did Father's testimony not conflict with Mother's testimony that the move occurred in September of 2006, not August of 2006, but his testimony reinforced her testimony; Father's trial testimony related to the date of the move to Georgia is set forth below:

(The following exchange took place between Father and Ms. Higinbotham:

Q. Okay. Now I want to talk about this time when Ms. Myers moved from New Jersey down to Georgia; okay?

A. Uh-huh.

Q. When was it that you knew that your daughter was living in Georgia?

A. September of '06.

Q. Okay. And prior to September of '06, I believe what Ms. Myers had indicated is that they might move down to Georgia?

A. It was a probability. It was a might.

Q. Okay. And at no time did she tell you, we are moving. This is our address. This is our phone number. Anything like that?

A. No.

Q. Okay. Did you ever receive in the mail a certified letter that indicated where she was moving?

A. No.

Q. Did you ever -- when did you find out what school in Georgia that your daughter would be going to?

A. Once they had established residency, and she was going to start, I think in a couple days. But nothing prior to the move.

Q. So that was in early September?

A. Early September. *Tr. at 144-145.*

The following exchange took place between Father and Ms. Higinbotham:

Q. Okay. What other concerns if there are any that you had about Johnae being taken to Georgia?

A. Well, once I found out that they had moved there, and I found out what the school was, I accessed the school's website and the first thing I noticed is the school started in early August. And so I called Melissa at that time and said, Johnae is three weeks behind schooling. And as I further accessed the website I saw that Georgia standard testing was going to be the week of September 15 and Johnae had only been in school September 6 for the second grade. So I said, how will she be up to par in getting what she needs to take this

Georgia standardized testing.

Q. Okay. So you were concerned about how this was affecting her education?

A. Absolutely. *Tr. at 147-148.*

The following exchange occurred between Father and Ms. Higinbotham:

Q. Okay. And so you learned that she started September 6th and seven, eight days later whatever, she is going to be taking this test?

A. Yes. *Tr. at 148.*

The following exchange took place between Mother and Father:

A. When you moved to Georgia, you violated the Parenting Plan twice. You violated it for Christmas and then you violated it again in September. So then I said, enough is enough because your behavior was going to continue on in that manner. *Tr. at 172.*

Regardless of the fact that neither parent ever testified that the move occurred in August of 2006, after Mother filed her Motion for New Trial based in part on lack of subject matter jurisdiction, Judge Midkiff entered two supplemental Orders on November 19, 2007.

In her new Findings of Fact, Judge Midkiff found that Johnae did not move in September of 2006, but rather in August of 2006, meaning that she had no home state on the date Father filed his Motion to Modify. *L.F. 232.*

The trial court's supplemental Findings regarding jurisdiction and the date of the move are as set forth below in their entirety and then discussed individually.

“Petitioner's parental relationship has been established. Regardless of the validity of the prior judgment provisions establishing a parenting plan, this court had jurisdiction to take up the custody issues raised in this action.” *L.F. at 232.*

The Court is incorrect in assuming that because paternity had been established here, Missouri automatically had jurisdiction to take up custody issues. *See Krasinski at 204-205; Hudson at 326.*

“The undisputed evidence was that Ms. Myers had recently moved out of the State of New Jersey. She had moved to Georgia. New Jersey was no longer the home state of Johnae. In the absence of another state's jurisdiction, it was appropriate for this court to assume subject matter jurisdiction under 452.450.1(2), when the court found the requisite basis for jurisdiction.” *L.F. at 232*

This finding is incorrect because New Jersey was still Johnae's home state when Father filed his Petition on September 5, 2007.

The circumstances in our case are similar to those in the *Hudson* case, where the father filed a Motion to Modify in Missouri, and on the day that he did so, the mother and the minor child were actually living in Texas, but very shortly after the father filed his Motion in that case, the mother and child relocated to Arizona; the father in that case argued that because Mother and child had relocated to Arizona shortly after the filing of his Motion to Modify and were no longer living in Texas, the child no longer had a home state based on the recent move and Missouri could assume jurisdiction. *Hudson at 325-326.*

However, the *Hudson* court held that Texas was clearly the child's home state, and since Texas had not indicated that it would not accept jurisdiction, Missouri could not assume jurisdiction over the child until the home state of Texas had made that determination. *Id. at 325-326.*

Further, in determining whether or not New Jersey was Johnae's home state on September 5, 2006, 452.450.1(1) required Judge Midkiff to determine whether or not on September 5, 2006, Johnae had resided in New Jersey for the six months immediately preceding the commencement of the cause of action.

If the trial court had looked only at Johnae's circumstances on September 5th, and had not considered the fact that thereafter she resided in Georgia rather than New Jersey, as the law

requires, she would clearly have determined that for six months immediately preceding September 5, 2006, Johnae lived in New Jersey and New Jersey was her home state; to have considered the fact that from September 5, 2006 forward, Johnae lived in Georgia, was to adjudicate jurisdiction based on facts established during the pendency of, as opposed to at the commencement of the proceedings. ***State of Missouri ex rel Laws v. Higgins* at 278-279.**

In addition, in Father's Answer to Mother's Motion for New Trial, Father relied on and provided a copy of the case of ***Allen v. Allen*, 645 P.2d 300 (1982)** to support Father's argument that Johnae had no home state on September 5, 2006; however, in that case, the child was born in New Jersey and lived there with his parents until September of 1980; on October 2, 1980, the mother in that case relocated with child to the State of Hawaii and commenced proceedings regarding custody on October 8, 1980; the court there found that because the child had only been in the State of Hawaii for six days when the suit was filed, New Jersey remained his home state and Hawaii refused to entertain Mother's suit. ***Id.* at 306.**

The ***Allen*** court found further that jurisdiction remains with a child's previous home state while that child is in the process of acquiring a new home state after physically moving from the previous one. ***Id.* at 305.**

Home state jurisdiction relies upon the child's physical presence in the state, not the child's legal residence or domicile, so even though the trial court properly found that Johnae intended to permanently reside and establish a legal domicile in Georgia as of September 5, 2006, there is no dispute that for the six months immediately preceding that date, namely from September 4, 2006 and back from there six months, she was physically present and actually lived in the State of New Jersey. ***Miller* at 691.**

"Respondent incorrectly asserts that "it is undisputed that Johnae moved permanently from New Jersey to Georgia on September 4, 2006." (Respondent's Motion-p. 12, Para.65). In fact, this court included specific factual findings that Johnae and her mother moved from New Jersey in August, 2006. The arguments based on counsel's incorrect argument in this regard, are therefore rejected". ***L.F.* at 232**

There are several problems with this finding, specifically that in both the trial court's original Judgment and in both supplemental Orders, the trial court seems to believe that the testimony at trial established that Mother and Johnae moved from New Jersey to Georgia sometime in early August; counsel for the Mother presumes that because of the volume of cases that the trial court had heard between

the date of the trial on June 8, 2007 and the date of she rendered her supplemental Orders on November 19, 2007, the Judge simply did not accurately remember the trial testimony, since as is set forth above, Mother and Father both agreed that the move took place in early September, and Mother testified that it took place on September 5th. *Tr. throughout.*

“There was no longer "home state" UCCJA jurisdiction in the State of New Jersey.”
L.F. at 233.

This finding is similar to some of the other trial court’s other findings, and it is incorrect because New Jersey was Johnae’s home state on September 5, 2006. *Supra.*

“She left New Jersey and moved Johnae to Georgia in August, 2006.” *L.F. at 235.*

Again, this finding is factually incorrect and contrary to the testimony at trial. *Supra.*

“The State of New Jersey was not the child's home state at the time of filing of Father's Motion to Modify.” *L.F. at 235.*

This finding is incorrect, again, because New Jersey was Johnae’s home state on September 15, 2006. *Supra.*

“Johnae had not lived in the State of New Jersey for at least six consecutive months *immediately preceding* the filing of custody proceedings. Respondent and Johnae had moved from the State of New Jersey in August, 2006. This action was filed on September, 5 2006. By that time, the Respondent had already established her new domicile in the State of Georgia. There was no "home state" as of the date of commencement of this custody action.” *L.F. at 235*

The Court incorrectly recollected the trial testimony, which showed that Johnae did live in New Jersey for the six consecutive months immediately following the filing of Father’s Motion for custody (in fact, she was in transit to Georgia on the very day that Father was filing his Motion in Missouri, namely September 5, 2006); and as such, not only was New Jersey Johnae’s home state, but the trial court’s finding that Johnae had no home state on September 5, 2006 is factually incorrect. *Supra.*

“At the time of the filing of this action, the State of Georgia would have had only scant evidence of the minor child's present or future care, protection, training and personal relationships. The minor child had resided in the State of Georgia for approximately one month when this custody action was commenced.” *L.F. at 236*

Mother agrees that the State of Georgia would have had access to limited current evidence regarding Johnae on September 5, 2006, as would Missouri; but it would have had as much evidence regarding her future, care, protection and training as Missouri would have had; and further, how much information was available in Georgia on September 5, 2006 was irrelevant, because New Jersey remained Johnae's home state as of that date, and almost all of the information regarding her present and past care, protection and training was located there, as is discussed in detail below.

“The State of Georgia had only been the domicile of Johnae for a period of one month.” *L.F. at 236.*

Again, this finding is factually incorrect and contrary to the trial testimony. *Supra.*

“At the time of the filing of this action, no other state would have had jurisdiction as the "home state" of the minor child. New Jersey was no longer the "home state" of the minor child, since Johnae had moved with her mother to the State of Georgia in August, 2006.” *L.F. at 237*

Again, this finding is factually incorrect and contrary to the trial testimony. *Supra.*

“Under 452.450(4), this state is the more appropriate forum to determine the custody of the child because New Jersey is no longer the home state of the minor child, and any evidence available in that state was not focused on the child's current or future situation. Evidence available to the court in this state would include not only past perspective based upon child's history of contact with her father, as well as future-looking information. In the State of Georgia, information would have been limited to a history of only one month of connection with that state, as the child's domicile for a period of only one month.” *L.F. at 237*

Again, this finding is factually incorrect and contrary to the trial testimony. *Supra.*

“At no time did Respondent offer evidence that would have supported this court making findings that a state other than the State of Missouri was the appropriate forum for jurisdiction of this custody action.” *L.F. at 237*

Mother concedes that she did not raise the issue of subject matter jurisdiction until she filed her Motion for New Trial on August 24, 2007; however, objections to subject matter jurisdiction may be raised at anytime, and the record below clearly indicates that New Jersey was Johnae's home state on September 5, 2006. ***Gosserand at 632.***

"Under 452.450.1(4), the court finds that at the time of the filing of this custody action, no other state had jurisdiction of this case under 452.450.1 (1), (2) or (3). There was no "home state" at the filing of this action." ***L.F. at 238***

Again, this finding is factually incorrect in that Johnae did have a home state, namely New Jersey, on September 5, 2006. *Supra.*

Numerous times throughout the above Findings, the trial court clearly states that the move occurred in August, and Judge Midkiff bases all of her Conclusions of Law on her assumption that Johnae moved in August of 2006, and not on September 5th, the same day that Father filed his Motion to Modify. ***L.F. at 236-238.***

If there had been evidence that Johnae moved a month before Father filed his Motion on September 5, 2006, Judge Midkiff's supplemental findings might have been correct; however, since the uncontroverted testimony was that the move occurred on September 5, 2006, all of Judge Midkiff's Findings of Fact and Conclusions of Law based on an August move date are factually incorrect, and therefore legally inconclusive.

Mother is at a loss as to how the trial judge got the date of the move off by over a month in all three of her Judgments, since neither Father, nor Mother, nor any other witness ever testified that Johnae and her Mother moved to Georgia in August, and all of the testimony set forth above makes it clear that every time either Father or Mother responded to a question about the move, they stated that it occurred in September of 2006. ***Tr. throughout.***

Counsel does note there was a significant amount of testimony regarding the fact that Mother's husband relocated to Georgia almost two months before she did in July 2006, and there was a great deal of testimony about a lease agreement he signed in Georgia in August of 2005, but Father's counsel's questioning regarding the August lease document sought to prove that Mother was not in Georgia when that document was signed on August 5th and that she was still back in New Jersey. ***Tr. at 42, 25-28.***

In addition, it appears that Judge Midkiff also failed to look at her own notes, because on her Case Management Pre-Trial Checklist, in her own handwriting, she states that the child moved to Georgia without notice in September of 2006. *L.F. at 247.*

Further, on that same Case Management Checklist, although neither party raised the issue of jurisdiction until after trial, Judge Midkiff was certainly aware there was a jurisdictional problem, because her own handwritten notes indicate that she inquired as to when the child last lived in Missouri, and she also wrote that there was an issue regarding UCCJA jurisdiction. *L.F. at 247.*

In an effort to refresh Judge Midkiff's recollection regarding the date of the move, and because the first time the Judge had an opportunity to review any evidence specifically related to jurisdiction was when Mother filed her New Trial Motion, in her New Trial Motion, Mother provided the documentation that was either introduced or discussed at trial, all of which shows that the move occurred in September of 2006, as set forth below, and not August of 2006.

In addition to the documents provided for the trial court's consideration with Mother's Motion for New Trial, should this Court remand this matter for a jurisdictional evidentiary hearing, Mother would also be able to introduce additional evidence regarding the date of the move, which she was not able to acquire from New Jersey in time to submit with her New Trial Motion.

This evidence would include her moving records from ABS Freight Systems, which show that the moving company arrived to load her furniture in New Jersey on September 5, 2006.

Mother would also be able to offer copies of her husband's application for the connection of water service, sewer service, and other utilities at their new residence in Georgia on September 5, 2006, and those documents show that he signed all of the requests to turn on the utilities at that home because Mother and Johnae were still in transit.

In her Motion for New Trial, Mother also provided proof that as of August 22, 2006, Ms. Myers was still residing in New Jersey, and in fact, was still working at Global Trading, in that on Mother's Administrative Case Information Report, at the top of the document, one can see that she faxed this document from her work number in New Jersey to the Child Support Technician on August 22, 2006. *L.F. at 74.*

In Father's response to Mother's Motion for New Trial, Father asserts that by attaching the documents that supported Mother's position that Missouri lacks subject matter jurisdiction, she was in some way requesting that the court reopen or rehear evidence in this case.

In support thereof, Father cites to Reeves v. Reeves, 768 S.W.2d 649 (Mo. App. 1989); however, the evidence relevant to husband's argument in that case consisted of photographs, land records and other evidence regarding a property disposed of by a dissolution Judgment; the additional evidence did not relate to subject matter jurisdiction, Reeves at 53; however, Mother's additional evidence related exclusively to subject matter jurisdiction, which can be raised for the first time in a New Trial Motion and should have been considered by the trial court at that time.

Since the trial court incorrectly believed that the move took place in August 2006, rather than September of 2006, the trial court found that this somehow "canceled" New Jersey's status as her home state; but, in the case of Miller v. Sumpter, 196 S.W.3d 683 (Mo. App. 2006), the court made it clear that a home state is defined exclusively based upon where the child lived for the six months immediately preceding the filing of the motion, and not based upon her legal residence or domicile, or any evidence that as of the date that Father filed his Motion, Johnae would reside or would be domiciled for future purposes in the State of Georgia. Miller at 691.

Further, it is the party seeking to assert jurisdiction, namely the Father, who has the burden of establishing a prima facie basis for jurisdiction. See Laws at 277.

Not only did Father not present any evidence that the move occurred in August, his attorney went to great lengths to introduce evidence that Mother was not even present in Georgia in August of 2006, and Father introduced no evidence whatsoever regarding Johnae's whereabouts in August of 2006, much less any evidence supporting the trial court's finding that the move occurred in August of 2006. *Tr. throughout*.

A Missouri court can make a custody determination if Missouri is the child's home state or had been the child's home state within the six months before the commencement of a proceeding. **RSMo. Sec. 452.450.2.**

"Home state" is defined as the state in which the child had resided for the last six consecutive months. **RSMo. Sec. 452.445(4).**

Here, Johnae had continuously resided in New Jersey from May of 2001 until September 5, 2006.

Thus, Johnae's only possible "home state" on September 5, 2006, was unequivocally New Jersey, since she was still in New Jersey (or physically in transit therefrom) when the Father filed his Motion to Modify; and, Johnae had not resided in any other state in excess of 6 months at that time. **RSMo. Secs. 452.445(4) and 452.450.1(1).**

Johnae had not resided in Missouri since 2001, nor did she reside in Missouri within the six months preceding the filing date of September 5, 2006, and since subject matter jurisdiction is based on the circumstances existing at the time of invoking a court's jurisdiction, namely the date of filing, Missouri did not qualify as Johnae's home state in 2006.

The trial court, therefore, could not have exercised subject matter jurisdiction over Johnae's custody pursuant to **RSMo. Sec. 452.450.1(1).**

Jurisdiction Based Upon Either RSMo. Sec. 452.450.1(3) or (4)

Subsections (3) and (4) would only have applied if Johnae was physically present in Missouri or if no other state had subject matter jurisdiction over the proceedings, respectively. **R.S.Mo. Sec. 452.450.1(3) and (4).**

Because Johnae was not physically present in Missouri in September of 2006, **Subsection (3)** simply does not apply. ***Miller at 693.***

In addition, both Mother, ***L.F. at 79***, and counsel for Father, ***L.F. at 29-30***, offered into evidence at trial a copy of Mother's lease agreement for her new residence in Georgia, which showed that the earliest date that the new house in Georgia was even available for their occupancy was September 1, 2006, and certainly not August. ***L.F. at 83-88.***

Further, the school records show that the day after Mother and Johnae arrived in New Jersey, Mother took her to school and enrolled her immediately. ***L.F. at 104.***

Because Johnae was not physically present in Missouri in September of 2006, because New Jersey was unequivocally able to assert subject matter jurisdiction pursuant to both **Subsections (1) and (2)** (New Jersey's versus Missouri's jurisdiction under **Subsection 2** is discussed at length below), and because New Jersey had not declined to accept jurisdiction, Missouri could not have exercised jurisdiction pursuant to **UCCJA Subsection (4) RSMo. Sec. 452.450.**

Mother asserts that presenting this matter for a jurisdictional determination by the State of New Jersey before in Missouri proceeded with Father's Motion, is exactly what should have happened in this case.

When Johnae moved in September of 2006, rather than in August of 2006, New Jersey was her home state, and as such, it is the State of New Jersey, pursuant to **RSMo. Sec. 452.450.1.(4)**, which should have made the determination as to whether or not it would like to retain jurisdiction over Johnae's custody and visitation issues and hear Mother's relocation matter and Father's modification arguments to determine with whom Johnae would live with in the future.

If the State of New Jersey did not wish to decide the issues regarding Johnae's future custody and visitation because of Johnae's relocation to Georgia, New Jersey could then have declined jurisdiction in favor of either Georgia or Missouri, and Father's Motion to Modify could then have been filed in the appropriate state at that time. **RSMo. Sec. 452.450.1(4)**. *See Krasinski at 206; Lopp at 671-672; Miller at 693.*

Mother agrees that on September 6, 2006, not only had she and Johnae moved to Georgia, but it was their intention to remain there; and in fact, by the time the trial court had entered its Judgment, Johnae had been living in Georgia for over ten months, Johnae had completed the second grade there, and she was a few weeks away from commencing third grade there. *Tr. at 40, 93.*

On September 5, 2006, Missouri was not the home state of the child, and Georgia was not the home state of the child; and since New Jersey, Johnae's then home state, was not going to be her future domicile, it is entirely possible that had Father filed the appropriate motion in Johnae's home state of New Jersey and asked the New Jersey court either to hear his case or to issue an opinion declining jurisdiction in favor of either Georgia or Missouri; or, had he asked New Jersey to find that either Georgia or Missouri provided a more convenient forum, Father would have able to file and go forward with his cause of action either in Georgia or Missouri, depending upon the ruling of the New Jersey court. **RSMo. Sec. 452.450.1.(4)**.

The necessity of the declination procedure by the home state and its impact on Missouri's jurisdiction is discussed in detail in the case of *State ex. rel. Lopp v. Munton*, 67 S.W.3d. 666 (Mo. App. 2002); suffice it to say that Missouri cannot proceed until the child's home state declines jurisdiction.

The fact that the 2003 Missouri Judgment had never been registered in New Jersey, nor the fact that there was not any litigation concerning Johnae's custody pending previously or presently in New Jersey in 2006, does not effect the fact that New Jersey was Johnae's state and that it needed to relinquish its jurisdiction in favor of either Missouri or Georgia before either of those states would have had any jurisdiction consider Johnae's custody based on a pleading filed on September 5, 2006. See *Piedmonte v. Nissen*, 817 S.W.2d. 26 (Mo. App. 1991).

Furthermore, even though Johnae resided exclusively in Georgia and not in New Jersey from September 6, 2006 through the date that the trial court heard evidence and subsequently rendered its Judgment in this case, jurisdiction cannot change while a cause of action is pending, nor can jurisdiction be surrendered or established during the pendency of any court proceedings. *State ex. rel. Laws v. Higgins*, 734 S.W.2d 274 at 278. (Mo. App. 2002).

Because New Jersey did not decline to exercise jurisdiction pursuant to the provisions of RSMo. Sec. 452.450.1(4), this renders Judge Midkiff's Judgment of July 27, 2007 and her subsequent Orders of November 19, 2007, void. *Krasinski* at 207; *Miller* at 693.

Significant Connections Jurisdiction Pursuant to Sec. 452.450.1 (2)

Having established that **Subsections 1, 3 and 4** of the UCCJA did not confer subject matter jurisdiction, the only possible alternative, and the alternative that this trial court partially relied on in rendering its Judgments, is **RSMo.Sec. 452.450.1 (2)**.

The evidence in this case does not support the exercise of subject matter jurisdiction pursuant to **Subsection (2)**, which states that subject matter jurisdiction can be exercised if it is in the best interest of the child that a Missouri court 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 [Missouri] substantial evidence concerning the child's present or future care, protection, training, and personal relationships. **R.S.Mo. §452.450.1(2). *Emphasis added.***

It is important to note that Missouri courts have uniformly held that paragraphs (1) through paragraphs (4) of **Section 452.450.1** are in descending preferential order. *Gosserand* at 632; *Miller* at 690.

A trial court generally cannot make a custody determination based on **RSMo. Sec. 452.450.1(2)** if the child has been out of the state for more than six months. *Payne* at 204.

It has also held that the essential purpose of the provisions of **452.450** is to limit jurisdiction rather than to proliferate it. *Weker* at 204; *Gosserand* at 632.

Accordingly, once a child's home state has been determined, and therefore qualifies to assume jurisdiction, the essential purpose of **RSMo. Sec. 452.450** is to preclude any other court from determining that child's custody, and as such, a court must defer to a child's home state unless the basis for jurisdiction is found either because an emergency exists or the child's home state declines jurisdiction pursuant to **Subsections (3) or (4)**, respectively. *Piedimonte* at 370.

For example, had Father waited to file his Motion to Modify until November or December of 2006, Judge Midkiff's analysis of the factors under **RSMo. Sec. 452.450.1(2)** would have been necessary, in that at that time, Johnae would not have resided for the six months immediately preceding the Father's filing of his Motion in any one state, and the trial court would then have had to determine whether or not Missouri had the information available to assume jurisdiction.

Indeed, the only information in Missouri in 2006 was the information accumulated while Johnae visited with Father here a few weeks each year since 2003.

Father attempted to argue, and the trial court found, that the information found in Missouri in 2006 resulting from the periods of, predominantly summer visitation, created the requisite significant Missouri connections required by **RSMo. Sec. 452.450.2.(2)(a)**; but visitation connections fall well short of what Missouri Courts have defined as the "substantial evidence" necessary to invoke subject matter jurisdiction.

Even if Father had exercised every day of his allotted visitation with Johnae, which he did not, that amount of time simply is not enough to establish to form a "significant connection" to Missouri pursuant to **RSMo. §452.450.1(2)**.

Rather, the requisite "significant connections" existed in September of 2006 only in New Jersey, because Johnae spent almost all of her time there between 2001 and 2006. *Tr. throughout. Timmings v. Timmings*, 628 S.W. 2d 724, 727 (Mo. App. 1982)

On September 5, 2006, almost all of the relevant evidence about Johnae was located in New Jersey. *Tr. throughout.*

Johnae had continuously resided in New Jersey, not Missouri, for the five years preceding the filing of Father's Motion in September of 2006; she had not attended school anywhere but in New Jersey; she participated in numerous activities in New Jersey; she had developed relationships in New Jersey; and all of her medical and other records were located in New Jersey. *Tr. throughout.*

Therefore, the trial court erred in exercising subject matter jurisdiction pursuant to the significant connections provision of §452.450.1(2), as outlined in the Western District decision of *Payne v. Weker*, 917 S.W.2d 201 (Mo. App. 1996).

In *Payne* case, the father appealed the Jackson County Circuit Court's order dismissing his motion to modify child custody.

The *Payne* dismissal was based upon a finding that it was in the child's best interests for a Maryland court to assume jurisdiction and that Missouri was an inconvenient forum.

The pertinent facts of the *Payne* case are as follows.

In July 1990, the mother and child moved to Maryland. *Id.* at 202.

Shortly thereafter, the father filed a petition for dissolution in Jackson County with the divorce being finalized on August 21, 1991. *Id.*

Pursuant to the dissolution decree, the parties were awarded joint custody of their child, with mother designated as the primary physical custodian. *Id.*

The father continued to reside in Missouri while mother and child continued to reside in Maryland. *Id.* at 203.

The child's only contact with Missouri after July 1990 was during visitations with her father. *Id.*

Then, in 1994, father filed a motion to modify custody, and mother in turn moved to dismiss for lack of subject matter jurisdiction. *Id.*

The mother argued that Maryland was the child's "home state", and as such, had the most "significant connections" with the child. *Id.*

The father argued that because he still resided in Missouri and the child still had contacts to Missouri, Missouri retained jurisdiction in all subsequent modification proceedings. *Id.*

The circuit court dismissed the father's motion, holding therein that Maryland was the child's home state and that her best interests were served if Maryland assumed jurisdiction. *Id.*

The Western District affirmed the trial court's decision. *Id.* at 207.

In upholding the decision, the Western District elaborated on Missouri's subject matter jurisdictional requirements. *Id.* at 204.

The court quickly dismissed **Subsection (1) of RSMo. § 452.450.1** as both mother and father had conceded that Missouri was not the child's home state. *Id.*

The *Payne* court also found that **Subsection (2)** did not provide for jurisdiction either because in analyzing that subsection, while the court recognized that Missouri continued to have preferential jurisdiction to hear subsequent custody and visitation matters even if the child and a parent have moved to another state, such a situation is not conclusive in determining jurisdiction. *Id.* at 204.

Rather, the *Payne* court recognized that "a court generally cannot make a custody determination if a child has lived out of the state for more than six months." *Id.*

The UCCJA commissioner's notes guided the *Payne* court in its application of **Subsection (2)** to the facts in that case:

"Subsection (2) was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the child's interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state.

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.

The submission of the parties to a forum is not sufficient without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction. (emphasis supplied). *Timmings at Timmings, 726-27. Payne at 204.*

The *Payne* court found that the father clearly had a significant connection to Missouri, as he had continuously resided in Missouri since before the divorce. *Payne, at 204.*

But, the deciding factor was whether or not the child also had the requisite "significant connection." *Id.*

The Payne court noted that the child had lived in Maryland for several years preceding the custody modification proceedings, with only visits to her father in Missouri. Id.

Further, the limited medical records, involvement in her father's church, the presence of the father's extended family in Missouri and the child's relationships with them, did not give the child the "significant contacts" necessary to exercise jurisdiction pursuant to *Subsection (2)*. Id. at 204-205.

Indeed, the optimum access to evidence relevant to a determination of the child's best interests was in her home state of Maryland. Id.

The Payne court held that the child's significant contacts with Maryland stemmed from her school attendance, established friendships, peer activities, and the fact that the majority of her medical records were there. Id. at 205.

The Western District dismissed the very bases upon which Judge Midkiff established that "significant contacts" jurisdiction existed in Missouri in our case, in that all of the information available in Missouri on September 5, 2006 was accumulated while Johnae visited her Father in Missouri, and it was almost identical to the type of information that the Father in the Payne case was unsuccessful in using to establish subject matter jurisdiction. *L.F. at 31-38; Payne at 205; Weker at 205.*

The courts are also clear to point out that the provisions of **RSMo. Sec. 452.450** do not involve the best forum for the parent, or relate to the fitness of a parent, but are instead a choice of the forum that is most likely to contain the information a trial court needs in order to make an informed decision for the child. Dooley at 757; Laws at 278.

The courts are also aware that this is an "awkward" result and that commonsense seems to indicate that when one parent continues to reside in a state where a court previously entered a Judgment and exercised its jurisdiction over a child, that state would seem like the logical place for all future litigation; however, Missouri's version of the UCCJA requires, awkward or not, that a Missouri court reevaluate and determine that it still has subject matter jurisdiction before proceeding and that Missouri courts must give effect to this statute as it is written. Straight at 467.

The Western District came to the same conclusion in a similar set of circumstances in the Hudson case. Hudson at 325.

There, the Court noted that the best interests of a child, as defined by **Section 452.450.1(2)**, are served when the forum has optimum access to relevant evidence about the child and family. ***Hudson at 325.***

The ***Hudson*** court sought the maximum rather than minimum contacts with Missouri in its subject matter jurisdictional determination. ***Id.***

In ***Hudson***, even though the child had been born in Missouri and one parent still resided there, the Court found that Missouri did not have the requisite “maximum” contacts, and accordingly, subject matter jurisdiction could not be exercised pursuant to **RSMo. §452.450.1(2)** ***Id. at 325.***

When applying the holdings in ***Payne*** and ***Hudson*** to the present case, it is clear that a Missouri court could not exercise subject matter jurisdiction over Johnae, since just as in the cases discussed *supra*, Johnae has lived in another state for several years, and the relevant evidence pertaining to her education, health and general welfare was not found in Missouri on September 5, 2006. ***Tr. throughout.***

In our case, Father argued that there was significant information concerning Johnae’s future life here in Missouri, but only if he were granted custody. ***L.F. at 236-237.***

The trial Judge also gave substantial consideration to the fact that Johnae had recently moved to Georgia, such that there was little or no information accumulated regarding her present or future life in Georgia.

The trial court issued several findings indicating that there was a great deal of information about Johnae’s future, if placed in her Father’s custody, available in Missouri. ***L.F. at 236-237. Timmings at 727.***

Courts presume and hope that a child has a good relationship with a parent who lives here in Missouri and that a parent would not be filing a request for custody unless he had an appropriate plan and would be able to provide an appropriate future for his child.

It is undisputed that Johnae loves and has a relationship with her Father, her step-siblings, and Father’s family members who live in the Kansas City area; nor is it disputed that she has made friends, and attended a regular summer program while visiting with her Father in Missouri during the summers of 2004, 2005 and 2006. ***L.F. at 132, 236.***

The last time Johnae lived in Missouri, she was 20 months old, and the total time that she resided in Missouri was only from June 1, 2000 until May 13, 2001. ***L.F. at 10-11.***

With that being said, the courts do not consider this to be a valid basis for jurisdiction under **UCCJA Section (2)**, because if that were the case, Missouri would automatically have jurisdiction in any case where one parent resided in or received regular visitation in Missouri. **See *Bounds v. O'Brien* 134 S.W.3d 666, 670 (Mo. App. 2004).**

In order to find jurisdiction under **Subsection (2)**, Missouri must have the maximum, optimum, and majority of information available concerning the child, not simply the information that accumulates during visitations in Missouri; nor may a court find jurisdiction under this provision based upon a parent's speculation about what a child's future here might be like. **See *Payne* at 204-205; *Bounds* at 670; *Hudson* at 324-325; *Lydic* at 132.**

The 2003 Judgment granted Father 48 days of visitation in even years, and 44 days of visitation in odd years, give or take a day or two depending upon the length of Johnae's Spring, Thanksgiving, and Christmas breaks. ***L.F. at 54-55.***

In 2003, 2004, 2005 and 2006, Father voluntarily chose to forgo his Thanksgiving and Spring Break visitations, because he did not feel that the limited number of days available to him during those scheduled parenting times sufficiently warranted the travel expenses necessary to bring Johnae to Missouri for such a short visit; and as such, Johnae spent the majority of her time from 2001 to 2006 in New Jersey. ***Tr. throughout.***

It is impossible, therefore, for the trial court to have found that the maximum information, rather than the minimum information, regarding Johnae could possibly have been found in Missouri on September 5, 2006, and as in the **Miller** case, the trial court's finding jurisdiction under these circumstances was inappropriate. **See *Miller* at 692.**

In the past, parents have argued that failing to allow them to proceed with custody matters in Missouri, when they reside here, is somehow unfair to them or prohibits them from being able to have the opportunity to adjudicate child custody, since Missouri's version of the **UCCJA** necessarily requires them to file and conduct proceedings where the child lives, which is sometimes very distant from their homes in Missouri.

Courts have responded to these arguments by reminding parents that it is not their inconvenience, whether it is fair to the Missouri parent, or whether there would be any harm in proceeding in Missouri; but rather, it is the child's best interest that forms the basis for Missouri's version of the **UCCJA**. **See *Hudson* at 323; *Payne* at 205.**

On August 7, 2007, less than two weeks after this Court rendered its Judgment on July 25, 2007, the Western District issued its opinion in the **Gosserand** case, which had not yet been published when Mother filed her Motion for New Trial on August 24, 2007.

The facts in the **Gosserand** case are so similar to the fact situation in our case and the holdings in the **Gosserand** decision so directly impact the resolution of the issues in our case, that the entire **Gosserand** opinion warrants analysis.

The facts of the **Gosserand** case are substantially similar to the facts in our case and are as follows.

“Based on Father's testimony, the court found that circumstances had changed with regard to the children in that Mother had denied Father parenting time with the children, Mother had relocated at least three times without notifying Father, the children had changed schools many times, and Mother had withheld information about the children from Father, all despite Father's efforts to contact Mother and the children. The court found that it had jurisdiction over the parties and the subject matter. The court modified the custody arrangement, granting Father the right to have the children reside primarily with him and granting Mother visitation rights. The court revoked Father's obligation to pay child support to Mother and ordered Mother to pay \$506 per month to Father in child support.” **Gosserand** at 630.

In **Gosserand**, as in our case, the trial court considered jurisdiction based both on home state jurisdiction and on the significant contacts jurisdiction. **Gosserand** throughout.

The **Gosserand** court indicated that RSMo. Sec. 452.450.1(2), should be used only in unusual circumstances where the relevant information about the child is found in Missouri, and not in her home state as set forth below:

“The purpose behind this intent is to increase the likelihood that the custody decision will be in the child's best interests. *Id.* As a general rule, the state with access to the most relevant information is the child's home state. *Id.* We only resort to section 452.450.1(2), then, in unusual circumstances. *Id.* It may only be used if the child and his family have equal or stronger ties with another state. *Miller*, 196 S.W.3d at 691.” **Gosserand** at 633.

The Father also asked the Gosserand court to find that the information regarding the future of the child in that case warranted jurisdiction pursuant to **RSMo. Sec. 452.450.1.(2)**, which the Gosserand court was not found appropriate:

“The mere fact that Father and Father's family reside in Missouri and there are plans for the children's future care here does not by itself provide sufficient evidence of significant contacts with Missouri to overcome the presumption in favor of home state jurisdiction. *See Hudson*, 158 S.W.3d at 324-25. Father had additional witnesses to present at the earlier hearing that he did not have the opportunity to call because the trial court considered his testimony sufficient. He should be permitted on remand to call these witnesses if they have pertinent information.” Gosserand at 634.

Lastly, the Gosserand decision also gives us the proper remedy in this case, mainly that the jurisdictional issues be remanded to the trial court for a hearing, at which point the parties could present evidence specifically related to that topic. Gosserand at 634.

The Gosserand opinion, and all of the other authority cited above regarding subject matter jurisdiction over Johnae, show that Missouri did not have jurisdiction over her on September 5, 2006.

Even if this Court was able to get over the extraordinary hurdle of the substantial case law, which goes directly against the trial court's having properly found subject matter jurisdiction under **RSMo. Sec. 2**, and we assume for the sake of argument that Johnae's maximum contacts rather than her minimum contacts were in Missouri on September 5, 2006, this Court would still not have had jurisdiction under **Subsection (2)**, because a Missouri court may only find jurisdiction under **Subsection 2** when no other state could have assumed jurisdiction on September 5, 2006, or when that state has declined jurisdiction as discussed above, neither one of which is present in our case.

Further, it is inappropriate for the trial court to have even considered jurisdiction pursuant to **UCCJA Subsection 2** when the four bases for jurisdiction thereunder are in descending order of preference, so if the trial court had properly determined that New Jersey was Johnae's home state on September 5, 2006, Missouri's jurisdictional inquiry was over until New Jersey decided to relinquish its jurisdiction and send the case here or elsewhere for adjudication. See Dooley v. Dooley, 15 S.W. 3d. 747, 755. (Mo. App. 2000).

A Missouri court must first determine whether or not Johnae had a home state on September 5, 2006, and since she did, namely New Jersey, the jurisdictional inquiry should have ended there.

It is not necessary that this Court even consider the remaining **UCCJA Subsections**, because the law presumes that the child's home state automatically contains the maximum and optimum information concerning the factors necessarily considered by a court regarding a child's custody and visitation. ***Laws at 278.***

Nothing in any of the trial court's Findings of Fact or Conclusions of Law regarding jurisdiction under **Subsection (2)** outline what present information was available in Missouri that was not more readily available in New Jersey in 2006 or equally available in Georgia in 2006; nor how the Missouri information was superior to the information available to the New Jersey or Georgia courts as of September 5, 2006; therefore, this Court's jurisdictional determination was simply a conclusory finding, rather than a factual adjudication. ***See Piedmonte at 266.***

Jurisdiction Based Upon Misconduct

It also appears that the trial court utilized the fact that Mother had improperly relocated to the State of Georgia without providing proper notice under Missouri's relocation statute in deciding whether or not to assume subject matter jurisdiction in this case. ***L.F. at 130.***

It was inappropriate for the trial court to consider that as a basis for jurisdiction in that a court is not to determine the relative fitness of the parent, or any potential wrong-doing of either parent in assuming jurisdiction, since a Missouri court is only allowed to consider those factors after it has made an impartial evaluation of the jurisdictional issue itself. ***Laws at 278.***

In addition, while Missouri recognizes that this state may decline jurisdiction based upon a parent's misconduct, misconduct can never be utilized as a ground to assume jurisdiction, only to deny it. ***See Ray v. Ray 820 S.W.2d 341 (Mo. App. 1991).***

Further, in assessing whether or not there was an inappropriate intent on the part of either party in this matter, the Court should not forget that Father's Motion to Modify to obtain custody of Johnae was filed within a week of his receipt of the Hearing Officer's Administrative Decision in the Modification case, which is discussed at length below in Point III of Father's Brief.

Conclusion – Point II

The determination of Johnae's subject matter jurisdiction in Missouri based upon the significant contacts or any other provision of **RSMo. Sec. 452.450** would have been the same now as it was when the trial court initially assumed jurisdiction in Missouri in 2001; and if anything, there would have been less information about Johnae available in Missouri back then, when the first Judgment was entered, than there was in Missouri in September of 2006.

By 2006, the information that was available in Missouri was exclusively information obtained during visitations since Johnae had been living in New Jersey for more than five years; and as such, this Court did not have jurisdiction to enter any custody findings in 2003, nor does it have jurisdiction to do so at this time.

The custody provisions found in all of the above Judgments and both of the supplemental Orders, are therefore, a nullity and are not capable either of recognition or enforcement by this or any other court.

Appellant is aware that because she did not raise the issue of subject matter jurisdiction until the post-trial proceedings, Judge Midkiff did not focus on jurisdiction during the underlying proceeding or trial, and accordingly, that much of the information presently available regarding jurisdiction was not presented; accordingly, if this Court does not believe that the evidence provided is sufficient to find that Missouri was completely without jurisdiction on September 5, 2006, at very least, the appropriate remedy would be to remand this issue to the trial court for a full evidentiary hearing.

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 standard of review of this court-tried case is found in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The judgment is to be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or the trial court erroneously declared or applied the law. *Estate of Williams*, 922 S.W.2d 422, 423 (Mo.App.1996).

This court will reverse a custody determination on the ground that it is against the weight of the evidence only if there is a firm belief that the judgment is wrong. *Murphy v. Carron*, 536 S.W.2d at 32.

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.

Argument

Even if the trial court did have subject matter jurisdiction over the issues of Johnae’s custody and visitation, the trial court erred in that many of its findings and judgments were against the weight of the evidence presented at trial, or did not support the trial court’s determination that those changes made the current Judgment unreasonable such that a change in Johnae’s custody was necessary.

For the convenience of this Court, rather than linking all of the factual issues raised at trial into a single narrative, counsel will provide a brief overview of the law in this area, and then counsel has examined each of the factors found under **RSMo. Sec. 452.375** and separately evaluates each of the trial court’s Findings and any issues related to each factor.

Once a Missouri Court assumes subject matter jurisdiction to determine child custody issues, whether it be for an initial determination or a modification, that court is then required to consider the factors set forth in **RSMo. Sec. 452.375**.

Prior to modifying existing custodial arrangements, even if a trial court finds that there has been a substantial and continuing change in the circumstances of a child; the court must still find that modification is also necessary to serve the best interests of the child. *See, Taylor v. Taylor*, 908 S.W.2d 361, 365 (Mo. App. 1995).

The paramount concern in child custody matters is the welfare of the child; the interests of the parents are secondary. *Id.* at 365.

In any case where the parties have not agreed upon the custodial arrangements for a child, a trial court must make written Findings of Fact and Conclusions of Law based on the factors set forth in **RSMo. Sec. 452.375**.

These Findings of Fact and Conclusions of Law must detail the specific factors that a trial court utilized in making its jurisdictional custody decision, and where specific findings are missing, not supported by the evidence, or incomplete, that court's judgments regarding custody will not stand. *See, Weiss v. Crites*, 169 S.W.3d 888, 890 (Mo. App. 2005).

Since Johnae had already been living with Mother for the first eight years of her life, either with or without Missouri's consent depending upon how this Court decides the issue of Judge Torrence's jurisdiction to enter the original Judgment in 2003, Mother is presumed to be her suitable custodial parent, and trial courts must inherently presume that there is value in continuing to allow a child to remain with the parent with whom they have resided for the longest period of time. *See Wilson v. Wilson* 873 S.W.2d 667 (Mo. App. 1994).

When there is also evidence that while a child has been in a parent's custody, that child is doing well in school, generally progressing well with her development, and has a good relationship with her custodial parent, this evidence mandates that a trial court conclude that the child's welfare does not necessitate a change of custody. *Wilson* at 670.

A change in custody should not be granted simply because it is preferable, but only when the child's welfare makes it absolutely necessary. *Id.* at 670.

A trial court's modification of custody must be based upon facts and circumstances so substantial that any change in custody gives a "definite promise" that the custody change will substantially benefit the child. *Ijames v. Ijames*, 909 S.W.2d 378, 379 (Mo. App. 1995).

Before a trial court can determine whether or not a modification of custody or visitation is in a minor child's best interests, the court must first establish that a change in the child's circumstances has occurred, and that this change is so substantial and continuing as to make the terms of the existing custody and visitation Judgment unreasonable. *Taylor* at 365.

In his Motion to Modify of September 5, 2006, Father alleged that there were numerous substantial and continuing changes; however, Judge Midkiff did not find evidence of or enter

Judgments regarding many of the substantial and continuing changes alleged in Father's Motion. *L.F. at 96-100.*

In her Answer, Mother claimed that many of the changes alleged by Father had simply not occurred and that the only substantial and continuing change since the date of the previous Judgment was that Mother and Johnae had relocated from New Jersey to Georgia; however, Mother also contended that since the original Parenting Plan was already based on a long-distance relationship between Father and Johnae, and because her relocation to Georgia actually moved Johnae closer both to Father and his extended family, her move to Georgia did not render the terms of the original Judgment unreasonable. *L.F. at 114-117.*

The trial court, in its Judgment of July 25, 2007, found that there had been four substantial and continuing changes in the circumstances of the parties since the entry of the previous Judgment.

In paragraphs 4a and b of the Judgment, the Judge found that Mother had moved from New Jersey to Georgia and that she had done so without providing Father with notice of her relocation or school enrollment. *L.F. at 130.*

The trial court, in paragraph 4c, found that Johnae was old enough to travel by airplane without a chaperone. *L.F. at 130.*

In paragraph 4d, the trial court found that Mother had willfully and intentionally denied Father regular contact and parenting time with the child for long periods of time. *L.F. at 130.*

These were the only substantial and continuing changed circumstances found by the trial court in its Judgment; the remainder of the Judgment then examined whether or not those changed circumstances warranted a change in custody and rendered the then existing custody Judgment unreasonable. *L.F. at 129-134.*

Analysis of Factors (1) (3) (4) (6) (7) and (8)

In looking specifically at factors set forth under RSMo. Sec. 452.375.2(1)-(8), there were several factors that did not play any role in the trial court's findings or judgments, including **Subsection (6)**, the mental and physical health of all individuals involved, including any history of abuse of any individuals involved; there was no evidence or any allegations from either side

that either Father or Mother in this case was mentally or physically unable to care for Johnae, or any evidence of a history of domestic abuse by either of Johnae's parents *L.F. at 132*.

Subsection (7), the intention of either party to relocate the potential residence of the child, also did not play into Judge Midkiff's decision in that although Mother's relocation without providing the proper notice was a factor in the trial court's determination under other factors, at trial neither parent indicated they had any intention of moving from their present residences at anytime in the foreseeable future, and in fact, neither parent has done so. *L.F. at 132*.

The other subsection that did not play a role in Judge Midkiff's decision was **Subsection (1)**, the wishes of the child's parents as to custody and the Parenting Plans proposed by both parties.

Each parent wished to have custody of Johnae and indicated a willingness to do so; however, Mother proposed that the Parenting Plan then in effect continue, and Father presented an alternative Parenting Plan placing residential custody with him and setting forth visitation for the Mother.

As such, the wishes of the parents in this case cancelled each other out in that each parent had an appropriate Parenting Plan for Johnae and each parent wanted Johnae to reside with them. *L.F. at 130*.

One of the other factors a trial court must consider pursuant to **RSMo. Sec. 452.375.2(8)**, is the child's preference concerning custody.

The trial court notes in paragraph 14 of its original Judgment of July 25, 2007, that there was no evidence presented regarding the child's wishes, and the trial court made no further findings regarding the child's wishes in either of its subsequent Orders of November 19, 2007. *L.F. at 132, 231-238*.

Mother concedes that the child in this case was only eight at the time of trial, and that the trial court may or may not have determined that she was able to logically express a custodial preference; however, in cases where the child is not able to evaluate their own custodial arrangements and make an informed decision, the trial court generally appoints a Guardian Ad Litem to do so on their behalf. *See generally, Sanders v. Bush, 123 S.W.3d 311, 312-314 (Mo. App. 2003)*.

However, in the case at hand, the Judge did not make any attempt to speak with Johnae to determine whether or not she was logically capable of expressing a custodial preference, nor did the court appoint a Guardian Ad Litem to investigate the allegations made by Father and Mother or to act on the child's behalf in this matter.

In the *Sanders* case, the Father sought a modification of custody because of the Mother's relocation to the State of Washington without providing the statutorily-required relocation information; but there, the court remanded the trial judge's change in custody because the record and Judgment were deficient regarding the preference of the child. *Id.* at 314.

Johnae's preferences and input through a Guardian Ad Litem were particularly necessary in our case, where the testimony of Mother and Father on many of the other statutory factors was so diametrically different.

There was absolutely no evidence in the record or in any of the trial court's three Orders that any person testified regarding or provided evidence concerning Johnae's custodial preference. *L.F. at 132.*

In addition, Johnae was staying with her Father for her summer visitation the day of the trial on June 8, 2007, so he could easily have made Johnae available to the court, but chose not to do so - - leaving us to presume that bringing Johnae to court with him on the date of trial would not have been beneficial to his case. *Tr. at 168.*

With regard to **RSMo. Sec. 452.375.2 (3)**, the trial court found that Johnae had healthy and stable relationships with the members of Father's household; was impressed with the testimony of Father's current wife, Angie Hightower; and found that there was insufficient evidence to assess Johnae's interaction or relationship with Mother or members of Mother's household. *L.F. at 131.*

The trial court expanded upon its **RSMo. Sec. 452.375.2(3)** decision making process in its November 19, 2007 Order Overruling Respondent's Motion for New Trial; specifically, the Judge found that both Mother and Father were very loving and caring parents; the trial court did not find that the Respondent was an unfit Mother; and the Judge found that Mother was a good mother who loved and cared deeply about her daughter. *L.F. at 233.*

In her November 19, 2007 Order, the trial court also found that both Mother and Father demonstrated the ability to parent adequately. *L.F. at 233.*

In fact, Judge Midkiff went out of her way to indicate that she believed that Mother was loving and fit, but instead, the trial court focused predominately on **Subfactor (4)**, namely which parent was most likely to allow the child frequent, continuing, and meaningful contact with the other parent, and on **Subfactor (2)**, the needs of the child for a relationship with both parents and each parent's ability to provide those needs. *L.F. at 233.*

The July 25, 2007 Judgment contained very little in the way of findings or conclusions related to **Subfactor (3)**.

The trial court's limited Judgments on this factor show that the court considered both parents to be an equally fit and appropriate placements. *L.F. at 233.*

Mother's Credibility

In paragraph 15 of its Judgment, the trial court stated that it disbelieved portions of Mother's testimony and found that she was lacking in creditability. *L.F. at 132.*

Counsel for Mother brings credibility up at this point, as Mother's credibility will be relevant to the discussion of all of the trial court's findings from this section forward.

Mother points out that she was *Pro Se*, and because of that, much of the documentation that would have proven that she was telling the trial court the truth, was not admitted into evidence and was not available to the trial court until Mother filed her post trial Motion.

Mother understands that she was under an obligation to introduce her evidence whether she was *Pro Se* or not; however, the trial court based a number of its findings on its belief that Mother lacked credibility, particularly about Johnae's schooling, her marriage, and her employment. *Tr. throughout.*

As to much of the testimony during trial, the trial court believed Father's testimony and not Mother's, when it was actually Mother who was telling the truth.

Further, during the post-trial proceedings, even after the trial court had an opportunity to review the documentary evidence that showed unequivocally that Mother was the one telling the truth about all of the issues listed above, the trial court chose not to grant a new trial or rehearing, or even to issue new Findings of Fact or Conclusions of Law on any of the issues regarding Mother's credibility. *L.F. at 231-238.*

Although the trial court is in the best position to assess the credibility of witnesses at trial, the fact that the documentary evidence supplied in Mother's Motion for New Trial showed

that she was telling the truth, at very least, about Johnae's schooling, her employment, and her marriage, necessarily reflects on the trial court's ability to properly assess the credibility of the evidence presented at this trial.

The trial court mentions its concern about Mother's lack of credibility in two different places on its original Judgment and once in its supplemental Order of November 19, 2007, which clearly shows the trial court considered Mother's credibility to be a substantial factor in determining and resolving the issues in this case; and as such, the fact that Mother presented uncontroverted documentary evidence show that she was the one telling the truth certainly reflects on the trial court's proper assessment of the evidence presented. *L.F. at 129-133; 233.*

Unfortunately, the trial court's assessment of Ms. Myers credibility seemed to cast a shadow all of the trial court's Findings and Conclusions. *L.F. at 231-238.*

It appears that although Mother has since proven that she was telling the truth about many of the contested issues, she was not a very persuasive witness. *Tr. throughout.*

Mother also notes that in paragraph 9 of its Judgment, the trial court indicated that it doubted that Mother was telling the truth when she indicated that she had married Mr. Napper and that she had obtained gainful employment at Zurich Insurance in Georgia. *L.F. at 131.*

Attached to Mother's Motion for New Trial were copies of Mother's Marriage License, showing that she was telling the truth concerning the status of Mother's marriage to Mr. Napper, *L.F. at 127-128;* and a copy of her letter of employment and several pay stubs showing that she was telling the truth concerning her employment with Zurich Insurance. *L.F. at 119-126.*

School Related Findings

The trial court considered Johnae's adjustment to her home, school and community, pursuant to **RSMo. Sec. 452.375.2 (5)**.

The trial court erred in finding that Mother, while living with Johnae in New Jersey, moved in excess of five times and that those moves disrupted Johnae's school attendance by requiring her to change schools numerous times. *L.F. at 131.*

In paragraph 8 of its Judgment of July 25, 2007, the trial court found that Mother had moved at least five separate times and that this had disrupted Johnae's school attendance; also in paragraph 8 of its Judgment, the trial court found that Johnae had many moves and changes in her residence and school while in her Mother's physical custody. *L.F. at 131.*

The trial court further found, in paragraph 11 of its Judgment, that Johnae had difficulty adjusting to her new school in Georgia in that there was evidence of behavioral problems during her first year of school in Georgia (namely school year 2006/2007). *L.F. at 132.*

The trial court, in paragraph 11 of its Judgment, found that Johnae had trouble adjusting to her new school in Georgia and had behavioral problems during her first year of school there. *L.F. at 132.*

Unfortunately, the trial court did not accurately recollect the parties' trial testimony when making its paragraph 8 and 11 findings, in that Mother's testimony at trial (which was not disputed by Father) was that the behavioral event at Johnae's school occurred in kindergarten, and not after she moved to Georgia. *Tr. at 38.*

Attached to her Motion for New Trial, Mother provided a copy of the disciplinary records from the Johnae's School in New Jersey, which showed that the disciplinary incident with the teacher occurred in 2004, so there is no question that the trial court's Findings of Fact and Conclusions of Law, based upon Johnae's educational difficulties at her new school in Georgia, were factually incorrect. *L.F. at 131-132.*

The trial court's finding that the behavioral incident occurred in Georgia was clearly a result of the trial court's incorrect recollection of the evidence presented at trial, since neither parent testified that the incident between Johnae and her teacher occurred after she moved to Georgia. *Tr. at 38.*

The testimony of the Mother regarding the incident with the teacher is as follows:

The following exchange took place between Ms. Higginbotham and Mother:

Q. Now what grade was Johnae in in New Jersey in May
of 2006?

A. First.

Q. First grade?

A. Yes.

Q. Okay. And at the time in May of 2006, Johnae was
having some behavior problems at school; wasn't

she?

A. No, she wasn't.

Q. Okay. She didn't kick a computer? She didn't get suspended from school?

A. No, she didn't.

Q. She didn't do that?

A. No, she did not. That was in -- she had problems in kindergarten.

Q. Oh, I see. That was kindergarten?

A. Yes.

Q. Okay. So that would have been in '04?

A. Yes. *Tr. at 38.*

During trial, Father did not testify that Johnae had any behavioral difficulties either at her school in New Jersey, or at her new school in Georgia. *Tr. Throughout.*

In addition, Mother pointed out the trial court's mistake regarding the year of Johnae's school behavioral incident in her Motion for New Trial, but the trial court did not correct its Findings of Fact or Conclusions of Law to match the uncontroverted evidence, and the trial court let the factually incorrect, school-related findings from its original Judgment of July 25, 2007 stand. *L.F. at 231-238.*

The only possible testimony at trial that could have led Judge Midkiff to improperly find that Johnae had any difficulties whatsoever at her new school in Georgia, was Father's testimony that because Mother and Johnae did not move to Georgia until September, Johnae actually started the school there three weeks late since the new school in Georgia commenced three weeks earlier than Johnae's previous school in New Jersey. *Tr. at 47, 148*; or possibly, his testimony about a notice he received indicating that Johnae's social studies grade had dropped down to 80 her first semester. *Tr. at 151.*

However, Mother testified that Johnae was not affected by her late school start, and in fact, made the honor roll, *Tr. at 42*.

Further, one of the few exhibits that Mother actually offered into evidence for the court's consideration at trial, was a copy of Johnae's grade cards from Georgia, which were offered and received as Respondent's Exhibit A. *Tr. at 179*.

Attached to her Motion for New Trial, Mother provided additional copies of Johnae's grade cards from all four semesters at her new school in Douglasville, Georgia, which showed that Johnae received 20 "As", 9 "Bs" and 2 "Cs". *L.F. at 104-113*.

The trial court was also in error in its Findings of Fact and Conclusions of Law when it found that Mother's moves required Johnae to make several changes in school while living in New Jersey. *L.F. at 131*.

There was also absolutely no testimony from anyone at trial indicating that Johnae had ever changed schools while living in New Jersey. *Tr. throughout*.

In addition, even if the trial court was unable to remember the testimony of the parties at trial regarding this issue, Mother provided a copy of Johnae's records from the John Fenwick School in New Jersey with her Motion for New Trial, and the school records clearly show that Johnae never attended any school in New Jersey other than John Fenwick School, which she attended in 2003 for pre-kindergarten; in 2004 for her kindergarten year; and in 2005 for her first grade year. *L.F. at 63-65*.

Aside from the grade cards both from Johnae's school in Georgia and her school in New Jersey, attached to Mother's Motion for New Trial for the trial court's consideration, were copies of numerous "student of the month," attendance, and other academic awards received by Johnae while in her Mother's custody. *L.F. at 66-73*.

Johnae's school records from New Jersey and from her first year of school in Georgia speak for themselves, so the trial court's finding that Johnae was having difficulty adjusting to her new school in Georgia or switched schools numerous times in New Jersey; and then the Judge's relying thereon in determining that a change in custody was necessary to allow Johnae to attend school in Lee's Summit, was not only unfounded, but contrary to the evidence presented. *L.F. at 132*.

Although the trial court gave a great deal of consideration to Father's outline for Johnae's future education, specifically that Johnae would attend school in the Lee's Summit school district

and attend the Freedom School during the summer, the trial court completely ignored the testimony of Mother, who indicated that she purposely purchased her home in Georgia in a part of town that would allow Johnae to go to the best possible school district, a school district in which Johnae was excelling and in which Johnae already had completed the second grade. *Tr. at 43.*

The trial court's finding that it was in Johnae's best interests to be sent to Missouri to live with her Father because she had an unstable educational record while in her Mother's custody and behavioral and educational adjustment problems at her new school in Georgia, was not only against the weight of the evidence, but as shown above, factually incorrect. *Tr. throughout.*

If anything, the fact that Johnae had been so successful at her school in New Jersey and at her new school in Georgia, while in Mother's custody, should have weighed heavily in favor of Mother, and not in favor of Father, in the trial court's determination as to the proper placement for Johnae. *Wilson at 670.*

Mother's Visitation Denials

In considering **RSMo. Sec. 452.375.2 (4)**, the trial court made a number of findings regarding what the Judge believed to be the Mother's willful disregard of the terms of the 2003 Parenting Plan and for her failure to promote meaningful contact between Johnae and Father. *L.F. at 130-133.*

In its Judgment in paragraph 5, the trial court found that Father had been deprived of substantial periods of parenting time with the minor child such that if a change in custody were not granted, his relationship with Johnae would be jeopardized. *L.F. at 130.*

In paragraph 10 of its Judgment, the trial court found that Mother had demonstrated a pattern of denying or refusing visitation to Father; that she unilaterally canceled Father's Christmas 2005 visitation; and that Mother refused, in the spring of 2006, to schedule additional parenting time at Father's request. *L.F. at 131-132.*

In paragraph 10, the trial court also found that the Mother refused all visitation attempts by the Father between November of 2001 and April of 2003. *L.F. at 131.*

Also in paragraph 10, the trial court found that there was credible evidence to conclude that until very recently, Mother had not made a good effort to promote meaningful contact

between Johnae and her Father; and, that Mother's actions demonstrated a willful disregard for the terms of the 2003 Parenting Plan. *L.F. at 132.*

Aside from the fact that it is Mother's position that the 2003 Judgment was entered without subject matter jurisdiction and that its custody provisions were, therefore, a nullity, purely for the sake of clarification, Mother will respond to each of the trial court's findings regarding visitation denials in turn.

Even the limited evidence introduced concerning Mother's compliance with the 2003 Parenting Plan should have led the trial court to conclude that not only was Mother in compliance with 2003 Parenting Plan, but that she had, in fact, provided Father with visitation far in excess of that granted under the 2003 Judgment.

Father was entitled to 44 days of visitation during odd years and 48 days of visitation during even years, according to the 2003 Judgment. *L.F. at 54-56.*

In his Motion to Modify, in paragraphs 4i and 4j, Father alleges that Mother violated the Parenting Plan by failing to send Johnae to Kansas City for the 2005 Christmas vacation without a chaperone, causing him to waste money on a ticket, even though the 2003 Judgment required that he consult with Mother before purchasing any tickets. *L.F. at 97-98.*

In her Answer to Petitioner's Motion and paragraphs 4i and 4j, Mother responded that Father was to pay for 100% of the transportation costs, including for a ticket for her to accompany Johnae to Kansas City and one for Father to accompany Johnae on the return flight; but Father instead purchased a single ticket for the Christmas of 2005 visitation, knowing that Mother did not feel it was appropriate that Johnae travel by herself; and further, Mother pointed out that there was no specific language in the Judgment requiring that a specific airline's regulations, rather than her parents, would determine when Johnae was mature enough to fly on her own. *Tr. at 73-75, 128-130; L.F. at 115.*

Since the entry of the Judgment of 2003, the Christmas visitation in 2005 is the Father's only alleged denial of the visitation as specified in the Judgment. *L.F. at 97-98; Tr. at 128-130.*

There was a great deal of testimony concerning the fact that Mother did not utilize the plane ticket purchased by Father to send Johnae for her Christmas of 2005 visitation, and there were varying versions of the events leading up to the 2005 Christmas visit. *Tr. at 72-74; 129-131;* but, nowhere in the record did the Father allege denial of any court-ordered visitations since

the entry of the 2003 Judgment, other than the single alleged denial of the Christmas 2005 visitation. *Tr. throughout.*

In fact, Father himself admitted at trial that he finally compromised with Mother, and in spite of his belief that Johnae could fly on her own, he agreed that Mother would fly with Johnae to Kansas City and Father would fly her back; Father's exact testimony on this topic is set forth in full below.

The following exchange took place between Father and Ms. Higginbotham:

Q. Okay. And let's talk about Christmas of 2005.
Did you have a conversation with Ms. Myers about
Johnae coming to your home for Christmas?

A. Yes. It was understood from the Parenting Plan
that Johnae was supposed to be --

Q. The question -- listen to my question.

A. Yes.

Q. Did you speak with Ms. Myers?

A. Yes.

Q. And you guys made an agreement that Johnae was
going to come for Christmas to your home?

A. Yes.

Q. Okay. And, in fact, in anticipation of that, you
purchased tickets?

A. Yes.

Q. Okay. And, in fact, you had an itinerary printed
out and you had actually paid for that ticket?

A. Yes.

Q. And it was \$329?

A. That is correct.

Q. And that ticket was Johnae's

A. Yes.

- Q. And you had provided that to Ms. Myers; is that right?
- A. Yes.
- Q. And Ms. Myers at the time was refusing to put Johnae on a plane and allow her to fly with the unassisted program?
- A. That is correct.
- Q. And did you have numerous conversations with Ms. Myers about that program?
- A. Yes.
- Q. And did you try to reassure her about the safety of that program?
- A. I did.
- Q. Okay. And despite all of your reassurances she still did not agree to put her on the plane?
- A. Correct.
- Q. At some point did you agree between the two of you that she would fly Johnae to Kansas City and then you would fly her back?
- A. Yes.
- Q. And that was your compromise with her?
- A. Yes. *Tr. at 129-130.*

Mother testified, and Father did not dispute, that the reason Father ultimately decided not to purchase a round-trip ticket for him and for Mother pursuant to the chaperon provisions, was because of the expense involved. *L.F. at 92-95.*

It is also important to note that in the original Judgment, Judge Torrence made substantial financial concessions in order to allow Father to be able to afford to purchase not just a plane ticket for Johnae for each of his scheduled visits, but a round-trip ticket for both he and Ms. Myers to accompany her on their respective legs of the trip, as was pointed out by Mother at trial. *Tr. at 129-130.*

Specifically, the presumed amount of child support on the Form 14 prepared by the Division during the Administrative Hearing on January 21, 2003, was \$935.00. *L.F. at 42*; however, specifically because of the transportation costs that Father would encounter based upon the chaperoning agreement, the parties asked Judge Torrence to find the presumed amount of child support to be unjust and inappropriate and to instead order child support in the amount of only \$500.00. *L.F. at 53*.

This results in a monthly financial savings to Father of \$435.00 per month, or \$5,220.00 per year; Father should have been able to afford three tickets for the 2005 Christmas visit, and it is because he voluntarily chose not to do so that he did not receive his visitation in Christmas of 2005, since both parties testified that the only obstacle to his obtaining that visit was his failure to purchase the additional tickets for he and Mother to accompany Johnae. *Tr. at 73-75 and 128-130*.

In addition, when Mother filed her request for an administrative child support modification, she stated that one reason why she was requesting an increase in child support was because Father was refusing to pay all of the costs of transportation, namely for the second plane ticket for her to fly with Johnae until she believed Johnae was mature enough and comfortable with flying on her own. *L.F. at 78*.

In order to determine whether it was Father's or Mother's actions during Christmas of 2005 that constituted a violation of the 2003 Parenting Plan, the Court must look at the written provisions of the Parenting Plan; on page 4, under paragraph f of the 2003 Judgment, the following language is found:

“While the cost of transportation is to be paid by the Petitioner, generally while the minor child requires a chaperone, Respondent shall accompany the minor child from Philadelphia to Kansas City to commence Father's visitation, and the Father shall accompany the minor child back to Philadelphia from Father's home when his visitations end...Petitioner shall always consult with Respondent before Petitioner buys airline tickets...” *L.F. at 55-56*.

Nothing in paragraph f designates a certain age at which Johnae would no longer need a chaperone, nor does anything in the Judgment indicate that the parties would be required to rely upon a determination of Johnae's maturity and ability to fly alone based exclusively on the regulations of any given airline. *L.F. at 55-56*.

In fact, based upon its “plain language” and because of its failure to set a specific cut-off age for the chaperone requirement or to specify in any manner when the chaperoning was to end, it is clear that the court intended that Johnae’s parents confer, evaluate Johnae’s development, and then determine when it was appropriate for her to travel alone; and further, Father was to consult and resolve this issue with Mother before he purchased any plane tickets. *L.F. at 55-56.*

Even if this Court can find, anywhere in paragraph f of the Judgment, that the chaperoning was to end at a certain age or was to end automatically based upon a certain airline’s regulations, at the very least, the disagreement surrounding the Christmas visitation was clearly based upon each parent’s differing interpretation of this provision of the Parenting Plan.

There is nothing in the 2003 Judgment from which the trial court could have determined that Mother violated the provisions of the Parenting Plan. *L.F. at 55-56.*

The Parenting Plan provisions of the trial court’s 2003 Judgment never required Mother to place (as Mother testified), a screaming and terrified 6 year old on a plane to travel half-way across the country on her own. *Tr. at 75.*

Both parents testified that Mother notified Father, well in advance of the 2005 Christmas visitation, that Mother had misgivings about placing Johnae on a plane without a chaperone at 6 years old and was requesting that he purchase two tickets; and at no time did Mother ever indicate that she would send Johnae unless Father provided two tickets so that she could accompany her, as set forth in the chaperone provisions of the Parenting Plan. *Tr. at 73-75, 94, 130-131.*

Since the language of the Parenting Plan does not require the parents to defer to any given airline, its plain language indicates the provision is to remain in effect until both parents believed Johnae was mature enough to fly on her own; and furthermore, if Father and Mother could not agree as to when Johnae should be able to fly alone, Father could certainly have filed (in the appropriate court), a motion to remove the chaperon provision, which is what he did when he filed his Motion in 2006. *L.F. at 98.*

In addition, had the 2003 Judgment actually specified that Johnae would be able to fly alone at a certain age, or that the parents would defer to airline regulations in determining when she would fly alone, and then Mother refused to send Johnae to fly on her own, she would be in violation of a court order, but she certainly was not in violation in 2005.

Since Christmas of 2005 is the only denial of court-ordered visitation even alleged by Father since the Judgment went into effect in 2003, even if this Court finds that Mother's failure to place Johnae on the airplane in 2005 was a violation of paragraph f of the 2003 Judgment, this single violation certainly does not form a basis for the trial court's finding that Mother demonstrated "pattern of unilateral refusal" to abide by the Parenting Plan. *L.F. at 131*.

The fact that Father was only able to complain about the denial of a single court-ordered visitation, is evidence that the Mother complied with the custody provisions of the 2003 Judgment in that she made Johnae available for each and every visitation awarded to the Father under the Judgment (although Father voluntarily chose to forgo several of his visits as discussed below.)

In fact, when Appellate Courts have reviewed situations where a parent has substantially complied with custody decrees, this factor weighs against granting any proposed change of custody. *See Sumnicht v. Sackman, 906 S.W.2d 725 (Mo. App. 1995)*.

Father also argued that a change in custody was necessary because Mother refused to grant him additional parenting time during Spring Break of 2006. *Tr. at 137-138*.

Mother certainly is not required to give any additional or "make up" parenting time, and her failure to do so is not the same as denying Father any of his court-ordered parenting time, particularly when she did not violate the Parenting Plan.

When Father called Mother, in the Spring of 2006, and requested that Johnae accompany his family to Florida, Mother refused to let Father take Johnae, but Mother was not in violation of the Judgment, particularly in light of the fact that Father was not designated to have any visitation during Spring Break in 2006. *Tr. at 76*.

Counsel could find no case law that holds that a parent's refusal to grant parenting time in excess of the court-ordered parenting time, can be used against them as a factor for changing custody; nor was it appropriate for the trial court to find that Mother's failure to do something that she was not required, let alone ordered to do, constituted wrong doing on her behalf or formed a basis to change custody. *L.F. at 131-132*.

Further, the fact that Mother refused to allow Father to take Johnae to Florida in the spring of 2005, particularly because it would require her to miss a week of school, shows that the Mother placed Johnae's education above her recreational activities, which is to be commended, and should not have been used by the trial court as a basis to modify custody. *Tr. at 76-77*.

Father was also well aware, based upon the Christmas 2005 visitation disagreement three months earlier, that Mother had no intention of placing Johnae on an airplane alone to fly between Philadelphia and Florida. *Tr. at 76-77.*

Father also testified that he knew, again even before he purchased tickets for the additional visitation he requested during Spring Break of 2006, that Mother indicated that she would not send Johnae on a plane from Philadelphia to Florida unaccompanied. *Tr. at 137-138.*

Aside from the trial court's findings regarding the specific incidents surrounding visitation at Christmas in 2005 and Spring Break in 2006, the trial court also made a Finding indicating that Mother had demonstrated a pattern of denying or refusing visitation to Father. *L.F. at 131*; however, the record, even as it relates to parenting time other than Christmas of 2005 and Spring Break of 2006, also fails to support the trial court's conclusions. *Tr. throughout.*

By Father's own admission under oath, Father concedes that not only did Mother substantially comply with the visitation provisions of the parenting plan (with the exception of the 2005 Christmas break, which remains in dispute), but there was no dispute that she had voluntarily provided him with parenting time in excess of that ordered by the court in 2003. *Tr. at 128.*

Even though Father had only been granted 48 days of court Ordered visitation for calendar year 2006, not only had he not been deprived of any days, but he had been given 27 additional days according to his sworn statement. *L.F. at 81.*

When Father returned his Financial and Informational Statement in the administrative case on 08/18/2006, less than two weeks before he filed his Motion to Modify, Father stated under oath that Johnae had spent 75 days out of the last 12 month period with him. *L.F. at 81.*

The additional parenting time voluntarily provided by Mother since the entry of the 2005 Judgment did not just occur during 2006, but occurred on many different occasions, among them: allowing Johnae to go to her paternal grandmother's house in Tennessee in 2007; a visit in May of 2005 when Father and his sister Carrita took Johnae to Philadelphia for the weekend; an additional weekend in September of 2004 when Father was attending job training in Philadelphia and Mother sent Johnae there to visit with her Father since he was in the area, etc... *L.F. at 116, 175 Tr. at 47, 89.*

In addition, in her Answer, Mother outlined not only some of the additional visitations that she had provided to Father, but also visits that she voluntarily provided to Father's Mother, who lives in Tennessee. *L.F. at 116, Tr. at 47.*

There have been other instances when Father and his sister Carrita were passing through New Jersey while Carrita was traveling back and forth for college in Connecticut, and the Mother made Johnae available to visit her Father at those times, usually with very little notice. *Tr. at 47; L.F. at 175.*

At no time, either in his pleadings or during his testimony at trial, did Father indicate that any of the additional visitations set forth in Mother's pleadings or testified to by Mother during trial did not take place.

It was not possible for the trial court to conclude that Mother substantially failed to comply with the Parenting Plan or to allow Father to have an ongoing relationship with Johnae, particularly since she voluntarily made Johnae available for more visitation than was required according to the 2003 Judgment.

A custodial parent's non-compliance with a custody and visitation order, even if proven, which was not the case here, is far less important when the non-custodial parent has not consistently utilized his allotted visitation. *See McCubbin v. Taylor, 5 S.W.3d 202, 209 (Mo. App. 1999).*

Since Father, who was granted limited visitation with Johnae due to the fact that Mother resided with her in New Jersey when the 2003 Judgment was entered, voluntarily chose to forego, in all years, between 2003 and 2006, almost half of his designated visitations, he has very little cause to complain about the missed visitation at Christmas of 2005, particularly when there is no evidence that Mother didn't comply with the parenting provisions of the 2003 Judgment. *Tr. at 80-81.*

Mother's testimony at trial indicated that Father failed to exercise any of his Thanksgiving and Spring Break visitations, and that is not the Mother's fault. *Tr. at 80-81.*

Not only did Father not dispute Mother's testimony that he decided not to have Johnae for Spring Break or Thanksgiving, but he indicated that Mother's testimony regarding the visitations utilized was correct. *Tr. at 128.*

When a non-custodial parent does not bother to exercise all the visitation granted under a custody decree, it is his fault if his relationship with his child has been jeopardized. *Id. at 205.*

Only in cases where there has been substantial and reliable evidence of one parent's unilateral refusal to comply with the provisions of a custody decree, have the courts upheld a modification of custody based upon the denial of visitation.

One case where a court did find that a custody change was necessary based upon visitation denials was the case of *Stevens v. Stevens*, 977 S.W.2d 305 (Mo. App. 1998); in that case, a Guardian Ad Litem investigated the Father's assertions that he was repeatedly denied a relationship and visitation with his daughter, and the Guardian found that the Mother there had, on numerous occasions, unilaterally refused to allow visitations.

In the *Stevens* case, the Mother also testified under oath that she did not intend to abide by the court's custody orders. *Id.* at 308.

However, in our case, Mother testified that she had every intention of abiding by Court Orders and that she was doing her best to do so. *Tr. at 10-11.*

In addition, in the *Stevens* case, the Judge was also concerned about the child's mental health, welfare and development. *Id.* at 308.

In our case there was no evidence in any of the trial court's Judgments indicating that she was concerned about Johnae's mental health, welfare or development.

Accordingly, nothing in the factual or procedural history concerning Johnae's custody even comes close to the level the *Stevens* court required in order to uphold the trial court's change in custody. *Id.*

Counsel for Appellate was not able to find a single case in which any court in the State of Missouri upheld a change in custody or supported a finding of visitation denial where the uncontroverted record showed that not only that a Mother had voluntarily provided visitation in excess of that awarded to a Father who had voluntarily chosen to forego many of his visitations; nor was Counsel for Appellant able to find a single case where any Appellant Court upheld a trial court's finding of a pattern of visitation refusals based upon a single denial of visitation, much less based upon a visitation that was missed because of a genuine difference between the parents in interpreting their Parenting Plan, as occurred during Christmas of 2005. *L.F. at 55-56.*

Despite of the testimony of the parties, Judge Midkiff found that Mother had willfully and intentionally denied Father parenting time with Johnae for long periods of time and that if the existing Parenting Plan was not amended, the Judge believed that Father's relationship with Johnae would be jeopardized. *L.F. at 130.*

There is certainly no evidence anywhere in the record to support a finding of Mother's willful or intentional denial of any parenting time, much less of her denying Father access to Johnae for long periods of time; and as such, the trial court's findings to the contrary are wholly against the weight the evidence presented in this case.

Once the trial court had decided that Mother had unreasonably denied parenting time to Father, the court utilized that finding in paragraphs 8 and 10 of its July 27, 2007 Judgment to find that pursuant to **RSMo. Sec. 452.375.2 (2)**, Mother had failed to work cooperatively or to promote frequent or continuing parenting time for Father. *L.F. at 131-132.*

Further, in paragraph 10, pursuant to **RSMo. Sec. 452.375.2(4)**, the Judge found that Father was the parent more likely to allow the child to have frequent and meaningful contact with the other parent because of Mother's problem of denying or refusing visitation to Father, and because Mother unilaterally cancelled the 2005 Christmas visitation. *L.F. at 131.*

The trial court also made a finding that Father did not receive his visitation between November 2001 and April of 2003, while the original case was pending; however, not only does something that happened before a Judgment was even in place not constitute a substantial and continuing change since the date of the last Judgment, but Mother made it clear in her testimony that she did voluntarily give Father visitation during the underlying case, but once he refused to return Johnae, the visitations did not resume until there was a court Order in place so that Mother would have appropriate remedies in the event Father chose not to return Johnae again. *Tr. at 84-85.*

The trial court's finding that Father did not receive visitation in Missouri between November 2001 and April of 2003, while the original case was pending was accurate; however, something that happened before a Judgment was even in place does not constitute a substantial and continuing change since the date of the last Judgment.

Also, Mother made it clear in her testimony that although she was uncomfortable allowing Johnae to return to Missouri to visit with her Father until the initial paternity case was finalized, she did allow him to come to New Jersey to visit her. *Tr. at 86.*

The testimony regarding the November 2001 and April 2003 visitation is as follows:

The following exchange took place between Mother and Ms. Higginbotham:

Q. And he compensated him because of the fact that

you had withheld the child from Mr. Hightower; is that right?

A. I did not withhold the child from Mr. Hightower.

The agreement -- I mean basically we had a court issue pending and until that court issue was resolved, Mr. Hightower chose not to give the child back to me and wasn't going to give the child back to me until we went to court and everything was finalized. And court kept getting postponed. *Tr. at 6-7.*

Even more problematic, is the fact that although the trial court found that Mother was not likely to allow Father to have frequent meaningful or a continuing relationship with Johnae in the future if Mother remained Johnae's residential custodian, when the trial court issued its new Parenting Plan as part of its Judgment of July 25, 2007, the trial court gave Mother even less court-ordered visitation than Judge Torrence had previously given to Father in 2003, which is inexplicable. *L.F. at 138-141.*

Specifically, Judge Torrence granted Father 6 weeks uninterrupted of summer visitation, to be added onto his Father's Day visitation, but Judge Midkiff granted Mother only 4 weeks of summer visitation with Johnae, and she further ordered that those four weeks not be consecutive because they could not be utilized during the time period when the Johnae is attending Freedom school, which occurs during the middle each summer for approximately four weeks. *L.F. at 54-55, 6-7; Tr. at 119-120.*

As such, while Father was given 6 uninterrupted weeks and Father's Day each summer, Mother was granted only four weeks, which she was supposed to try to fit in between the date Johnae completed her regular school year and commenced the Freedom school in July, or after she completed Freedom school four weeks later but before Johnae returned to her regular elementary school in August. *L.F. at 140-141.*

In her supplemental Order of November 19, 2007, Judge Midkiff did issue some additional findings of fact regarding the visitation denials, *L.F. at 232*, namely, that Mother's actions had clearly jeopardized Johnae's ability to continue to have meaningful contact and a relationship with Father.

Mother's Moves

Another of Father's complaints was that Mother moved numerous times when she lived in New Jersey and that she then moved to Georgia in September of 2006; Father further alleged that these moves had caused Johnae to exhibit behavioral problems at school. *L.F. at 97*.

The trial court then made findings in its Judgment consistent with Father's allegations, namely that Mother had made many moves and changes in residence *L.F. at 131*, and that these moves caused a disruption in Johnae's school enrollment and attendance, *L.F. at 131*.

In its Judgment in paragraph 11, the trial court also made a finding that Johnae had difficulty adjusting to her new school in Georgia and that there was evidence of behavioral problems for some time. *L.F. at 132*.

It is clear that Father intended, and the trial court accepted, Father's argument that Johnae's behavioral problems at school were a direct result of Mother's moves.

However, as set forth above in the section of this Brief regarding the trial court's School Related Findings, there is no basis upon which the trial court could have found that any of Mother's moves caused any disruption in Johnae's schooling, because Johnae attended the same school the entire time she lived in New Jersey, and her academic progress and adjustment there was excellent. *L.F. at 73*.

There was also no basis upon which the trial court could find that Mother's relocation to Georgia negatively impacted Johnae in any way, as there was no evidence that Johnae had any behavioral problems or adjustment difficulties to her new school in Georgia, but rather, that she had excelled academically there as well. *L.F. at 14*.

Mother's Relocation

There is no dispute that the provisions of *RSMo. Sec. 452.377*, Missouri's relocation statute, were included in Judge Torrence's Judgment of 2003, and that the Mother in this case was on notice to comply with those relocation provisions. *L. F. at 48*.

The provisions were also in the trial court's Amended Judgment of August 25, 2003. *L. F. at 59*.

Mother does not dispute that she failed to comply with the provisions of *RSMo Sec. 452.377*, in that she did not provide written notice of her relocation, nor did she not provide notice 60 days in advance of her move. *Tr. at 22-23*.

The trial court cited to relocation as the partial basis for its modification of custody in paragraphs 3, 4b, 8, and 10 of its Judgment. *L.F. at 129-132*.

In its supplemental Orders of November 19, 2007, the trial court made additional Findings regarding Mother's relocation, specifically, in paragraph 13, the trial court found that there was a history of frequent moves by Mother and a lack of her providing updated and current information regarding her moves, which resulted in Father's having a lack of current information regarding Johnae's whereabouts or a way of contacting her. *L. F. at 237*.

Courts have held that unless it can be shown that moves negatively impacted the child in some way, or that they prevented or interfered with visitation, that factor was irrelevant. *See Humphrey v. Humphrey*, 888 S.W.2d 342 (Mo. App. 1994).

In this case, there was no evidence that Johnae had in anyway been negatively affected by any of Mother's moves in New Jersey, or by the move to Georgia; in fact, the evidence was that she was progressing and developing appropriately and that she did very well in school in both New Jersey and in Georgia.

In addition, none of the moves either in New Jersey or to Georgia prohibited Father from exercising the visitation set forth in 2003 Judgment, since that 2003 Judgment was already set up to allow Father to have long-distance visitation with Johnae. *L.F. at 54-56*

Further, by relocating from New Jersey to Georgia, Johnae moved closer to her Father, and she is now living near Atlanta, which is one of the four major airline hubs in the United States, thus making ample airline flights available to Father for the purpose of continued visitation. *Tr. at 154*.

While this Court's analysis of the Johnae's relocation will be discussed in full below, it is important to note at this time that the trial court excluded two important factors from its

deliberations regarding relocation, namely, that the impetus for Father's Motion to Modify was not the Mother's relocation to Georgia in September of 2006, but it was instead occasioned by the Division's Motion to Modify to increase his child support from \$500.00 per month to \$722.00 per month. *L.F. at 94; Tr. at 98-99, 172*; and secondly, that Father did, in fact, know that Mother intended to relocate to Georgia with Johnae before the move took place, although that information was provided orally rather than in written form. *Tr. at 23*.

Once he received that Notice, Father contacted an attorney and began the modification process - - even before Johnae moved to Georgia.

This is evident from the fact that Father's Motion to Modify, which he filed on September 5, 2006, was actually signed under oath and verified by a Notary Public on August 25, 2007, 11 days before Johnae moved, and contrary to the Father's testimony at trial that he did not know anything about the move until early in September, when he claims Mother provided him with Johnae's new address, phone number, and school information. *L.F. at 97-98; Tr. at 144-145*.

Father had already contacted Ms. Higginbotham, and a Motion to Modify had already been drafted and signed by him as of August 25, 2007. *L.F. at 103*.

It also appears that after he had already signed the Motion to Modify in response to the Division's action to increase his child support, that Motion was later "re-worked" when Johnae moved to Georgia, and the relocation objections were added to the Motion before it was actually filed in Jackson County on September 5, 2007. *L.F. at 96-103*.

Father, in his response to Mother's Motion for New Trial, explained that the reason his signature was verified on August 25th, 11 days before his Motion filed, yet his Motion contained facts that occurred after the verification date, was because he actually signed the Affidavit on August 25th when he was in his counsel's office, and pursuant to Father's counsel's office routine, Father understood that after he signed and notarized it, the verification page would be attached to a Motion that had not yet been prepared. *L. F. at 228-229*.

Father's counsel states that this was done so that Father would not have to travel back to her office to review and sign the final Motion. *L. F. at 228-229*.

Father's counsel also indicated that once the Motion had been completed, a day or two prior to the filing date of September 5th, she faxed the Motion to Father for his review and they discussed the document by phone; Counsel then attached Father's previously-executed and

verified Affidavit to the Motion she prepared thereafter and filed it with Jackson County on September 5th.

Father's counsel's office procedures also raise an interesting "sub-issue" in that a domestic Motion to Modify that is not properly reviewed, signed, and verified contemporaneously, does not vest a trial court with jurisdiction to take any action thereon.

Counsel is aware that the majority of cases that deal with the issue of contemporaneous verification of pleadings involve criminal movants signing post-trial motions, but there is case law in the civil arena that reaches the same result. ***See generally, In Re the Marriage of Dunn, 650 S.W.2d 638, 639 (Mo. App. 1983).***

Accordingly, if this Court finds that Father's execution of a blank Affidavit, not to mention the fact that there is apparently a Notary Public out there who is willing to notarize a blank Affidavit which purports to have been executed contemporaneously with the Affiant's review of the document, was not a properly verified Motion; then accordingly, Father's Motion was never properly pending before Judge Midkiff, so the Judge never had jurisdiction to have a trial, *and this case is over.*

In getting back to the heart of the issue concerning Father's financial motivation, a trial court should always consider whether or not a party seeking to modify custody truly has a child's best interests at heart, or whether a movant is financially motivated in seeking a modification; this analysis should take place in all custody and relocation cases.

In fact, for many years, a non-custodial parent's motives for seeking a modification and objecting to relocation was one of four specifically delineated factors that a trial court had to consider. ***See, Stewart v. Stewart, 905 S.W.2d 114 (Mo. App. 1995)***

In the case of ***Stowe v. Spence, 41 S.W.3d 468 (Mo. banc 2001)***, the Missouri Supreme Court overruled the four factor test, but the case of ***Kell v. Kell, 53 S.W.3d 203 (Mo. App. 2001)*** held that those factors are still to be considered by trial courts in determining motives of a party, and they are part of a trial court's necessary evaluation of any custody matter involving relocation issues. ***Kell at 206.***

Even more alarming in this case is the fact that it was on 8/30/2006 that the Division filed its formal Motion for Modification of the child support order, which was contemporaneously mailed to both Father and Mother; and six days later, Father filed his Motion to obtain custody of Johnae; this alone should have raised a red flag to the trial court.

When Appellate Courts have reviewed a party's failure to completely and specifically comply with the relocation notice provisions, they look at the reasons for the party's failure to do so and have found that in many circumstances, a relocating party simply does not know their exact address or all of the specifics surrounding their move, and many times they are unable to provide all of that information a full 60 days in advance. *See Loebner v. Loebner, 71 S.W.3d 248, 253-255 (Mo. App. 2002).*

In that circumstance, courts have been satisfied when a relocating party has done their best to provide information to the other party as soon as it is received, which is what Mother in our case did.

In her Answer to Father's Motion to Modify, Mother states that she verbally notified Father, on or about July 17, 2006, of her intention to relocate to Georgia and that at that time, she anticipated moving on September 4, 2006. *L.F. at 114.*

Mother also states that after she and her husband actually signed the paperwork for their new home, she notified Father on August 16, 2006 and provided him with her new address, phone number and contact information. *L.F. at 114.*

Mother testified extensively at trial that although her husband began his employment in Georgia in July of 2007, he was staying temporarily with a relative and Mother traveled back and forth several times while they conducted their home search and decided where they would live. *Tr. at 23-26.*

Although Mother had provided Father with notification back in August that she intended to move, she didn't have a complete mailing or home address until she and her husband signed a lease and finalized their housing arrangements; and she certainly could not have known which school district Johnae would attend until they knew for certain where they would be residing. *Tr. at 23-26.*

Father, in his trial testimony, agreed that prior to September of 2006, Mother had notified him that it was a possibility that she might be moving to Georgia, but he denied that he received any specific information regarding address, phone number, or Johnae's schooling until after the move occurred in September of 2006. *L. F. at 144-145.*

Under the circumstances presented, Mother did her best to provide Father with the statutorily-required information as she acquired it; although she concedes that she did not send the information in writing. *L.F. at 116.*

Where a party seeking to relocate has a good reason to move, courts generally allow the relocation, and appropriate reasons for relocation include marriage or a spouse's acceptance of new employment; which is exactly what occurred in Johnae's case. *Tr. at 32; See Weaver v. Kelling*, 53 S.W.3d 610, 613 (Mo. App. 2001).

In addition, Mother testified at trial that one of her reasons for relocation was to provide herself and Johnae with a better standard of living. *L.F. at 114*.

She testified in detail that she and her boyfriend of three years intended to marry, and that he had been offered a lucrative job opportunity in Georgia. *Tr. at 31-32*.

Mother also testified that being able to move from New Jersey to Georgia was beneficial to Johnae because they specifically selected a home there in the best school district available. *L.F. at 43*.

The trial court should have found that Mother's move was not intended to thwart or deny visitation, again particularly since Father's visitation schedule was already a long-distance schedule and did not require adjustment because of the move. *L.F. at 78-79; Tr. at 80*.

When a trial court finds that a Mother has good motives in attempting to relocate a child, and particularly when a court finds that a non-custodial parent may be financially motivated, relocation is permitted. *See, In Re of S. E. P. v. Petry*, 35 S.W.3d 862, 867-868. (Mo. App. 2001).

Mother's Finances

In his Motion to Modify Custody, Visitation, and Support of September 5, 2006, Father cited, as one of the substantial and continuing changes, his belief that Mother had no employment in Georgia and would not be able to support their child. *L.F. at 97*.

Further, in his Motion to Modify, in paragraph 8c, Father again states that one of his alleged substantial and continuing changes in circumstances was that Mother had experienced changes in employment since the date of the original decree. *L.F. at 99*.

Surprisingly, although Father alleged that Mother's financial instability was a basis upon which he asked the trial court to consider a custody modification, in the same Motion, he also asks the trial court enter an award of child support in his favor. *L.F. at 99*.

The trial court found that the Mother's "financial instability" weighed against her continuation as an appropriate custodian in paragraphs 8 and 9 of its Judgment. *L.F. at 131.*

The fact that the trial court considered the earning capacity of Father in comparison to that of Mother as part of its custody determination is not only demoralizing, but consideration of a parent's financial status is excluded from the factors a trial court may consider in custody cases pursuant to **RSMo. Sec. 452.375.8.**

Mother, in her Motion for a New Trial, pointed out the trial court's error in relying, even partially, on Mother's financial circumstances as a factor utilized in its decision to change custody from Father to Mother. *L.F. at 178.*

However, the trial court did not address or correct its findings regarding Mother's finances or its utilization of her finances as a determining factor in that either of the supplemental Orders entered on November 19, 2007. *L.F. at 129-134.*

Conclusion-Point III

The trial court's Judgment in this case should be reversed, because significant portions of the Judge's Findings of Fact and Conclusions of Law have no substantial evidentiary support, go completely against the weight of the evidence, or are factually incorrect; accordingly, this resulted in the trial court's also erroneously applying the law when it reached its conclusion to change Johnae's residential custodian from Mother to Father.

CONCLUSION

Improper verification of Father's Motion to Modify

If this Court finds that because of the unusual “verification method” of Father’s Motion to Modify in this case that Father’s pleadings were never properly before the trial court, then this Court should vacate Judge Midkiff’s Judgment of July 25, 2007 in its entirety.

Original Subject Matter Jurisdiction

If this Court finds that the original Judgments from 2003 were entered without Missouri’s having acquired subject matter jurisdiction over the issues of Johnae’s custody and visitation, then this Court should reverse the Judgments of 2003 and hold that Missouri did not possess subject matter jurisdiction sufficient to allow Father’s custody case to go forward at that time, and Father’s Petitions should be dismissed.

In the alternative, if this Court finds that there may have been subject matter jurisdiction during the original cause of action, but that the Findings and/or the evidence before the trial court were insufficient to support a finding of subject matter jurisdiction, then the appropriate remedy is to remand this case and to allow the trial court to conduct a full jurisdictional evidentiary hearing regarding the existence of original subject matter jurisdiction.

2006 Subject Matter Jurisdiction

If the Court finds that subject matter existed in the original cause of action, and accordingly, that the 2003 Judgments are valid; but this Court also finds that Missouri was without subject matter jurisdiction over Johnae’s custody and visitation issues on September 5, 2006, then this Court should reverse Judge Midkiff’s Judgment of July 25, 2007, and her supplemental Orders of November 19, 2007, and require that Father file the appropriate motion in the appropriate jurisdiction in order to seek relief.

If this Court finds that it is possible that Missouri had subject matter jurisdiction on September 5, 2006, but that the record below or the trial court’s findings are insufficient to convey subject matter jurisdiction, then the appropriate remedy is to remand this matter to the trial court for a full jurisdictional evidentiary hearing.

Change in Residential Custody

If this Court believes that subject matter jurisdiction existed during the original underlying proceedings, and also on September 5, 2006, but that there was insufficient evidence to support the trial court's findings first, that a substantial and continuing change in the parties' circumstances required a modification of the previous Judgment regarding custody and visitation; and second, that it was in Johnae's best interests that the trial court modify custody and transfer residential custody from Father to Mother, then this Court should reverse Judge Midkiff's Judgment of July 25, 2007 and her supplemental Orders of November 19, 2007.

As an alternative remedy, this Court could remand this matter to Judge Midkiff to conduct an additional hearing or to make additional Findings of Fact and Conclusions of Law regarding the change in custody.

General

Even if the trial court in this case had subject matter jurisdiction either in 2003 or 2006, nothing in the record in this case supports the trial court's Findings and Judgments transferring residential custody from the Mother to Father.

At the end of the trial, Judge Midkiff said "I am hugely concerned...because it is very clear that kids who at a young age who have interrupted contact with their parents will lose that close relationship." *Tr. at 183.*

In taking Johnae away from her Mother, with whom she has resided her entire life, and then only allowing Mother to see her for to two, two-week periods in the summer, and a few days during the rest of the year, the above is exactly what the trial court has done to Johnae and her Mother.

Respectfully submitted:



Sandra Grant Hessenflow, #40346
1102 Grand Blvd., Suite 800
KCMO 64106
Telephone: 816-471-1066
Fax: 816-471-1066
Attorney for Appellant

CERTIFICATE

State of Missouri)
) ss.
County of Jackson)

Sandra Grant Hessenflow, having first been duly sworn upon her oath, states that on the 19th day of May, 2008, she delivered ~~two copies~~ of the above 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 Michelle Higginbotham, 117 Bradford Lane, Belton, MO 64082, Attorney for John Hightower.

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 30,883 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).

Sandra Grant Hessenflow
Sandra Grant Hessenflow

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 19th day of May, 2008.

Erin Frye
Notary Public

My Commission Expires

January 29, 2011

