

IN THE SUPREME COURT OF MISSOURI

DOROTHY SZRAMKOWSKI, )  
 )  
 Respondent/Cross-Appellant, )  
 )  
 vs. ) Supreme Court No.: SC91108  
 )  
 JOSEPH SZRAMKOWSKI, )  
 )  
 Appellant/Cross-Respondent. )

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**RESPONDENT/CROSS-APPELLANT DORTHY SZRAMKOWSKI'S  
SUBSTITUTE BRIEF**

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## **STATEMENT OF FACTS**

### **Procedural History**

This appeal arises out of a Judgment of Dissolution of Marriage (the “Judgment”) in favor of the Petitioner below, Respondent/Cross-Appellant Dorothy Szramkowski (“Respondent”) on her Petition, entered by the trial court on April 17, 2009. (LF 138-46, 243-46)<sup>1</sup>. The Respondent below, Appellant/Cross-Respondent Joseph Szramkowski (“Appellant”) challenges the Judgment. (LF 243-46). Respondent cross-appealed, asserting that the trial court erred in denying Respondent’s December 5, 2008, Motion for Leave to File Amended Petition (the “Motion for Leave”). (LF 247-50).

On November 14, 2006, Respondent filed her verified Petition for Dissolution of Marriage (the “Petition”) against Appellant. (LF 1, 11-13). Respondent’s Petition alleged that her marriage to Appellant was irretrievably broken. (LF 12).

On November 7, 2006, Appellant filed a Petition for Appointment of a Guardian and Conservator (the “Petition for Guardianship”), alleging that Respondent is incapacitated and disabled, and requesting that the court grant letters of guardianship to Appellant. (Appellant’s Substitute Brief Appendix A24-A27). On December 11, 2006, Appellant filed his Motion to Dismiss for Lack of Capacity, noting that the Petition for Guardianship remained pending, but alleging that Respondent “lacks the mental capacity

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<sup>1</sup> References to “LF” are to the Legal File filed by Appellant. References to “Tr.” are to the Transcript on Appeal filed by Appellant.

to proceed in the instant matter.”) (LF 1, 14-15).

On May 31, 2007, the trial court on its own motion appointed Brian D. Dunlop, Esq., as guardian ad litem for Respondent pursuant to Rule 52.02(k). (LF 2, 173). On July 9, 2007, the probate court entered its Judgment Adjudicating Incapacitated and Disabled Person and Authorizing Appointment of Guardian and Conservator (the “Judgment of Incapacity”). (Appellant’s Substitute Brief Appendix A28-A29). The Judgment of Incapacity: (i) declared Respondent an incapacitated and disabled person; (ii) declared that Respondent shall retain the right to vote; (iii) found that, despite her incapacity, Respondent retained the capacity to make and communicate a reasonable choice of a person to serve as guardian; (iv) appointed Respondent’s sister Margaret Fowler (“Fowler”) as guardian; and (v) appointed James R. Wright, Jr., as conservator. Id.

On October 30, 2007, Appellant filed his Amended Motion to Dismiss for Lack of Capacity. (LF 3, 16-19). Such motion: (i) noted Answers to Interrogatories from Appellant’s expert Dr. Margaret Wilson regarding Respondent’s condition; (ii) noted the Judgment of Incapacity; (iii) noted the appointment of the guardian ad litem; (iv) alleged that the Petition did not allege abuse or neglect; (v) alleged that Respondent lacked the mental capacity to file her Petition; (vi) prayed for dismissal of Respondent’s Petition; and (vii) alternatively, prayed that the trial court conduct a hearing to determine Respondent’s capacity. (LF 16-18). Such Answers to Interrogatories from Appellant’s expert Dr. Wilson dated October 2006 included, among other things, the following:

Q: Do you consider Dorothy Szramkowski to be

“incompetent,” i.e., of unsound mind?

A: Not at this time.

(Appellant’s Substitute Brief Appendix A54).

On November 30, 2007, Appellant filed his Answer to Petition for Dissolution of Marriage denying, among other things, that his marriage to Respondent was irretrievably broken. (LF 4, 27-28). On December 6, 2007, Appellant filed his Amended Motion to Dismiss Petition for Dissolution for Lack of Capacity and For Lack of Proper Parties to the Action. (LF 4, 33-36). Such motion reiterated many of the allegations made in Appellant’s October 2007 motion to dismiss, and: (i) asserted that the trial court lacks jurisdiction to continue the appointment of the guardian ad litem; (ii) alleged that neither Respondent’s guardian nor her conservator entered in this case; (iii) asserted that an action brought by an incapacitated person must be brought by such person’s guardian or conservator; and (iv) prayed for dismissal of the Petition due to Respondent’s lack of capacity and because her guardian and conservator are not parties to the action. (LF 33-36).

On December 5, 2008, Respondent, by her guardian ad litem, filed her Motion for Leave, requesting that the case caption be amended to reflect the appointment of such guardian ad litem. (LF 7, 44-45). The body of the Motion for Leave specifically requested substitution. (LF 44-45). Respondent attached her proposed Amended Petition for Dissolution of Marriage (the “Amended Petition”) to her Motion for Leave. (LF 40-43). Respondent captioned her Amended Petition “Dorothy Szramkowski by her G.A.L. Brian Dunlop her Guardian Margaret Fowler her Conservator James Wright.” (LF 40).

Respondent's Amended Petition alleged, among other things, that: (i) Respondent's marriage to Appellant was irretrievably broken; (ii) Appellant behaved in such a way that Respondent cannot reasonably be expected to live with Appellant; and (iii) Respondent has been the victim of abuse and neglect by Appellant. (LF 40-42).

On December 12, 2008, the trial court conducted a trial in this matter. (LF 8; Tr. 1-217). At that time, the trial court, among other things, heard arguments regarding: (i) Appellant's October 30, 2007, Amended Motion to Dismiss for Lack of Capacity; (ii) Appellant's December 6, 2007, Amended Motion to Dismiss Petition for Dissolution for Lack of Capacity and For Lack of Proper Parties to the Action; and (iii) Respondent's Motion for Leave. (Tr. 4-14). The trial court reserved ruling on such motions. (Tr. 12). Respondent made an oral motion "to substitute Margaret Fowler as the guardian ad litem in the amended petition, if that's necessary." (Tr. 12). Again, the trial court reserved ruling on such oral motion. (Tr. 14). The parties stipulated that the parties' property fell under the jurisdiction of the probate court. (LF 141). Therefore, the only issue for the trial court was whether the marriage was irretrievably broken. (LF 141). The guardian ad litem attended the trial and did not object to allowing Respondent to proceed. (See, Tr. 1-20, 50-53). At the conclusion of the trial, Respondent moved for leave to amend her pleadings to conform to the evidence and moved to substitute parties. (LF 93-96).

### **Respondent's Testimony**

At trial, Respondent testified on her own behalf. (Tr. 51-81). Respondent testified that Appellant does not love her, and tried to humiliate her. (Tr. 54-55). She testified that she and Appellant were not happy with each other. (Tr. 60). Respondent testified

that Appellant pushed her down the steps for fun, was physically abusive and would throw things at her. (Tr. 60-61). She testified that she had marks on her from being pushed. (Tr. 68). Respondent testified that she felt unsafe living with Appellant due to his temper, and his screaming and throwing things. (Tr. 67). She testified that Appellant would scream, holler and throw a fit, that he would call her “stupid,” and that he made her sleep on the floor, telling her that the floor is where she belonged. (Tr. 60-63). Respondent testified that, despite her need for eye treatment, Appellant stated to Respondent that there was nothing wrong with Respondent’s eyes. (Tr. 63). She testified that Appellant loved it that she could not see, because he wanted to control her. Id.

Respondent testified that Appellant wanted to control Respondent’s money and spend it, and that he wanted to spend money on things she did not want. (Tr. 63). She testified that she bought a lake house and wanted the children of her relatives to be able to enjoy it, but that Respondent did not want to be around the children. (Tr. 64-65). Respondent testified that Appellant did not want to be around Appellant’s family. (Tr. 66). She testified that she was upset when Appellant had his brother move into the lake house, because such brother would get drunk and throw things around the house. Id. She testified that she did not eat well when she was living with Appellant, that there was not enough food in the house, and that Appellant would shop for food but then eat up the food himself. (Tr. 69). Respondent testified that she needed clothes when she was living with Appellant that she never got. (Tr. 72). She testified that she does not love Appellant any more because he wants her locked up, that she wants a divorce, that she cannot live with Appellant, that Appellant considers her stupid and dumb and that he pushed her

down the steps. (Tr. 67, 72, 73).

### **Conservator James Wright's Testimony**

Respondent's conservator James Wright ("Wright") testified at the trial. (Tr. 32-39). He testified that he met with Respondent several times, and attended her probate court hearing. (Tr. 33). He testified that, in his opinion, Respondent and Appellant have irreconcilable differences and, therefore, "it is in [Respondent's] best interest to proceed with the dissolution." (Tr. 34). Wright testified that he based his opinion on what Respondent told him about her relationship with Appellant, on Respondent's demeanor when she discusses that relationship and on what other people told him about the parties' relationship. *Id.* Wright testified that he further based his opinion on what Appellant told him about Appellant's relationship with Respondent's family. (Tr. 35).

### **Guardian Margaret Fowler's Testimony**

Fowler testified at the trial on December 12, 2008. (Tr. 82-117). She testified that she believes it is in Respondent's best interest to get a divorce because, based on observation and Respondent's statements, Respondent was upset and unhappy with Appellant and "felt like she was nothing." (Tr. 83-84). Fowler testified that Appellant told her on the telephone that "things are terrible," that Respondent "is just really getting to [him]" and that he felt like packing up, leaving and getting a divorce. (Tr. 86).

She testified that in over two years preceding the trial, Appellant has had no contact with Respondent, never came to visit her and never sent any letters, postcards or gifts. (Tr. 92-93). Fowler testified that Appellant never called to check on Respondent after Respondent's cataract surgery. (Tr. 106). She testified that since December 2006,

Appellant has not attempted to contact Respondent in any way. (Tr. 114).

**Other Testimony Regarding Abuse, Neglect and Irretrievably Broken Marriage**

Respondent testified that: (i) Appellant pushed her down the steps for fun, was physically abusive and would throw things at her; (ii) she had marks on her from being pushed; (iii) she felt unsafe living with Appellant due to his temper, and his screaming and throwing things; (iv) Appellant would scream, holler and throw a fit, that he would call her “stupid,” and that he made her sleep on the floor, telling her that the floor is where she belonged; (v) she did not eat well when she was living with Appellant, and that there was not enough food in the house; (vi) she needed clothes when she was living with Appellant that she never got. (Tr. 60-63, 67-69, 72). All of the foregoing testimony from Respondent regarding abuse and neglect occurred without any objection from Appellant to the relevance or subject matter of the evidence. (Tr. 60-63, 67-69, 72). Appellant’s counsel specifically raised the issue of abuse, asking Fowler: “Now, ma’am, whenever you saw [Respondent], did you ever see any signs that she had in any way been physically abused?” (Tr. 101).

Wright testified that Fowler voiced allegations of physical abuse and emotional abuse by Appellant, and told him that Appellant was not getting proper treatment for Respondent. (Tr. 37-38). Wright testified that it was his understanding that Fowler had observed the aftermath of incidents of abuse. (Tr. 38).

Fowler testified that she personally observed that Appellant “was verbally abusive most of the time” to Respondent. (Tr. 85). She testified that Appellant always told Respondent that Respondent didn’t know anything, and that Appellant had temper

tantrums. Id. She testified that Appellant would leave Respondent at home alone until late at night. (Tr. 89). Fowler testified that before Respondent came to live with Fowler, Respondent weighed about one hundred pounds, and that Respondent's clothes were very loose, but that since living with Fowler Respondent gained twenty pounds. (Tr. 89-90).

Fowler, Respondent's sister Jeanette Louise Behan ("Jeanette") and Respondent's brother-in-law Vincent Joseph Behan ("Vincent") also testified by deposition<sup>2</sup>. (Respondent's Appendix). Fowler testified that Appellant did not feed Respondent, and that Appellant would not take Respondent to the doctor to have her eyes taken care of. (Fowler Deposition 21). Vincent testified that Respondent did not have enough food and would call Vincent's sister crying because of that. (Vincent Deposition 24). He testified that he needed to pick up Respondent and take her to get food because Respondent did not have food and was crying. (Vincent Deposition 24-25).

Jeanette testified that she saw indications of injury on Respondent's shins. (Jeanette Deposition 12). She testified that Appellant neglected Respondent and did not take Respondent to the eye doctor when she couldn't see. (Jeanette Deposition 24). She testified that Respondent had no food to eat, and that Appellant would stay out late and eat out by himself. (Jeanette Deposition 25). Jeanette testified that Respondent's

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<sup>2</sup> Fowler's deposition, Jeanette's deposition and Vincent's deposition were admitted at trial as Respondent's Exhibits MM, LL and SS, respectively. (Respondent's Appendix). Citations to these depositions, contained within Respondent's Appendix, will from this point forward reference the deposition page number.

stomach would hurt from lack of food. Id.

### **Evidence Relevant to Mental Capacity**

Respondent testified that she knew why she was at trial, adding: “I want to testify in my behalf.” (Tr. 53-54). When asked why she wanted to divorce Appellant, Respondent testified that Appellant would push her down the stairs, call her stupid and dumb, scream and yell, and throw things at her such as books. (Tr. 59-61). Respondent recalled events regarding the couple’s bed, and being made to sleep on the floor. (Tr. 61-62). She further recalled Respondent’s contemporaneous comments about such issues, and recalled her feelings at the time. Id. Respondent explained the reason that Appellant “loved it” that Respondent couldn’t see, offering that Appellant wanted to control her, and do “what he wanted and when he wanted it.” (Tr. 63).

After testifying that Appellant hated children, Respondent stated: “Can you imagine being a teacher for years and hating children?” (Tr. 65). Respondent testified regarding her current living arrangements, the reason she wanted to live with her sister, and the reasons that she believed that living with Appellant would not be safe. (Tr. 67). Respondent made at least four specific comparisons between living with her sister and living with Appellant. (Tr. 68). Respondent was able to recall specifics of conversations with Appellant regarding problems with food. (Tr. 69). She was able to recall specific work she did on properties the parties owned, including cleaning and painting, and she recalled her specific feelings about that work and specific comments made by Appellant about those feelings. (Tr. 70).

On cross-examination, Respondent was able to recall the name of her doctor, Dr.

Galanis. (Tr. 74). She was able specifically to recall a direct examination question about marks on her body and supplement her testimony about them. Id. Respondent was able to reiterate her earlier testimony about Appellant's anger, throwing things, and making Respondent sleep on the floor. (Tr. 77).

Fowler testified that Respondent is able to take care of her own personal hygiene, brush and take care of her teeth, and bathe. (Tr. 83). Fowler testified that Respondent reads the newspaper, that Respondent follows the news, that during the election Respondent knew who she would vote for and was able to go to the polls and vote for that candidate. (Tr. 87-88).

#### **Appellant's Evidence**

Appellant testified at the trial, disputing Respondent's evidence and claiming that he loved Respondent. (Tr. 133-209). Appellant's nephew testified that he did not witness any abuse or temper tantrums, and that Appellant asked him to call Fowler because Appellant was interested in how Respondent was doing. (Tr. 210-214). Appellant presented the testimony of a police officer regarding an alleged incident in which Respondent drove in the wrong lane on Lindbergh Boulevard. (Tr. 41-49).

#### **Respondent's Post-Trial Motions**

On February 5, 2009, Respondent filed her Motion to Amend the Pleadings to Conform to the Evidence Pursuant to Rule 55.33. (LF 8, 93-94). Such motion: (i) alleged that Appellant did not object to much of the evidence of abuse and neglect; (ii) asserted that Appellant injected the issue of his behavior into the case by denying his marriage to Respondent was irretrievably broken; and (iii) prayed for leave to amend

Respondent's Petition as requested in her December 5, 2008, Motion for Leave. (LF 93-94). Also on February 5, 2009, Respondent filed her Motion for Substitution of Parties, requesting that Respondent's guardian be substituted as a party rather than all three of the parties listed in Respondent's December 5, 2008, Amended Petition. (LF 8, 95-96). On March 3, 2009, Respondent filed objections to such post-trial motions. (LF 8, 131-37).

### **Trial Court Judgment and Subsequent History**

On April 17, 2009, the trial court entered the Judgment. (LF 8, 138-46). The Judgment, among other things: (i) found that Respondent had the mental capacity to file her Petition; (ii) found that Respondent had the mental capacity to testify in her own behalf as to the issue of whether the parties' marriage is irretrievably broken; (iii) found that Respondent met her burden of proof, and that there is no reasonable likelihood that the parties' marriage can be preserved, and that, therefore, the parties' marriage is irretrievably broken; (iv) awarded fees to the guardian ad litem; (v) ordered that the parties' marriage is dissolved; (vi) denied Appellant's motion(s) to dismiss for lack of capacity, and denied any other pending motion not specifically ruled on in the Judgment; (vii) essentially denied Respondent's Motion for Leave by ordering the dismissal of Respondent's December 2008 Amended Petition, without prejudice. (LF 144).

On May 1, 2009, Appellant filed his Motion for Rehearing Before Commissioner which, among other things, requested that the trial court make specific findings on a voluminous number of specific issues. (LF 9, 149-201). On May 15, 2009, Appellant filed his Motion to Amend and/or for New Trial. (LF 9, 202-225). On May 18, 2009, Respondent filed her Motion to Amend Judgment raising, among other things, the trial

court's denial of Respondent's December 2008 Motion for Leave. (LF 9, 226-32). On May 28, 2009, the trial court denied the foregoing post-judgment motions. (LF 238). On June 2, 2009, Appellant filed his Notice of Appeal. (LF 9, 243-46). On June 8, 2009, Respondent filed her Notice of Appeal. (LF 9, 247-50).

On June 8, 2010, the Missouri Court of Appeals – Eastern District entered its Order affirming the Judgment, ruling in Respondent's favor on her cross-appeal and finding that the trial court should have permitted Respondent to substitute parties as she specifically requested in her Motion for Leave. (Appellant's Substitute Brief Appendix A10-A23). On October 26, 2010, this Court granted Appellant's Application for Transfer.

**POINTS RELIED ON**

**I. THE TRIAL COURT DID NOT ERR IN FINDING THAT RESPONDENT HAD THE CAPACITY TO SUE, BECAUSE SHE ADDUCED SUFFICIENT EVIDENCE TO REBUT ANY PRESUMPTION AGAINST SUCH CAPACITY, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING IN FAVOR OF RESPONDENT ON THIS ISSUE.**

Allee v. Ruby Scott Sigears Estate, 182 S.W.3d 772, 782 (Mo.App. 2006).

Sivils v. Sivils, 659 S.W.2d 525, 528-29 (Mo.App. 1983).

Clark v. Reeves, 854 S.W.2d 28, 30 (Mo.App. 1993).

State v. Beine, 730 S.W.2d 304, 307-08 (Mo.App. 1987).

**II. THE TRIAL COURT DID NOT ERR IN FINDING THAT RESPONDENT HAD THE CAPACITY TO TESTIFY, BECAUSE SHE COULD UNDERSTAND THE OBLIGATION OF HER OATH, AND HAD SUFFICIENT MIND AND MEMORY TO NOTICE, RECOLLECT, AND COMMUNICATE THE RELEVANT EVENTS. FURTHERMORE, RESPONDENT REBUTTED ANY PRESUMPTION REGARDING SUCH CAPACITY THAT MAY HAVE ARISEN FROM PRIOR PROBATE COURT FINDINGS. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING IN FAVOR OF RESPONDENT ON THIS ISSUE.**

Sivils v. Sivils, 659 S.W.2d 525, 528-29 (Mo.App. 1983).

Clark v. Reeves, 854 S.W.2d 28, 30 (Mo.App. 1993).

State v. Beine, 730 S.W.2d 304, 307-08 (Mo.App. 1987).

**III. THE TRIAL COURT DID NOT ERR IN ALLOWING RESPONDENT'S ACTION TO PROCEED BECAUSE THE TRIAL COURT'S FINDINGS REGARDING RESPONDENT'S CAPACITY MADE SUBSTITUTION OF PARTIES UNNECESSARY AND, EVEN IF SUBSTITUTION OR JOINDER WERE NECESSARY, DISMISSAL WOULD NOT BE AN APPROPRIATE REMEDY.**

City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189, 193 (Mo. 2006).

In Rep. Trustees Indian Springs v. Greeves,

277 S.W.3d 793, 797-99 (Mo.App. 2009).

Preston v. State, 33 S.W.3d 574 (Mo.App. 2000).

Mo. R. Civ. P. 52.06.

**IV. THE TRIAL COURT DID NOT ERR IN FINDING THE PARTIES' MARRIAGE IRRETRIEVABLY BROKEN, BECAUSE SUBSTANTIAL EVIDENCE INDICATED THAT APPELLANT BEHAVED IN SUCH A WAY THAT RESPONDENT CANNOT REASONABLY BE EXPECTED TO LIVE WITH APPELLANT. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING IN FAVOR OF RESPONDENT ON THIS ISSUE.**

In re Marriage of Thompson, 894 S.W.2d 255, 256 (Mo.App. 1995).

Wagoner v. Wagoner, 76 S.W.3d 288, 290-91 (Mo.App. 2002).

§ 452.320.2(1) RSMo.

**V. RESPONDENT TAKES NO POSITION REGARDING THE AWARD OF FEES TO THE GUARDIAN AD LITEM, HOWEVER RESPONDENT REJECTS APPELLANT’S ARGUMENT ON THIS ISSUE TO THE EXTENT IT IS INCONSISTENT WITH THE REMAINDER OF RESPONDENT’S ARGUMENT ABOVE.**

City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189, 193 (Mo. 2006).

In Rep. Trustees Indian Springs v. Greeves,

277 S.W.3d 793, 797-99 (Mo.App. 2009).

Preston v. State, 33 S.W.3d 574 (Mo.App. 2000).

Mo. R. Civ. P. 52.06.

**VI. REGARDING RESPONDENT’S CROSS-APPEAL, THE TRIAL COURT ERRED IN DENYING RESPONDENT’S DECEMBER 2008 MOTION FOR LEAVE TO AMEND HER PETITION. THE MISSOURI CASES AND RULES PROVIDE THAT WHERE SUIT HAS BEEN BROUGHT IN THE WRONG NAME, SUCH ERROR MAY BE CURED BY AMENDMENT TO SUBSTITUTE OR JOIN THE PROPER PARTY, AND SUCH AMENDMENT DOES NOT CONSTITUTE A NEW ACTION AND CREATES NO PREJUDICE TO THE OPPONENT. IF THIS COURT FINDS THAT, BECAUSE RESPONDENT HAD AN APPOINTED GUARDIAN, SHE SHOULD**

**HAVE BROUGHT SUIT IN THE GUARDIAN’S NAME,  
RESPONDENT SHOULD HAVE BEEN ALLOWED TO CURE  
THAT ERROR THROUGH AMENDMENT. RESPONDENT  
MAKES THIS ARGUMENT IN THE ALTERNATIVE TO HER  
OTHER ARGUMENTS, WITHOUT CONCEDED THAT ANY  
SUCH AMENDMENT WAS IN FACT NECESSARY.**

City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189, 193 (Mo. 2006).

In Rep. Trustees Indian Springs v. Greeves,

277 S.W.3d 793, 797-99 (Mo.App. 2009).

Preston v. State, 33 S.W.3d 574 (Mo.App. 2000).

Mo. R. Civ. P. 52.06.

## ARGUMENT

### **STANDARD OF REVIEW.**

In reviewing a trial court's judgment in a non-jury case, a Missouri appellate court must affirm the judgment 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. 1976). In reviewing a decree in a dissolution case, the Missouri Court of Appeals explained:

Appellate review of a decree entered by a trial court sitting without a jury is exceedingly circumscribed. . . .

Furthermore, where it is reasonably possible to do so, the decree "should be construed so as to give [it] force and effect ... make it serviceable instead of useless, and support rather than destroy it." Gunkel v. Gunkel, 633 S.W.2d 108, 110 (Mo.App., E.D. 1982). Our concern is whether or not the trial court reached the proper result; this court's role is not to determine what reasons may have guided the trial court in making its judgment. C.L.R. v. L.B.R., 555 S.W.2d 372, 375 (Mo.App., S.D.1977). The Missouri Supreme Court has ruled that a correct decision will not be disturbed because the trial court gave a wrong or insufficient reason for its judgment. Edgar v. Fitzpatrick, 377 S.W.2d 314, 318 (Mo. banc 1964).

Ederle v. Ederle, 741 S.W.2d 883, 885 (Mo.App. 1987).

In 8000 Maryland v. Huntleigh Financial Serv., 292 S.W.3d 439, 445 (Mo.App. 2009), the Missouri Court of Appeals further explained:

**We accept all evidence and inferences therefrom in the light most favorable to the judgment, and we disregard all contrary evidence.** Sheppard v. East, 192 S.W.3d 518, 522 (Mo.App. 2006). **We defer to the trial court on factual issues** "because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." Essex Contracting, Inc. v. Jefferson County, 277 S.W.3d 647, 652 (Mo. banc 2009) (quoting In re Adoption of W.B.L., 681 S.W.2d 452 (Mo. banc 1984)). In determining the credibility of the witnesses and the weight to be given to their testimony, a trial court is free to believe all, part, or none of the testimony of any witness. Missouri Land Dev. Spec. v. Concord Exca., 269 S.W.3d 489, 496 (Mo. App. 2008).

8000 Maryland, 292 S.W.3d at 445 (emphasis added). In another appeal following a non-jury trial, the Missouri Court of Appeals stated:

Under Murphy v. Carron, . . . the judgment of the trial court is to be sustained unless it is against the weight of the evidence,

**such a finding to be made "with caution and with a firm belief that the decree or judgment is wrong."**

In re Marriage of R. R., 575 S.W.2d 766, 768 (Mo.App. 1978) (emphasis added)<sup>3</sup>. In Simpson v. Strong, 234 S.W.3d 567, 578 (Mo.App. 2007), the Missouri Court of Appeals explained:

The phrase "weight of the evidence" means its weight in probative value, rather than the quantity or amount of evidence. . . . The weight of the evidence is not determined by mathematics, but depends on its effect in inducing belief. . . .

**An appellate court exercises extreme caution in considering whether a judgment should be set aside on the ground that it is against the weight of the evidence and will do so only upon a firm belief that the judgment was wrong.**

Simpson, 234 S.W.3d at 578 (emphasis added).

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<sup>3</sup> In Marriage of R. R., the trial court awarded custody of the children to the mother due to "the possibility of emotional damage from living with Ross and his illness." Marriage of R. R., 575 S.W.2d at 768. However, the Missouri Court of Appeals reversed, explaining that such possibility "finds **no support in the evidence.**" Id. at 768-69 (emphasis added).

**I. THE TRIAL COURT DID NOT ERR IN FINDING THAT RESPONDENT HAD THE CAPACITY TO SUE, BECAUSE SHE ADDUCED SUFFICIENT EVIDENCE TO REBUT ANY PRESUMPTION AGAINST SUCH CAPACITY, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING IN FAVOR OF RESPONDENT ON THIS ISSUE.**

While Appellant states that this case “presents the Court with the opportunity to establish the legal framework” regarding those potentially suffering the effects of age, the existing Missouri laws in fact adequately protected Respondent from the potential for manipulation through the legal system. (See, LF 138-46). Given her express desire to proceed on her own behalf with a dissolution of marriage, Respondent availed herself of the protections of Missouri law allowing her to rebut a presumption of incapacity, presented specific evidence of her mental capacity and obtained a judgment from the trial court affirming such capacity and granting her a dissolution. See, Id. Such ruling affirmed Respondent’s right to prosecute a lawsuit, arguably allowing her to retain a greater part of her own identity despite certain difficulties from age. See, Id.

Appellant’s seeming desire is for a “legal framework” that would protect his own litigation interests over Respondent’s interest in obtaining dissolution of an irretrievably broken marriage or retaining her right as an individual to sue. Despite that, it is in fact Respondent, and many others like her, that Missouri law should protect. Respondent’s evidence was, in part, that Appellant does not love her, that he tried to humiliate her, that she felt unsafe living with him due to his temper, his screaming and throwing things, that

he did not properly assist Respondent in obtaining necessary eye treatment, that she needed clothes when she was living with her husband that she never got, that he was verbally abusive to her, that she did not have enough food, and that her husband wanted to control her money and spend it, and have her put into a nursing home against her wishes. (See, Tr. 54-55, 63, 67, 68, 72, 85; Vincent Deposition 24). Appellant went as far as to take Respondent to a doctor to have her declared incompetent, and requested that the probate court grant him letters of guardianship. (Appellant's Substitute Brief Appendix A24-A27, A51-A54).

But for Appellant availing herself of the protections afforded by Missouri law, she may have found herself in a nursing home against her wishes, or stuck in a detrimental marriage from which she could not escape. (See, Tr. 54-55, 63, 67, 68, 72, 85; Vincent Deposition 24; Appellant's Substitute Brief Appendix A24-A27, A51-A54; LF 138-46). Appellant's argument appears to raise such risks for potentially millions of other individuals such as Respondent. While Respondent acknowledges that millions of Americans suffer the effects of age, Respondent urges this Court to recognize that they do not all suffer "delusional and paranoid thoughts," and they have not all lost capacity to pursue their legal rights. Any "legal framework" for dealing with such individuals should not render them, in effect, second-class citizens by withdrawing their ability to sue in their own name or restricting them from escaping detrimental relationships with stronger parties. Respondent urges the Court to consider the foregoing legal and philosophical background when considering the issues of capacity, as well as the other issues presented in this case.

The trial court properly found that Respondent had the mental capacity to file her Petition in this case. (LF 144); See, City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189, 193 (Mo. 2006); In Rep. Trustees Indian Springs v. Greeves, 277 S.W.3d 793, 797-99 (Mo.App. 2009); Allee v. Ruby Scott Sigears Estate, 182 S.W.3d 772, 782 (Mo.App. 2006); Clark v. Reeves, 854 S.W.2d 28, 30 (Mo.App. 1993); State v. Beine, 730 S.W.2d 304, 307-08 (Mo.App. 1987); Sivils v. Sivils, 659 S.W.2d 525, 528-29 (Mo.App. 1983). The evidence regarding Respondent's condition at the time she filed her Petition, as well as her trial testimony and the Missouri cases, support the trial court's finding on this issue. See, Allee, 182 S.W.3d at 782; (LF 1, 11-14, 147-48; Tr. 53-54, 59-63, 65, 67-70, 74, 77).

Allee supports Respondent here. See, Allee, 182 S.W.3d at 774-75, 782. In Allee, the plaintiff sought to invalidate a will made by Ruby Scott when she was eighty-one years old. Allee, 182 S.W.3d at 774-75. Approximately three months after she executed the will, a court "found Ruby to be fully incapacitated and disabled and appointed the Public Administrator of Nodaway County as the guardian of Ruby's person and the conservator of her estate." Id. at 775. The trial court rejected the plaintiff's argument, and entered its judgment declaring that the will was in fact valid. Id. at 780.

In affirming the trial court, the Missouri Court of Appeals explained:

Appellants claim the court erred in failing to apply a presumption of testamentary incapacity in favor of Appellants "because probative evidence indicated that the testator was in no better condition on the date of execution than when in

slightly more than three months the testator was without objection adjudged to be incapacitated and disabled, in need of a guardian and conservator, and presumed incompetent." They further claim that the court erroneously "declined to apply the standard of presumption set out by a finding of an individual as fully incapacitated and in need of a guardian and conservator." We disagree.

Appellants rely upon section 475.078.3 for such a presumption. . . . While Ruby was indeed [adjudicated incapacitated] on June 14, 2000, no valid statutory presumption of mental incapacity arose in the case *sub judice* because she executed the disputed will on February 25, 2000, **which was slightly more than three months before that adjudication took place.** In other words, the fact that Ruby was adjudicated to be fully incapacitated and disabled on June 14, 2000, **does not give rise to a presumption that she was mentally incapable of validly executing a will more than three months earlier.**

Allee, 182 S.W.3d at 782. Thus, the court refused to apply a presumption that a person was incompetent to perform a legal act when the adjudication supposedly giving rise to such presumption occurred **after** such act. Id.

In our case, Respondent filed her verified Petition for Dissolution of Marriage on

November 14, 2006. (LF 1, 11-14). On July 9, 2007, the probate court entered its judgment finding Respondent incapacitated. (LF 147-48). Thus, the adjudication giving rise to the presumption sought by Appellant did not occur until approximately **eight months after** the filing of Respondent’s Petition. (LF 1, 11-14, 147-48). Pursuant to Allee, the adjudication by the probate court on July 9, 2007, does **not** give rise to a presumption that Respondent was mentally incapable of filing her Petition approximately eight months earlier. Allee, 182 S.W.3d at 782.

Respondent further notes that in discussing the findings of Appellant’s own expert, Dr. Wilson, Appellant does not sufficiently acknowledge an Interrogatory answered by Dr. Wilson as follows:

Q: Do you consider Dorothy Szramkowski to be  
“incompetent,” i.e., of unsound mind?

A: **Not at this time.**

(Appellant’s Substitute Brief Appendix A54) (emphasis added). Such Interrogatory answer was dated just one month prior to the filing of Respondent’s Petition. Id. Thus, Appellant’s own expert found Respondent of sound mind only one month before the filing of Respondent’s Petition. Id.

Moreover, Respondent’s testimony demonstrated her capacity regarding the issues in this litigation. (See, e.g., Tr. 53-54, 59-63, 65, 67-70, 74, 77). Respondent answered questions responsively and intelligently. See, Sivils, 659 S.W.2d at 528; (Tr. 51-81). Respondent testified that she knew why she was at trial, adding: “I want to testify in my behalf.” (Tr. 53-54). When asked why she wanted to divorce Appellant, Respondent

spontaneously cited numerous facts, including that Appellant would push her down the stairs, call her stupid and dumb, scream and yell, and throw things at her such as books. (Tr. 59-61). Respondent was able spontaneously to recall events regarding the couple's bed, and being made to sleep on the floor. (Tr. 61-62). She further recalled Respondent's contemporaneous comments about such issues, and recalled her feelings at the time. Id. Respondent was able to explain the reason that Appellant "loved it" that Respondent couldn't see, spontaneously offering that Appellant wanted to control her, and do "what he wanted and when he wanted it." (Tr. 63).

After testifying that Appellant hated children, Respondent offered the rhetorical but completely logical and appropriate question: "Can you imagine being a teacher for years and hating children?" (Tr. 65). Respondent testified coherently and intelligently regarding her current living arrangements, the reason she wanted to live with her sister, and the reasons that she believed that living with Appellant would not be safe. (Tr. 67). Respondent was able to make at least four specific comparisons between living with her sister and living with Appellant. (Tr. 68). Respondent was able to recall specifics of conversations with Appellant regarding problems with food. (Tr. 69). She was able to recall specific work she did on properties the parties owned, including cleaning and painting, and she recalled her specific feelings about that work and specific comments made by Appellant about those feelings. (Tr. 70).

On cross-examination, Respondent was able to recall the name of her doctor, Dr. Galanis. (Tr. 74). She was able specifically to recall a direct examination question about marks on her body and supplement her testimony about them. Id. Respondent was able

to reiterate her earlier testimony about Appellant's anger, throwing things, and making Respondent sleep on the floor. (Tr. 77).

Despite Appellant's contention that "absolutely no evidence was presented at trial which corroborated [Respondent's] testimony," other evidence in fact does corroborate Respondent's position. Fowler testified that Respondent is able to take care of her own personal hygiene, brush and take care of her teeth, and bathe. (Tr. 83). As further corroboration, Fowler testified that Respondent reads the newspaper, that Respondent follows the news, that during the election Respondent knew who she would vote for and was able to go to the polls and vote for that candidate. (Tr. 87-88). Lending further credibility to Respondent's position and further contradicting Appellant's argument, the probate court previously ruled that Respondent retained the right to vote, and further found that Respondent "has the capacity to make and communicate a reasonable choice as to the person" who would serve as guardian. (LF 26).

Absent any applicable presumption in favor of Appellant, no single piece of evidence cited by Appellant in support of his argument can be dispositive. See, Murphy, 536 S.W.2d at 30; 8000 Maryland, 292 S.W.3d at 445; Wagoner v. Wagoner, 76 S.W.3d 288, 290-91 (Mo.App. 2002); Simpson, 234 S.W.3d at 577. Moreover, as discussed above, the trial court's election to believe certain evidence and to reject other evidence is entitled to deference. Murphy, 536 S.W.2d at 30. On review, this Court should accept all evidence and inferences therefrom in the light most favorable to the judgment, and we disregard all contrary evidence. 8000 Maryland, 292 S.W.3d at 445. The trial court is free to accept or reject all, part, or none of the evidence presented.

Simpson, 234 S.W.3d at 577.

In light of the evidence discussed above, the trial court made a specific factual finding that Respondent did not lack the capacity to sue, and in fact did not lack the capacity to testify approximately 25 months later. (LF 144). Because substantial evidence supported such finding, the trial court did not err. Murphy, 536 S.W.2d at 32; Ederle, 741 S.W.2d at 885.

Despite the above evidence and the applicable legal standards, Appellant attempts to argue that certain evidence contradicts the trial court’s finding that Respondent had the capacity to sue. (See, e.g., Appellant’s Substitute Brief 34-35). These included evidence of Respondent’s alleged driving issues, misplacing things, attending a lecture on Alzheimer’s disease, cognitive tests, and the findings of Dr. Wilson. Id. However, under the appropriate standards of review, this Court should disregard all such contrary evidence. 8000 Maryland, 292 S.W.3d at 445.

Appellant also argues variously that the trial court “ignored,” “failed to acknowledge in any fashion” and/or “failed to address” certain evidence allegedly supporting Appellant. (See, e.g., Appellant’s Substitute Brief 34-35). However, Missouri Rule 73.01(c) provides, in pertinent part:

The court shall render the judgment it thinks proper under the law and the evidence.

...

**All fact issues upon which no specific findings are made shall be considered as having been found in accordance**

**with the result reached.**

Mo. R. Civ. P. 73.01(c) (emphasis added). Thus, any fact issues that Appellant alleges the trial court did not address should be considered as having been found in favor of Respondent here. Id.

Respondent also notes that, in Section I of his Substitute Brief, Appellant cites not a single Missouri case finding a party unable to sue due to mental incapacity. (See, Appellant's Substitute Brief 31-37). In fact, Appellant acknowledges in his Substitute Brief that no Missouri case specifically addresses the issue of capacity to sue in the context of a dissolution case. (Appellant's Substitute Brief 33). While Appellant cites certain cases involving deeds and wills, Respondent notes that the law in these areas actually appears to support Respondent's position rather than Appellant's. See, Allee, 182 S.W.3d at 782. Appellant cites Novak v. Akers, 669 S.W.2d 644 (Mo.App. 1984). In Novak, the Missouri Court of Appeals specifically stated that it could not reach the substance of the capacity allegation, because the defendant's general denial was insufficient to put the plaintiff's capacity to sue in issue in the case. Novak, 669 S.W.2d at 647.

Respondent notes that Appellant's interpretation of the alleged prevalence of Alzheimer's disease raises other troubling implications. (See, Appellant's Substitute Brief 31-32). The Missouri legislature has afforded individuals in Missouri the right to dissolve their marriage without imposing extreme or severe restrictions. See, Section 452.305.1 RSMo; Section 452.320.2(1) RSMo. Appellant seems to imply that, due to the alleged prevalence of Alzheimer's disease, this Court should restrict the dissolution rights

afforded by the legislature. (See, Appellant’s Substitute Brief 31-37). Appellant also states that this case “presents the Court with the opportunity to establish the legal framework for dealing with this type of situation.” Id. at 32. However, “establishing the legal framework” governing the right to dissolution of marriage may arguably be more appropriate for the legislature.

Appellant states that the legal test regarding capacity to sue “must take in consideration the delusional and paranoid thoughts which often are manifestations of Alzheimer’s disease.” (Appellant’s Substitute Brief 33-34). However, Appellant overlooks the fact that a court in fact could consider alleged “delusional and paranoid thoughts” when determining a person’s mental capacity under the legal standards that already exist in Missouri. See, Allee, 182 S.W.3d at 782; Clark, 854 S.W.2d at 30; State v. Beine, 730 S.W.2d 304, 307-08 (Mo.App. 1987); Sivils v. Sivils, 659 S.W.2d 525, 528-29 (Mo.App. 1983). Thus, a decision approving the reasoning of cases such as Sivils would in fact address Appellant’s policy concerns regarding the prevalence of Alzheimer’s disease.

Appellant’s Substitute Brief seems to imply that an individual exhibiting any alleged “memory disturbance” or alleged early signs of Alzheimer’s disease should automatically be deemed to lack capacity to sue. (See, Appellant’s Substitute Brief 31-37). Respondent urges this Court to reject Appellant’s arguments in this regard, and hold that Respondent did not lack the capacity to sue. Mo. R. Civ. P. 73.01(c); Murphy, 536 S.W.2d at 30; 8000 Maryland, 292 S.W.3d at 445; Wagoner, 76 S.W.3d at 291; Simpson, 234 S.W.3d at 577. The Court should affirm the trial court’s Judgment in favor of

Respondent. Id.

**II. THE TRIAL COURT DID NOT ERR IN FINDING THAT RESPONDENT HAD THE CAPACITY TO TESTIFY, BECAUSE SHE COULD UNDERSTAND THE OBLIGATION OF HER OATH, AND HAD SUFFICIENT MIND AND MEMORY TO NOTICE, RECOLLECT, AND COMMUNICATE THE RELEVANT EVENTS. FURTHERMORE, RESPONDENT REBUTTED ANY PRESUMPTION REGARDING SUCH CAPACITY THAT MAY HAVE ARISEN FROM PRIOR PROBATE COURT FINDINGS. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING IN FAVOR OF RESPONDENT ON THIS ISSUE.**

The trial court properly found that Respondent had the mental capacity to testify in her own behalf as to the issue of whether the parties' marriage is irretrievably broken.

(LF 144); Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29. Section 491.060 of the Missouri statutes provides, in pertinent part:

The following persons shall be incompetent to testify:

(1) A person who is mentally incapacitated at the time of his or her production for examination; . . .

§ 491.060 RSMo. Section 475.078.3 of the Missouri statutes provides, in pertinent part:

A person who has been adjudicated incapacitated or disabled

or both shall be presumed to be incompetent.

§ 475.078.3 RSMo.

However, in Clark, the Missouri Court of Appeals explained:

A person . . . adjudicated as mentally ill is generally presumed to be incompetent as a witness. § 491.060(1), RSMo Supp.1992; State v. Beine, 730 S.W.2d 304, 307 (Mo.App. 1987); State v. Dighera, 617 S.W.2d 524, 526 (Mo.App. 1981). **This presumption may be overcome**, however, by extrinsic evidence that the witness both (1) understands the obligation of the oath, and (2) has sufficient mind and memory to notice, recollect, and communicate the events. . . . The burden to rebut the presumption rests on the party who offers the witness. . . . **The determination of a witness's competency to testify is for the trial court, whose decision will not be disturbed absent an abuse of discretion**, . . . while the credibility of the witness's testimony is for the fact finder to determine. . . .

Clark, 854 S.W.2d at 30 (emphasis added). In Beine, the Missouri Court of Appeals explained:

It has also been held that "in appropriate circumstances **testimony may be accepted from a person even after that person has been adjudicated incompetent.**" Sivils v. Sivils,

659 S.W.2d 525, 527 (Mo.App. 1983). Thus it is apparent from cases interpreting § 491.060(1) that **a prior adjudication of mental incompetence or a record of confinement in a mental hospital is not conclusive**; a witness must exhibit some mental infirmity.

Beine, 730 S.W.2d at 307-08 (emphasis added).

In Sivils, the Missouri Court of Appeals affirmed the decision of the trial court to allow an 82-year-old woman to testify despite obvious difficulty with vision and memory, and despite the possible need for guardianship. Sivils, 659 S.W.2d at 528. There, the woman filed an action to set aside a deed conveying a farm to her son because of a dispute about money owed between the parties. Id. at 526. The defendant argued that the woman's only evidence was her own testimony, and that she should not have been allowed to testify due to lack of capacity. Id. at 527-28.

The trial court made a factual finding that "in view of the infirmities of Plaintiff it would be in her best interests that steps be taken toward the appointment of a guardian to manage her affairs." Id. at 528. The Missouri Court of Appeals explained:

That finding was amplified by the following remarks made by the trial court at the conclusion of the hearing:

"The court would like to suggest to all the children . . . that they should all seriously consider a guardianship, and it is obvious to the Court, to me, from at least this point on that, with all due respect to Mrs. Sivils, she would not be

competent to sign a deed in the future and a guardianship might be considered to handle her affairs. She is a very fine lady. She is 82 years old. She cannot see. She had problems remembering what has occurred. I think that would be the appropriate protection for her and for the children, but the Court does find the deed should be set aside."

Id. Despite such difficulties, the Missouri Court of Appeals held that the woman could testify. Id. The court reasoned:

It is quite obvious that the trial court was concerned, and justifiably so, about the family dispute . . . which came at a time of her gradual deterioration. Nevertheless, despite the handicaps under which she was already laboring at the time of the trial, the court found her competent and credible. In appropriate circumstances, testimony may be accepted from a person even after that person has been adjudicated mentally incompetent. **Whether such evidence should be accepted is a matter for determination by the trial court** and the extent of credit to be given to the witness is a matter for determination by the fact finder. . . .

Our independent review of plaintiff's testimony confirms the trial court as to her competence and credibility. She answered question [sic] responsively and intelligently. When she did

not hear a question, she asked for repetition. When the lawyers lapsed into legalese, she demanded clarification. **The trial court's election to believe her testimony and to reject that offered on behalf of defendant is entitled to deference.** Rule 73.01(c)(2); Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976).

Id.

In light of the foregoing decisions, the trial court here properly found that Respondent had the capacity to testify, and allowed her to do so. (LF 144); Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29. The determination of Respondent's competency to testify was properly a matter for the trial court, whose decision should not be disturbed absent an abuse of discretion. Clark, 854 S.W.2d at 30.

As discussed more fully in Section I of this Argument above, Respondent's testimony demonstrated that: (i) Respondent understood the nature of the trial; (ii) she could spontaneously recite facts and circumstances justifying her desire for a divorce; (iii) she could recall conversations relevant to the issues in the litigation, as well as the feelings she was experiencing at the time; (iv) Respondent could comprehend possible motives for Appellant's unreasonable behavior toward her; (v) she could make rational observations about the effects of Appellant's attitudes and behaviors; (vi) she could understand the reasons for her living arrangements, and make specific comparisons with prior living arrangements; and (vii) she could recall the names of relevant individuals,

such as Dr. Galanis. (See, Tr. 53-54, 59-63, 65, 67-70, 74, 77). Here, as in Sivils, Respondent answered questions responsively and intelligently. Sivils, 659 S.W.2d at 528; (See, Tr. 51-81).

For example, Respondent testified that she knew why she was at trial, and spontaneously cited numerous facts justifying her desire for dissolution. (Tr. 53-54, 59-61). Respondent was able spontaneously to recall events regarding being made to sleep on the floor. (Tr. 61-62). She further recalled Respondent's contemporaneous comments about such issues, and recalled her feelings at the time. Id. Respondent testified coherently and intelligently regarding her reasons for believing that living with Appellant would not be safe. (Tr. 67). Respondent was able to make at least four specific comparisons between living with her sister and living with Appellant. (Tr. 68). On cross-examination, Respondent was able to recall the name of her doctor, Dr. Galanis. (Tr. 74). She was able to reiterate her earlier testimony about Appellant's anger, throwing things, and making Respondent sleep on the floor. (Tr. 77).

Also as discussed in Section I above, other evidence also supports Respondent's position on this issue. Fowler testified that Respondent is able to take care of her own personal hygiene. (Tr. 83). Fowler testified that Respondent reads the newspaper and follows the news. (Tr. 87-88). The probate court ruled that Respondent retained the right to vote and found that Respondent "has the capacity to make and communicate a reasonable choice as to the person" who would serve as guardian. (LF 26). The foregoing constitutes substantial evidence that Respondent retained the mental capacity to testify on the issue of whether her marriage was irretrievably broken. Clark, 854 S.W.2d

at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29.

Appellant argues that Respondent's alleged poor recollection of certain facts and certain allegedly contradictory testimony from various witnesses demonstrate that Respondent lacks capacity to testify. (See, e.g., Appellant's Substitute Brief 39-40). Despite Appellant's argument, Respondent actually demonstrated good memory about many specific and significant subjects, as discussed above. (Tr. 53-54, 59-63, 65, 67-70, 74, 77). Furthermore, poor memory about certain specific facts does not necessarily result in lack of capacity to testify. Sivils, 659 S.W.2d at 528.

As discussed above, the court in Sivils allowed an 82-year-old witness to testify despite obvious concerns about her lack of memory. Id. Respondent's memory here appears no worse than that of the witness discussed in Sivils. See, Sivils, 659 S.W.2d at 528; (Tr. 53-54, 59-63, 65, 67-70, 74, 77). Any alleged memory issues in this case should more appropriately bear on the weight of Respondent's testimony rather than its admissibility. See, Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29. The same holds true of any alleged contradictions in Respondent's testimony. See, Id. Thus, despite any alleged handicaps raised by Appellant under which Respondent may have been laboring at the time of the trial, the trial court properly found her competent and credible. Sivils, 659 S.W.2d at 528.

Appellant implies that the trial court's finding regarding Respondent's capacity to testify is contradicted by the trial court's decision to appoint a guardian ad litem pursuant to Rule 52.02(k). (Appellant's Substitute Brief 40). The Missouri cases refute such argument. See, Sivils, 659 S.W.2d at 528. As discussed above, the Missouri Court of

Appeals in Sivils affirmed the decision of the trial court to allow an 82-year-old woman to testify despite the possible need for guardianship. Sivils, 659 S.W.2d at 528. In fact, the trial court there made a factual finding that “in view of the infirmities of Plaintiff it would be in her best interests that steps be taken toward the appointment of a guardian to manage her affairs.” Id. at 528. Despite that, the trial court and the appellate court both ruled that the woman could testify. Id.

Moreover, Appellant’s inferences from the trial court’s appointment of a guardian ad litem are illogical. As a result of Appellant’s logic, any case involving a guardian ad litem would then automatically require the appointment of a conservator as a substitute party, rendering the position of a guardian ad litem apparently useless. Furthermore, by Appellant’s logic, any court considering even the possible appointment of a guardian ad litem would then need to conduct an immediate and full hearing on the competence of the party at issue. The trial court should be allowed to retain discretion regarding such issues. In this case, it was the judgment of the trial court to appoint a guardian ad litem out of an abundance of caution, and to allow Respondent later to present specific testimony regarding her capacity. The trial court did not abuse its discretion in handling these issues in that manner. See, Clark, 854 S.W.2d at 30.

The determination that Respondent had the capacity to testify was properly a matter for the trial court, whose decision should not be disturbed absent an abuse of discretion. Clark, 854 S.W.2d at 30. In light of the foregoing substantial evidence, the trial court did not abuse its discretion, and its Judgment should be affirmed. Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29.

**III. THE TRIAL COURT DID NOT ERR IN ALLOWING RESPONDENT’S ACTION TO PROCEED BECAUSE THE TRIAL COURT’S FINDINGS REGARDING RESPONDENT’S CAPACITY MADE SUBSTITUTION OF PARTIES UNNECESSARY AND, EVEN IF SUBSTITUTION OR JOINDER WERE NECESSARY, DISMISSAL WOULD NOT BE AN APPROPRIATE REMEDY.**

The trial court made specific findings and conclusions that Respondent had the mental capacity, not only to testify, but also to file her Petition for Dissolution in this matter. (LF 144). As discussed more fully in Sections I and II above, Respondent’s testimony and other evidence adequately demonstrated her mental capacity and, therefore, the trial court’s findings regarding such capacity were supported by substantial evidence. See, City of Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797-99; Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29; (Tr. 53-54, 59-63, 65, 67-70, 74, 77). Because Respondent did not lack capacity to sue, she need not substitute any parties, and the trial court did not err in permitting her dissolution action to proceed. See, Id.

Before addressing Appellant’s third point in more detail, Respondent must raise an objection to Appellant’s Points Relied On pursuant to Rule 84.04(d)(1)<sup>4</sup> and Stickley v.

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<sup>4</sup> Rule 84.04(d)(1) provides:

Where the appellate court reviews the decision of a trial court, each point

Auto Credit, Inc., 53 S.W.3d 560 (Mo.App. 2001). Appellant's Point Relied On is so vague as to render a responsive argument nearly impossible. See, Rule 84.04(d)(1); Stickley, 53 S.W.3d 560; (Appellant's Substitute Brief 27, 41).

Appellant asserts in his Point that the trial court erred in "permitting the dissolution of marriage matter to proceed." Id. Appellant never states in his Point whether the trial court should have granted a stay of some sort, dismissed the action either with or without prejudice, ordered the substitution or joinder of a party, or taken some other specific action. See, Id. Appellant's Point identifies no specific order or

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shall:

(A) identify the trial court ruling or action that the appellant challenges;

(B) state concisely the legal reasons for the appellant's claim of reversible error; and

(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]."

Mo. R. Civ. P. 84.04(d)(1).

ruling of the trial court on any specific date. Id. Appellant's Point identifies no specific motion or objection that should have been granted or denied. Id. The text of Appellant's argument cites various Rules pertaining to substitution of parties, party identity, and joinder, but his Point insufficiently identifies alleged legal or factual errors arising out such Rules. Id. In light of these deficiencies, Respondent hereby moves for dismissal of Point III of Appellant's Substitute Brief<sup>5</sup>. Stickley, 53 S.W.3d 560. However, Respondent also attempts to address the substance of Appellant's Substitute Brief.

Appellant's position creates a legal paradox, and would put a lock on the courthouse door that a person in Respondent's shoes could never open. Missouri law allows a person under a presumption of incompetence to rebut that presumption. Clark, 854 S.W.2d at 30. However, Appellant would appear to deny that opportunity and would force a person such as Respondent into an impossible choice. If Respondent takes the position that she has capacity to proceed with her Petition and does not substitute her guardian, Appellant would have the courts dismiss such Petition. (See, Appellant's Substitute Brief 41-46). If Respondent moves for substitution, Appellant would then argue that Respondent concedes a lack of capacity, the very issue that Respondent intends to rebut. (See, Appellant's Substitute Brief 43, footnote 3). This Court should not force Respondent into such a paradoxical position. As a housekeeping matter and as an

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<sup>5</sup> Appellant's other Points appear similarly vague and deficient, but because Respondent was able to discern their basic meaning from the overall context of Appellant's Brief, Respondent raises no specific objections to such other Points.

alternative to such a paradox, without conceding the issue of capacity, Respondent sought to amend her pleadings and substitute her guardian. (LF 40-45). Such an amendment would not prejudice any party, as discussed further below. The trial court's denial of such opportunity to amend forms the basis of Respondent's cross- appeal, discussed in Section VI below.

Appellant argues that the trial court “should have dismissed [Respondent's] Petition since Respondent was incapacitated,” and that “there was no substitution of a real party in interest.” (Appellant's Substitute Brief 46). The Supreme Court of Missouri discussed closely related issues in Wellston, 203 S.W.3d 189. In Wellston, certain cities filed suit against various companies to enforce the application of certain of their taxes. Id. The companies argued that the cities had no right to sue in their own names, but rather, under the Missouri statutes, suit had to be brought in the name of the state. Id. The trial court dismissed the cities' suit on that basis, and the cities appealed. Id.

In reversing the dismissals in Wellston, the Supreme Court of Missouri treated the issue as one of capacity to sue. Id. The court explained:

[T]he trial court was incorrect that failure to bring suit in the name of the state goes to Wellston's standing to sue. The alleged error is not one of standing but of whether the city had the capacity to sue in its own name or should have brought suit in the name of the state at the relation and for the use of the city collector . . .

Wellston, 203 S.W.3d 189.

The court then discussed prior Missouri cases regarding the failure to name a real party in interest. The court explained:

Missouri courts on multiple occasions have treated errors in bringing a claim directly rather than in the name of another party, or similar defects, as issues of capacity rather than standing, **which may be waived or avoided by amendment of the pleadings.** In Bank of Oak Ridge v. Duncan, 40 S.W.2d 656 (Mo. 1931), a bank brought suit [in its own name] . . . This Court found suit should have been brought "in the name of the Bank of Oak Ridge by the [state's][c]ommissioner" . . . but **because the finance commissioner knew of the suit and there was merit to the claim, this Court amended the pleadings to conform them to the requirement** that suit be brought in the name of the commissioner. . . .

Wellston, 203 S.W.3d 189 (emphasis added). The Supreme Court of Missouri discussed another prior case rejecting dismissal as a remedy:

Similarly, in Board of Public Works of Rolla v. Sho-Me Power Corp., 244 S.W.2d 55 (Mo. banc 1951), this Court held that the suit . . . should have been brought in the name of the city, rather than in the name of its board of public works, because the city was the real party in interest. But, because

the case had been fully tried before the real party in interest issue was raised, dismissal would result in needless hardship. If the city adopted the pleadings of the board of public works, then **the pleadings would be considered amended to conform to the evidence. . . .**

Wellston, 203 S.W.3d 189 (emphasis added). The court also discussed the case of State ex rel. Mather v. Carnes, 551 S.W.2d 272 (Mo.App. 1977):

Mather held plaintiff **erred in not bringing suit in the name of the state**, but that **this failure was not fatal to the suit**, which had been brought in the name of the real party in interest. "The failure to join the state in this nominal status in the proceeding to the use of the injured person was a defect in party-plaintiff and subject to correction by the extant rules of pleading."

Wellston, 203 S.W.3d 189 (emphasis added).

Next, the Supreme Court of Missouri specifically relied on Rule 52.06 in finding that Missouri's policy prohibits dismissal of the suits:

Rule 52.06<sup>6</sup> clearly permits substitution of the proper party

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<sup>6</sup> Rule 52.06 provides:

**Misjoinder of parties is not ground for dismissal of an action.** Parties may be dropped or added by order of the court on motion of any party or of

plaintiff where suit has been brought in the wrong name,  
whenever the issue becomes known . . .

Rule 52.06 reflects Missouri's policy that, absent a showing  
of bad faith or prejudice in failing to sue in the name of the  
proper party, "[t]he law in Missouri for nearly a century is  
that a new action is not commenced by substituting the party  
having the legal right to sue instead of another party  
improperly named."

Wellston, 203 S.W.3d 189. Thus, the court held that even if the city "should have  
brought suit in the name of the state, **the trial court erred in believing that this error  
could not be cured by amendment.**" Id. (emphasis added). The court reversed the  
dismissal of the cities' suits. Id.

In Greeves, the Missouri Court of Appeals discussed the distinction between  
capacity and standing. Greeves, 277 S.W.3d at 797. There, the court explained:

The distinction between capacity to sue and standing to sue is  
important because a claim that a party does not have capacity  
to sue can be waived **or avoided by amendment of the  
pleadings**, while a claim that a party does not have standing

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its own initiative **at any stage of the action** and on such terms as are just.

Any claim against a party may be severed and proceeded with separately.

Mo. R. Civ. P. 52.06 (emphasis added).

to sue cannot be waived. See City of Wellston, 203 S.W.3d at 193.

Id. at 797.

In Preston v. State, 33 S.W.3d 574 (Mo.App. 2000), the Missouri Court of Appeals refused to allow dismissal of a suit, even in the absence of a guardian deemed a necessary party under Rule 52.04(a). Preston, 33 S.W.3d 574. There, the appellant had been adjudicated completely incapacitated. Id. He then filed a statutory application for conditional release from the Missouri Department of Mental Health. Id. The trial court dismissed the application for lack of jurisdiction on the basis that his guardian had not joined in the action. Id.

It is worth noting that the court in Preston never discussed the necessity of substitution, but rather that of joinder. Id. In reaching its decision, the court discussed Rule 52.02(k) involving appointment of a guardian ad litem:

[W]here, as here, a guardian has been appointed, but he or she refuses to join the ward . . . the effect is that, for purposes of that proceeding, the ward is without a guardian. As such, we interpret this rule as requiring the court to consider whether to appoint a guardian ad litem . . . when his or her guardian refuses to assist the [ward] . . . In this context, the sole purpose of an appointed guardian ad litem would be to assist the [ward] in prosecuting his or her application.

Preston, 33 S.W.3d 574. The court then reversed the trial court's dismissal:

In our case, **the appellant's application was dismissed because his guardian refused to join in the application.**

**This was error** under our interpretation of the controlling law. Thus, we must reverse and remand for the probate court to reinstate the appellant's application and conduct a hearing thereon, after first considering whether to appoint a guardian ad litem.

Preston, 33 S.W.3d 574 (emphasis added).

Pursuant to the foregoing decisions, the trial court here properly refused to dismiss Respondent's Petition. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574. Appellant's argument, at most, amounts to an allegation that Respondent erred "in bringing a claim directly rather than in the name of another party." Wellston, 203 S.W.3d 189. Such technical defects "may be waived or avoided by amendment of the pleadings." Id. Thus, even if this Court finds error in the naming of the parties, this Court should simply amend the pleadings, or order them amended, to conform them to any requirement that suit be brought in the proper name. Wellston, 203 S.W.3d 189.

Pursuant to Preston, any amendment may in fact be unnecessary in our case. Preston, 33 S.W.3d 574. That holding essentially allows a guardian ad litem to fulfill the role of an absent guardian in assisting the ward in prosecuting a legal claim. Preston, 33 S.W.3d 574. That decision further allows the guardian ad litem to appear through joinder rather than by substitution. Id. Here, the trial court in fact appointed a guardian ad litem on May 31, 2007. (LF 2). Thus, all proper parties were before the trial court when it

entered its Judgment in this case. No substitution of parties should be required. See, Preston, 33 S.W.3d 574.

Appellant's Substitute Brief cites no case holding that failure to substitute the proper party to a lawsuit warrants dismissal. (See, Appellant's Substitute Brief 41-46). Appellant cites no case holding that the failure of a necessary party to join a lawsuit should automatically result in dismissal. Id. In fact, it appears that the only case cited by Appellant discussing joinder is Preston, which specifically held **against** Appellant's position on the issue of dismissal. Preston, 33 S.W.3d 574; (See, Appellant's Substitute Brief 41-46). Appellant cites no case discussing the consequences of failure to substitute for an incompetent party. (See, Appellant's Substitute Brief 41-46). Thus, Appellant is without any cases whatsoever to support his contention that "the trial court erred in permitting the dissolution of marriage matter to proceed." The Missouri cases, such as those discussed above, actually support Respondent. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574. Therefore, this Court should reject Appellant's argument.

Appellant cites Rule 52.01 in support of his position. However, that Rule does not appear to mandate that a guardian bring a lawsuit rather than a ward:

Every civil action shall be prosecuted in the name of the real party in interest, but an executor, administrator, **guardian**, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another and a party authorized by statute **may** sue in their own names in

such representative capacity without joining the party for whose benefit the action is brought. When a statute so provides, a civil action for the use or benefit of another shall be brought in the name of the State of Missouri.

Mo. R. Civ. P. 52.01. That Rule also does not, on its face, mandate dismissal of any action brought by an improperly named party, and Appellant cites no case to the contrary. Id.; (See, Appellant's Substitute Brief 41-46).

Appellant further misunderstands the requirements of Rule 52.13(b). That Rule provides, in pertinent part:

(a) Upon Death.

(1) If a party dies and the claim is not thereby extinguished, the court may, upon motion, order substitution of the proper parties. . . . A motion for substitution may be made by any party or by the successor or representative of the deceased party.

Such motion, together with notice of hearing shall be served upon the parties as provided in Rule 43.01, and upon persons not parties in the manner provided for the service of a summons. **Unless a motion for substitution is served within 90 days after a suggestion of death is filed, the action shall be dismissed** as to the deceased party without prejudice.

...

(b) Incompetency. **If a party becomes incompetent, upon motion for substitution** served as provided in Rule 52.13(a), **the court may allow the action to be continued** by or against the party's representative.

Mo. R. Civ. P. 52.13 (emphasis added). Thus, the Rule on its face distinguishes between death and incompetency. Id. Rule 52.13 requires dismissal if no proper substitution occurs after death of a party, but for an incompetent party Rule 52.13 contains **no provision for dismissal**. Id. Appellant's reliance on such rule should fail.

Walters v. Walters, cited by Appellant, provides no support for Appellant's argument. Walters v. Walters, 113 S.W.3d 214, 216 (Mo.App. 2003). There, the Missouri Court of Appeals never discussed the necessity of either substitution or joinder for an incompetent party. Id. Rather, the court discussed four issues completely irrelevant to our case: (i) whether the trial court erred in awarding to the husband's mother the right to exercise his visitation rights; (ii) whether the trial court erred in refusing to appoint a guardian ad litem for the children where a post-trial complaint alleged child abuse; (iii) whether it was necessary to join an individual before the trial court could make a division of property, where such individual may have had an ownership interest in such property; and (iv) whether the trial court erred in awarding the husband his 401K plan in its division of marital property. Id. Because Walters does not discuss any issue relevant to our case, it does not support Appellant's argument.

Appellant also relies on Rule 52.04(a) regarding joinder of necessary parties.

However, the Missouri Rules specifically provide that:

Misjoinder of parties is not ground for dismissal of an action.

Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Mo. R. Civ. P. 52.06. The court's holding in Preston, cited by Defendant, also makes clear that failure to join a guardian would not result in dismissal. Preston, 33 S.W.3d 574. Thus, Rule 52.04(a) does not support Appellant's position.

Appellant further points to alleged errors in the caption of Respondent's December 2008 motion seeking leave to file an amended petition, and in the caption of the attached proposed Amended Petition for Dissolution. (See, Appellant's Substitute Brief 43).

Appellant argues that such errors amount to "improper and unauthorized substitution."

Id. However, the cases discussed above hold that any alleged errors in bringing a lawsuit in the name of an improper party would not result in dismissal. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574. Moreover, such captions are arguably irrelevant, because the capacity in which a party sues should be determined from the content of the pleadings rather than from their captions or titles. See, Singer v. Siedband, 138 S.W.3d 750, 754 (Mo.App. 2004); Nye v. Gerald Harris Const., Inc., 28 S.W.3d 905, 908 (Mo.App. 2000). At most, the Court should find that the trial court should have permitted amendment of the pleadings, as specifically sought in Respondents motions, but this would **not** require reversal of the trial court's Judgment. Id.; Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574; See also, Turner

v. Turner, 214 S.W.3d 344, 346 (Mo.App. 2007); Mitalovich v. Toomey, 206 S.W.3d 361, 365 (Mo.App. 2006).

Also, if this Court finds substitution necessary, the Court should treat Respondent's December 2008 Motion for Leave as both a motion for leave to amend the pleadings and a motion to substitute. See, State ex rel. Heistand v. McGuire, 702 S.W.2d 419, 420 (Mo. 1985); State ex rel. Bugg v. Roper, 179 S.W.3d 893 (Mo. 2005). The body of the Motion for Leave **specifically requested substitution**. (LF 44-45). The substance of the Motion for Leave was sufficient to apprise Appellant that Respondent was seeking substitution. Id. The Court should look to the substance of Respondent's Motion for Leave rather than to any technical error in the captioning or titling of such pleading.

Respondent further notes that the caption used in her Motion for Leave appears reasonable in light of the somewhat contradictory authorities governing the choice of either the guardian, guardian ad litem or conservator as a substitute party. See, e.g., Mo. R. Civ. P. 52.13; Preston, 33 S.W.3d 574. It was reasonable of Respondent to submit all of those persons to the trial court and allow the trial judge to choose from among them a proper substitute, if indeed any was needed at all. See, Id. Thus, Appellant's arguments that errors in Respondent's motions warrant dismissal are completely unsupported. See, Heistand, 702 S.W.2d at 420; Bugg, 179 S.W.3d 893.

Appellant also notes the lack of verification of the proposed Amended Petition. (Appellant's Substitute Brief 44). Respondent did not verify the proposed Amended Petition for Dissolution of Marriage filed as an exhibit in connection with the Motion for

Leave to File Amended Petition dated December 5, 2008, or the proposed Petition for Dissolution of Marriage (Amended by Interlineation) filed as an exhibit in connection with Petitioner's Motion to Amend the Pleadings to Conform to the Evidence Pursuant to Rule 55.33 dated February 5, 2009. (LF 40-45, 89-94). This was because, as of the time of filing such exhibits, the trial court had not granted leave to file the proposed pleadings. See, Id.; (LF 1-10). Respondent is entitled to the inference that, had the trial court granted the leave requested, Petitioner would have then filed the necessary verified pleadings. Respondent further notes that, at the time of her Motion for Leave, it remained unclear as to precisely which person the trial court might choose as a substitute party, as discussed above. Respondent, it should be inferred, would have filed verified pleadings once the trial court made such determination.

To the extent that Appellant argues that such lack of verification amounts to an admission that Respondent lacked capacity to sue, the issue should be deemed resolved in favor of Respondent pursuant to Mo. R. Civ. P. 73.01(c). Moreover, in light of the trial court's other findings and conclusions, such requests for leave became moot. (See, LF 138-48).

Even if this Court determines that Respondent must substitute her guardian as a party to this action, she could do so at this stage without any prejudice to Appellant. None of the evidence adduced at trial would change in any way as a result of such substitution. Respondent's guardian Fowler and her conservator Wright **both testified** that it was in Respondent's best interest to proceed with the dissolution action. (Tr. 34, 83-84). Fowler, as Respondent's guardian, and Wright as her conservator, both ratified

the dissolution proceeding initiated by Respondent. See, § 475.091(2) RSMo; (Tr. 34, 83-84). Section 475.091 provides, in pertinent part:

The court has the following powers **which may be exercised directly or through a conservator** in respect to the estate and affairs of minors and disabled persons:

. . .

(2) Upon finding that the transaction was or is beneficial to the protectee, the court may approve, ratify, confirm and validate any transaction entered into by a conservator of the estate, without court authorization which it has power under this section to authorize the conservator to conduct. The power of the court to approve, ratify, confirm and validate transactions entered into by a conservator of the estate without court authorization . . . also includes **the power to make, ratify and undertake proceedings for, and agreements incident to, dissolution of the marriage of the protectee, . . .**

§ 475.091 RSMo (emphasis added). Fowler's and Wright's testimony amounted to a ratification of Respondent's dissolution action pursuant to Section 475.091. Even the trial court's appointed guardian ad litem tacitly ratified Respondent's action by attending the trial and allowing Respondent to proceed. (See, Tr. 1-20, 50-53). Appellant was aware of the existence and identities of the guardian and conservator, as it was his own

petition that led to such appointments. (Appellant's Substitute Brief Appendix A24). Moreover, Appellant was aware of such facts because his own attorney in the probate matter also assisted him in the dissolution case on a limited basis. (Tr. 25-26).

Respondent need not prove abuse. Section 452.314, cited by Appellant, does not apply in this case because Respondent's guardian did not file the action. (LF 1, 11-13). The Petition was in fact filed by Respondent herself, before any adjudication of incapacity. Id. However, even if Respondent must prove abuse, she adduced enough evidence to meet her burden. (Tr. 60-63, 67-69, 72; Jeanette Deposition 24-25; Vincent Deposition 24-25).

Respondent testified that Appellant pushed her down the steps for fun, was physically abusive and would throw things at her. (Tr. 60-61). She testified that she had marks on her from being pushed. (Tr. 68). Respondent testified that she felt unsafe living with Appellant due to his temper, and his screaming and throwing things. (Tr. 67). She testified that Appellant would scream, holler and throw a fit, that he would call her "stupid," and that he made her sleep on the floor, telling her that the floor is where she belonged. (Tr. 60-63). Respondent testified that she did not eat well when she was living with Appellant, and that there was not enough food in the house. (Tr. 69). Respondent testified that she needed clothes when she was living with Appellant that she never got. (Tr. 72). Deposition testimony indicated that Appellant did not properly feed Respondent or take her to the doctor for her eyes. (Jeanette Deposition 24-25; Vincent Deposition 24-25).

The testimony from Respondent described above all occurred without any

objection at trial from Appellant to the relevance or subject matter of the evidence. (Tr. 60-63, 67-69, 72). In fact, not only did Appellant fail to object to such evidence, but Appellant raised the issue of abuse in his own questioning of witnesses. (Tr. 101). Even if Appellant had not raised the issue and had objected to such testimony as allegedly beyond the pleadings, such argument would fail because the testimony remains relevant to the issues of whether the marriage is irretrievably broken, and whether Appellant behaved in such a way that Respondent cannot reasonably be expected to live with him. § 452.320.2(1) RSMo. Even if Respondent needed to substituted her guardian prior to trial, it would have changed nothing with respect to the prosecution of the dissolution action, the evidence adduced at trial or the Judgment.

Therefore, even if this Court finds that Respondent should have substituted her guardian as plaintiff in the litigation, and even if she must then be required to prove abuse, it would be inappropriate to dismiss this matter. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574; Mo. R. Civ. P. 55.24, 55.33. Rather, in such event, this Court should simply allow Respondent to amend her pleadings to conform to the evidence, as specifically requested by Respondent, and order that judgment be entered in favor of Respondent. Mo. R. Civ. P. 55.33. Appellant can claim no prejudice by such amendment, where Respondent's guardian and her conservator both testified that it was in Respondent's best interest to proceed with the dissolution action. (Tr. 34, 83-84). Respondent's evidence of abuse, though unnecessary, was properly admitted by the trial court. (Tr. 60-63, 67-69, 72, 101-02). This Court should reject Appellant's argument, and hold in favor of Respondent. Wellston, 203 S.W.3d 189;

Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574; Mo. R. Civ. P. 55.24, 55.33.

In light of the opinion of Appellant's own expert Dr. Wilson that Respondent was in fact competent, and the findings of the trial court on the issue of capacity, Appellant's position is untenable. Appellant would essentially have this Court find that Respondent was competent one month before the filing of her Petition per Dr. Wilson, but that she was incompetent at the time of filing her Petition and that she became competent again to testify at trial. (Appellant's Substitute Brief Appendix A54; LF 144; See, Appellant's Substitute Brief 41-46). Such a finding would be illogical and unsupported by the evidence. (Appellant's Substitute Brief Appendix A54; LF 144).

Respondent also notes that Appellant's entire argument regarding the alleged necessity of substitution and/or joinder of the guardian appears to be nothing more than an attempt to force Respondent to a higher standard of proof in her dissolution proceeding, and force her to prove abuse. (See, Appellant's Substitute Brief 41-46). The appointment of guardians and guardians ad litem are for the benefit of their wards, and not for the benefit of an opponent in litigation. See, Walters, 113 S.W.2d 214. Appellant's argument appears to be a cynical attempt to use such mechanisms for his own benefit rather than for the benefit of Respondent. (See, Appellant's Brief 44-48). This Court should reject such attempt, and hold in favor of Respondent.

**IV. THE TRIAL COURT DID NOT ERR IN FINDING THE PARTIES' MARRIAGE IRRETRIEVABLY BROKEN, BECAUSE SUBSTANTIAL EVIDENCE INDICATED THAT APPELLANT BEHAVED IN SUCH A WAY THAT RESPONDENT CANNOT REASONABLY BE EXPECTED TO LIVE WITH APPELLANT. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING IN FAVOR OF RESPONDENT ON THIS ISSUE.**

Respondent sufficiently proved that her marriage to Appellant was irretrievably broken. Section 452.305.1 of the Missouri statutes provides:

The court shall enter a judgment of dissolution of marriage if:

(1) The court finds that one of the parties has been a resident of this state, or is a member of the armed services who has been stationed in this state, for ninety days immediately preceding the commencement of the proceeding and that thirty days have elapsed since the filing of the petition; and

(2) The court finds that there remains no reasonable likelihood that the marriage can be preserved and that therefore **the marriage is irretrievably broken;** and

(3) To the extent it has jurisdiction, the court has considered and made provision for child custody, the support of each child, the maintenance of either spouse and the disposition of

property.

§ 452.305.1 RSMo (emphasis added). However, the Missouri statutes further provide that where one of the parties denies that the marriage is irretrievably broken:

[T]he petitioner shall satisfy the court of **one or more** of the following facts:

- (a) That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- (b) That **the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;**
- (c) That the respondent has abandoned the petitioner for a continuous period of at least six months preceding the presentation of the petition;
- (d) That the parties to the marriage have lived separate and apart by mutual consent for a continuous period of twelve months immediately preceding the filing of the petition;
- (e) That the parties to the marriage have lived separate and apart for a continuous period of at least twenty-four months preceding the filing of the petition.

§ 452.320.2(1) RSMo (emphasis added). In discussing the trial court's duty with respect to § 452.320.2, the Missouri Court of Appeals explained:

While the trial court must make a finding that the marriage is

irretrievably broken, **it need not make a finding concerning the specific statutory ground upon which it based that conclusion.**

In re Marriage of Thompson, 894 S.W.2d 255, 256 (Mo.App. 1995), *citing* Dodson v. Dodson, 806 S.W.2d 763, 765 (Mo.App. 1991) (emphasis added). In another dissolution case, the Missouri Court of Appeals further explained:

The statute does not contemplate a detailed factual finding, but . . . the court is required to make a "finding" that the marriage is "irretrievably broken." Whether a marriage is irretrievably broken depends on a number of facts, five of which are enumerated in the statute. § 452.320.2(1)(a)--(e).

We have said that **the finding of irretrievable breakdown is a sufficient finding**, Dodson v. Dodson, 806 S.W.2d 763, 765 (Mo.App. 1991), and **the court was not required to make findings of fact stating why it reached this conclusion**. Id. However, the finding that the marriage is irretrievably broken must be supported by substantial evidence and must not be against the weight of the evidence. Nieters v. Nieters, 815 S.W.2d 124, 126 (Mo.App. 1991).

**There must be factual support found in one or more of the five factors** when one party denies the marriage is irretrievably broken. Id.

Lawrence v. Lawrence, 938 S.W.2d 333, 336 (Mo.App. 1997) (emphasis added).

In Wagoner v. Wagoner, 76 S.W.3d 288, 290-91 (Mo.App. 2002), the Missouri Court of Appeals held that a wife's evidence sufficiently supported the trial court's finding that her marriage was irretrievably broken pursuant to § 452.320.2(1)(b). There, the wife testified that her husband did not participate in couples' retreats and activities when asked, stopped attending church with the wife and refused to attend marriage counseling. Wagoner, 76 S.W.3d at 290. The parties maintained separate finances and the wife performed most of the household chores. Id. The wife took care of her sick mother on alternating evenings, and her husband did not accompany her on those evenings, and eventually sent the wife an e-mail demanding that she remain home "24 hours a day". Id. The husband spoke to his wife only once during the month of July 2000. Id. at 291. The husband disputed his wife's testimony, and testified that he made efforts to involve his wife in marriage counseling since the filing of her petition. Id. He blamed his wife's work schedule and her time spent caring for her mother as the reason for their diminished relationship. Id.

The trial court found the parties' marriage irretrievably broken, and found that the husband behaved in such a way that his wife cannot be reasonably expected to live with him. Id. The trial court also noted "that there had been a significant, and long standing, lack of communication and absence of commonality of interests between the parties." Id. On appeal, the husband challenged those findings as unsupported by the evidence. Id. The court reasoned:

[T]here was clear testimony from both parties that Husband

refused to communicate directly with Wife and that Husband's intentional isolation was largely due to his anger over Wife caring for her ailing mother. Husband demanded that Wife give up personally caring for her mother "or else." Such "**dictatorial and repressive conduct** has been found sufficient to support a finding that the marriage is irretrievably broken. In re Marriage of Haugh, 978 S.W.2d 80, 84 (Mo.App. S.D. 1998).

**Although there may be a difference of opinion** as to whether Husband's conduct was egregious enough that Wife could not be expected to live with it, **we must defer to the trial court's assessment** of the factual evidence in this regard. Cregan v. Clark, 658 S.W.2d 924, 927-28 (Mo.App. W.D. 1983). Point I is denied, as the record is sufficient to support the judgment of dissolution.

Id. (emphasis added).

In this case, Appellant denied that the marriage is irretrievably broken. (LF 12, 27). However, the trial court made a finding that the marriage is irretrievably broken. (LF 144). Moreover, despite Appellant's denials, substantial evidence in the record demonstrates that Appellant has behaved in such a way that Respondent cannot reasonably be expected to live with him. § 452.320.2(1)(b) RSMo. Respondent adduced evidence of that fact at least as strong as at in Wagoner. See, Wagoner, 76 S.W.3d at

290-91.

Respondent testified that Appellant does not love her, and tried to humiliate her. (Tr. 54-55). She testified that she and Appellant were not happy with each other. (Tr. 60). Respondent testified that Appellant pushed her down the steps for fun, was physically abusive and would throw things at her. (Tr. 60-61). She testified that she had marks on her from being pushed. (Tr. 68). Respondent testified that she felt unsafe living with Appellant due to his temper, and his screaming and throwing things. (Tr. 67). She testified that Appellant would scream, holler and throw a fit, that he would call her “stupid,” and that he made her sleep on the floor, telling her that the floor is where she belonged. (Tr. 60-63). Respondent testified that, despite her need for eye treatment, Appellant stated to Respondent that there was nothing wrong with Respondent’s eyes. (Tr. 63). She testified that Appellant loved it that she could not see, because he wanted to control her. Id.

Respondent testified that Appellant wanted to control Respondent’s money and spend it, and that he wanted to spend money on things she did not want. (Tr. 63). She testified that she bought a lake house and wanted the children of her relatives to be able to enjoy it, but that Respondent did not want to be around the children. (Tr. 64-65). Respondent testified that Appellant did not want to be around Appellant’s family. (Tr. 66). She testified that she was upset when Appellant had his brother move into the lake house, because such brother would get drunk and throw things around the house. Id. She testified that she did not eat well when she was living with Appellant, that there was not enough food in the house, and that Appellant would shop for food but then eat up the

food himself. (Tr. 69). Respondent testified that she needed clothes when she was living with Appellant that she never got. (Tr. 72). She testified that she does not love Appellant any more because he wants her locked up, that she wants a divorce, that she cannot live with Appellant, that Appellant considers her stupid and dumb and that he pushed her down the steps. (Tr. 67, 72, 73).

Respondent's testimony about Appellant making her sleep on the floor, telling her that is where she belonged, calling her stupid and dumb and pushing her down the stairs, as well as Respondent's other testimony, demonstrates conduct by Petitioner at least as "dictatorial and repressive" as that described in Wagoner. See, Wagoner, 76 S.W.3d at 290-91; (Tr. 54-55, 60-69, 72-73). The same is true of evidence that Respondent lacked food and that Appellant would not take Respondent to the eye doctor. See, Wagoner, 76 S.W.3d at 290-91; (Jeanette Deposition 24-25; Vincent Deposition 24-25). Appellant refused to be around Respondent's family, just as in Wagoner the husband refused to participate in couples' activities and retreats. Wagoner, 76 S.W.3d at 290; (Tr. 66). Appellant insulted Respondent and threw fits, just as the court in Wagoner found a significant lack of communication. Wagoner, 76 S.W.3d at 291; (Tr. 55, 60-61, 72). In light of such evidence, the trial court here found that the parties' marriage was irretrievably broken. (LF 144).

As in Wagoner, Appellant here attempts to argue essentially that Respondent's evidence cannot support the Judgment because he disputed such evidence. (LF 143-44; Appellant's Substitute Brief 51-56). Appellant's argument should fail. See, 8000 Maryland, 292 S.W.3d at 445. Because a reviewing court must "accept all evidence and

inferences therefrom in the light most favorable to the judgment,” Appellant’s testimony as well as his characterizations of the entire record during this appeal, should be disregarded. 8000 Maryland, 292 S.W.3d at 445, *citing* Sheppard, 192 S.W.3d at 522. As explained in Wagoner, although Appellant and Respondent may differ as to whether Respondent should be expected to live with Appellant’s conduct, this Court should defer to the trial court's assessment of the factual evidence in this regard. Wagoner, 76 S.W.3d at 291.

Appellant’s reliance upon the decisions in Koon v. Koon, 969 S.W.2d 828 (Mo.App. 1998), Nieters v. Nieters, 815 S.W.2d 124 (Mo.App. 1991) and Simpson is misplaced. In Koon, the trial court found that the parties' marriage was irretrievably broken. Koon, 969 S.W.2d at 830. However, the trial court also made a specific finding in favor of the husband that he did **not** behave in such a way that his wife could not reasonably be expected to live with him." Id. In the present case, the trial court made no such specific finding in favor of Appellant. (LF 138-46).

Moreover, the husband’s conduct in Koon did not rise to such an extreme level as Appellant’s conduct here. In Koon, the wife testified that:

Husband tried to control everything she did and that they often argued over how and where money should be spent. She told the court that Husband "fought [her] most of the way" as she pursued a college education. Wife also recounted that while Husband was working on a job in Virginia for fifteen months she was much happier without

Husband around. In Wife's opinion, there was no hope for reconciliation with Husband.

Koon, 969 S.W.2d at 830. Here, Appellant's conduct such as making Respondent sleep on the floor, telling her that is where she belonged, calling her stupid and dumb and pushing her down stairs, and denying her food and eye treatment, among other things, proves more extreme and unreasonable than the conduct described in Koon. Id.; (Tr. 54-55, 60-69, 72-73; Jeanette Deposition 24-25; Vincent Deposition 24-25). Thus, Koon does not support Appellant, and if anything the case supports Respondent. See, Koon, 969 S.W.2d at 830.

Nieters is also distinguishable from the present case. Nieters, 815 S.W.2d at 125. There, the wife denied the marriage was irretrievably broken, the Missouri Court of Appeals described the evidence as follows:

At trial, husband testified that the couple had been separated since September 1988. He also testified concerning the problems the couple had during the marriage and his current relationship with a woman named Cindy Yates. Wife testified that husband left in October, 1988, and that the marriage was not irretrievably broken. She also stated that there were differences about how the children should be raised and that she donated some money she earned to televangelists.

Nieters, 815 S.W.2d at 125. The appellate court reversed a judgment that found the

marriage irretrievably broken. Id., at 126-27. The court held that the above conduct “is not behavior that one could not be reasonably expected to live with.” Id. at 126.

In our case, as discussed above, Appellant’s conduct is more extreme and unreasonable than that in Nieters. Id. at 125-27; (Tr. 54-55, 60-69, 72-73). Nieters is distinguishable on that basis, and the Judgment in our case is supported by substantial evidence.

Similarly, Simpson does not support Appellant. Simpson, 234 S.W.3d at 574, 576-78. There, the husband denied the marriage was irretrievably broken, and the trial court made a specific finding on that issue in his favor. Id. at 574. Moreover, the trial court made a specific finding that the wife “has not presented substantial evidence to support any of the factors required by Section 452.320.2(1).” Id. The court explained the evidence as follows:

Viewed in a light most favorable to the judgment, the court was presented with substantial evidence that the marriage between Husband and Wife was not irretrievably broken. Husband testified that, prior to December 2003, he and Wife got along pretty well and rarely argued. Husband adequately provided for Wife's needs and purchased items that she wanted, such as clothing and a new car. During their 50 years of marriage, Wife had never said that she wanted a divorce, wanted to move out or was dissatisfied with anything. When Wife was admitted to CHCC, Husband spent hours every day

at that facility so he could be with his wife. He planned to take her home when she was discharged, and Husband was willing to hire help so Wife could come home. . . .

Id. at 576. On appeal, the wife's representatives argued that the marriage was irretrievably broken, and argued that the evidence showed: (1) the husband only spoke to his wife once in the year before trial; (2) the couple frequently argued; (3) the husband did not provide for his wife's needs and desires; (4) he husband added his niece's name to a bank account after the separation; and (5) the husband had alleged in his cross-petition that the marriage was irretrievably broken. Id. at 576-77.

In rejecting the wife's arguments, the Missouri Court of Appeals explained:

The difficulty with this argument is that there was conflicting evidence before the court on all of these matters, and the trial court was not persuaded by the isolated bits of evidence upon which Representatives rely.

Id. at 577. The court further explained:

[I]t was Wife's burden to prove that Husband behaved in such a way that she could not reasonably be expected to live with him. . . . The facts cited by [the wife's] Representatives were controverted by other evidence and presented credibility determinations for the court to make. "**Great deference is given a trial court's ability to determine witness credibility.**" . . . The court is **free to accept or reject all,**

**part, or none of the testimony presented. . . .** The court found that the marriage between Husband and Wife was not irretrievably broken. Based upon our review of the record, that finding is supported by substantial evidence. "Although there may be a difference of opinion as to whether Husband's conduct was egregious enough that Wife could not be expected to live with it, **we must defer to the trial court's assessment of the factual evidence** in this regard." . . .

Id. at 577 (emphasis added).

As with Koon and Nieters, the conduct described in Simpson is less extreme and unreasonable than the conduct of Appellant here. Id. at 574, 576-78; (Tr. 54-55, 60-69, 72-73). Moreover, the trial court in our case made findings and conclusions in favor of Respondent. (LF 144-45). Such findings and conclusions are entitled to great deference. Simpson, 234 S.W.3d at 577; 8000 Maryland, 292 S.W.3d at 445. Thus, Simpson does not support Appellant. This Court should affirm the trial court's Judgment in favor of Respondent, and dismiss Appellant's appeal.

**V. RESPONDENT TAKES NO POSITION REGARDING THE AWARD OF FEES TO THE GUARDIAN AD LITEM, HOWEVER RESPONDENT REJECTS APPELLANT'S ARGUMENT ON THIS ISSUE TO THE EXTENT IT IS INCONSISTENT WITH THE REMAINDER OF RESPONDENT'S ARGUMENT ABOVE.**

Appellant argues that the trial court erred in awarding fees to the guardian ad litem. (Appellant's Substitute Brief 57-60). Respondent takes no position on the narrow issue of such fees. However, Appellant's argument appears to depend largely on his previous assertions that Respondent should have substituted or joined her guardian in this matter. See, Id. Appellant appears to argue that the trial court lacks jurisdiction over the entire claim due, similar to Appellant's other arguments refuted above. See, Id. Therefore, Respondent rejects that position to the extent it is inconsistent with Respondent's arguments set forth above. Respondent incorporates her arguments in Sections I through IV above into this Section. Respondent was competent to bring her Petition and to testify. Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29. Respondent need not substitute her guardian, and the trial court does not lack jurisdiction over this matter. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574; Mo. R. Civ. P. 55.24, 55.33. Such arguments are discussed in greater detail above. Therefore, to the extent Appellant's argument is inconsistent with the trial court's Judgment in favor of Respondent on her Petition for Dissolution, Respondent rejects such argument. This Court should hold in favor of Respondent and

affirm the trial court's Judgment in her favor. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574; Mo. R. Civ. P. 55.24, 55.33.

**VI. REGARDING RESPONDENT'S CROSS-APPEAL, THE TRIAL COURT ERRED IN DENYING RESPONDENT'S DECEMBER 2008 MOTION FOR LEAVE TO AMEND HER PETITION AND TO SUBSTITUTE PARTIES. THE MISSOURI CASES AND RULES PROVIDE THAT WHERE SUIT HAS BEEN BROUGHT IN THE WRONG NAME, SUCH ERROR MAY BE CURED BY AMENDMENT TO SUBSTITUTE OR JOIN THE PROPER PARTY, AND SUCH AMENDMENT DOES NOT CONSTITUTE A NEW ACTION AND CREATES NO PREJUDICE TO THE OPPONENT. IF THIS COURT FINDS THAT, BECAUSE RESPONDENT HAD AN APPOINTED GUARDIAN, SHE SHOULD HAVE BROUGHT SUIT IN THE GUARDIAN'S NAME, RESPONDENT SHOULD HAVE BEEN ALLOWED TO CURE THAT ERROR THROUGH AMENDMENT. RESPONDENT MAKES THIS ARGUMENT IN THE ALTERNATIVE TO HER OTHER ARGUMENTS, WITHOUT CONCEDED THAT ANY SUCH AMENDMENT WAS IN FACT NECESSARY.**

Because Respondent had the capacity to bring her suit, as well as to testify, no

substitution of parties was necessary in this matter. However, in the event this Court finds that Respondent should have substituted or joined her guardian, the trial court should have granted Respondent's December 2008 motion to amend her pleadings to accomplish that. Such motion specifically requested substitution. Respondent notes that this issue is fully covered by Respondent's arguments above and, therefore, Respondent incorporates all above arguments into this Section.

Appellant has argued that Respondent should have substituted or joined her guardian as a party to this suit when such guardian was appointed by the probate court. (See, Appellant's Substitute Brief 41-46). Appellant argues that the trial court erred "in permitting the dissolution of marriage matter to proceed" without such substitution. Id. However, Respondent had the mental capacity to testify in this matter. Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29. More importantly, Respondent had the capacity to bring her Petition for Dissolution. City of Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797-99; Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29. Because of that, no substitution or joinder of parties was necessary. Respondent directs the Court's attention to Sections I, II and III of this Substitute Brief above.

As discussed above, Appellant's position creates a legal paradox. Appellant would to deny the opportunity to rebut any presumption of incompetence and would force a person such as Respondent into an impossible choice. If Respondent takes the position that she has capacity to proceed with her Petition and does not substitute her guardian, Appellant would have the courts dismiss such Petition. (Appellant's Substitute

Brief 41-46). If Respondent moves for substitution, Appellant would then argue that Respondent concedes a lack of capacity, the very issue that Respondent intends to rebut. Id.

However, even if this Court finds that Respondent should have substituted her guardian, the action should not be dismissed, as Appellant would ask of this Court. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574. Rather, in that event, Respondent should be allowed to amend her pleadings to name the proper party. Id. Any error in bringing suit in the wrong name may be cured by amendment to substitute or join the proper party, and such amendment does not constitute a new action. Wellston, 203 S.W.3d 189; Mo. R. Civ. P. 52.06. Respondent directs the Court's attention to Section III of this Brief above. Because Respondent should have been allowed to cure any error by amendment, the trial court erred in denying Respondent's December 2008 motion to amend her pleadings. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574; Mo. R. Civ. P. 52.06.

Because this action was brought initially by Respondent, she need not prove abuse. Section 452.314 does not apply in this case because Respondent's guardian did not file the action. § 452.314 RSMo; (LF 1, 11-13). However, even if Respondent must prove abuse, she adduced enough evidence to meet her burden. (Tr. 60-63, 67-69, 72). Such testimony from Respondent occurred without any objection from Appellant to the relevance or subject matter of the evidence. Id. Furthermore, the testimony remains relevant to the issues of whether the marriage is irretrievably broken, and whether Appellant behaved in such a way that Respondent cannot reasonably be expected to live

with him. § 452.320.2(1) RSMo. Respondent could, if necessary, substitute her guardian in this matter with no prejudice to Appellant, as discussed more fully above.

Therefore, even if this Court finds that Respondent should have substituted her guardian as plaintiff in the litigation, and even if she must then be required to prove abuse, it would be inappropriate to dismiss this matter. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574; Mo. R. Civ. P. 55.24, 55.33. In such event, this Court should simply allow Respondent to amend her pleadings to conform to the evidence, as specifically requested by her post-trial motion, and order that judgment be entered in favor of Respondent. Id.

Appellant can claim no prejudice by such amendment, where Respondent's testimony regarding abuse gave rise to no specific objection, and in fact Appellant inquired into these areas himself during his questioning. (Tr. 101-02). This Court should hold in favor of Respondent on her cross-appeal. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574; Mo. R. Civ. P. 55.24, 55.33.

### **CONCLUSION**

Respondent had the capacity to bring her Petition for Dissolution. City of Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797-99; Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29; (LF 144). Respondent also had the mental capacity to testify in this matter. Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29; (LF 144).

Because Respondent had the capacity to sue, no substitution or joinder of parties is necessary. See, City of Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797-99;

Clark, 854 S.W.2d at 30; Beine, 730 S.W.2d at 307-08; Sivils, 659 S.W.2d at 528-29; (LF 144). However, even if substitution or joinder of Respondent's guardian was necessary, dismissal of this action would be inappropriate. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574. If any error in bringing suit in the wrong name is present in this case, such error may be cured by amendment to substitute or join the proper party, and such amendment does not constitute a new action. Wellston, 203 S.W.3d 189; Mo. R. Civ. P. 52.06.

Even if Respondent is required to substitute her guardian and is further required to prove abuse, she met her burden by proving abuse at trial. (Tr. 60-63, 67-69, 72). Such evidence was adduced without appropriate objection. Id. If the Court finds that Respondent should have substituted her guardian as a party, then it should find in favor of Respondent on her cross-appeal because the trial court should have allowed amendment of Respondent's pleadings to accomplish such substitution. Wellston, 203 S.W.3d 189; Greeves, 277 S.W.3d at 797; Preston, 33 S.W.3d 574; Mo. R. Civ. P. 55.24, 55.33. This Court should reject Appellant's appeal and affirm the trial court's Judgment in favor of Respondent.

Respondent sufficiently proved that her marriage to Appellant was irretrievably broken. Wagoner, 76 S.W.3d at 290-91; § 452.305.1 RSMo. Respondent sufficiently proved that Appellant has behaved in such a way that Respondent cannot reasonably be expected to live with him. Wagoner, 76 S.W.3d at 290-91; § 452.320.2(1)(b) RSMo. The findings and conclusions of the trial court on each of the above issues are entitled to great deference. Simpson, 234 S.W.3d at 577; 8000 Maryland, 292 S.W.3d at 445.

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**CERTIFICATE PURSUANT TO RULE 84.06**

COMES NOW Steve Wolf, Attorney for Respondent and, pursuant to Rule 84.06(c), hereby certifies:

1. That Respondent's Brief complies with the information required by Rule 55.03, and is within the Rule 84.06(b) limitations by containing 18,435 words;
2. That Respondent's Brief was saved on a CD-ROM and labeled with the case caption and is hereto attached;
3. That such CD has been scanned and is virus free;
4. That the word processing program utilized to create the brief was Microsoft Word 2008 for Mac, Version 12.0.0. However, the version of the brief on the attached CD has been converted to a Word 97-2004 "doc" format compatible with Windows.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and accurate copies of the foregoing, as well as a copy of the CD-ROM with electronic copy of the foregoing, were served this January 6, 2011, via:

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| <input type="checkbox"/>            | Facsimile           | <input type="checkbox"/> | UPS Second Day Air |
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