
IN THE SUPREME COURT OF MISSOURI

In re the Marriage of:

Susan Marie Randall and James
Randall Cannon

SUSAN MARIE RANDALL,

Petitioner,

vs.

JAMES RANDALL CANNON,

Respondent.

Nº SC89118

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
THE HONORABLE ROBERT SCHOLLMAYER, JUDGE

APPELLANT'S OPENING BRIEF

Respectfully submitted,

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- I. The trial court erroneously declared and applied the law in awarding Respondent joint custody and rights of unsupervised contact with his children based upon its finding that, due to Respondent’s convictions in 2001 of sex crimes against a child, Mo. Rev. Stat. § 452.375.3 unconstitutionally denied Respondent due process and equal protection by retrospectively depriving him of vested rights of unsupervised contact and custody of his children, because the version of § 452.375.3 in effect at the time Respondent filed his motion to modify did not retrospectively deprive Respondent of any vested rights regarding his children in that:
- a. Respondent filed his motion to modify after § 452.375.3 was amended to preclude unsupervised contact and to preclude custody; and

b. prior to filing his motion to modify Respondent had only ever had nothing more than vested rights of supervised contact and no vested rights of custody, which rights were not deprived by the amendment of § 452.375.3 21

II. The trial court erred in awarding Respondent joint legal and physical custody along with rights of unsupervised contact with the children because said award is not supported by substantial evidence and is against the weight of the evidence in that:

- a. Respondent abandoned his claim for joint legal and physical custody by admitting that the only issue in this case was whether he would have supervised or unsupervised visitation;
- b. there was no evidence that the parties had a commonality of beliefs concerning parental decisions and that the parties had the ability to function as a parental unit in making such decisions; and
- c. each of the parties' respective expert witnesses presented uncontroverted testimony that Respondent is either an incurable

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JURISDICTIONAL STATEMENT

Jurisdiction of this matter is vested in this Court because on February 13, 2008, the Circuit Court of Cole County granted Respondent James Randall Cannon, a man convicted in 2001 of sex crimes against his step-child, not only rights of unsupervised contact with his natural children, but joint legal custody after declaring Mo. Rev. Stat. § 452.375 unconstitutional. The circuit court found that the statute would have an impermissible, retrospective application to Respondent in that the version of § 452.375 in effect when he was convicted did not preclude awards of custody or unsupervised visitation of children to persons convicted of such crimes, whereas the version of § 452.375 at the time he filed his motion to modify the parties' marriage-dissolution judgment did preclude such awards. Appellant argued that Respondent should have no more than the supervised visitation he had been exercising since the divorce and that § 452.375 is constitutional as applied to Respondent because the version of § 452.375 in effect at the time he filed his motion precluded unsupervised visitation.

This Court has exclusive jurisdiction over this appeal because this case involves the validity of Mo. Rev. Stat. § 452.375. *See* MO. CONST., art. V, § 3.

STATEMENT OF FACTS

Petitioner Susan Randall and Respondent Randall Cannon were married in June, 1995. (Tr. I 43:5-6). At the time of their marriage, Ms. Randall's daughter from another marriage, S.S., was ten years old. (Tr. III 408:7-11). Respondent had known S.S. since she was around six years old. (Tr. IV 526:25-527:2). Within a year of their marriage, and without Ms. Randall's knowledge, Respondent began grooming S.S. for sex. (Tr. III 424:25-425:2; Tr. V 681-19-25). He would purposely violate appropriate boundaries between him and S.S., little by little, until he succeeded in committing rape and sodomy on S.S. by the time she was twelve. (Tr. V 694:2-18; Tr. III 408:16-21). At the trial herein, S.S. recalled that Respondent would rape and sodomize her in private while Ms. Randall was occupied elsewhere in the home. (Tr. III 402:5-17). In order to obtain maximum privacy from others and maximum control of S.S. while raping and sodomizing her, Respondent would order the other children of the household — S.S.'s sister, S.R., and the parties' children who are the subject of these proceedings, M.C. and A.C. — to go elsewhere within the home. (Tr. III 405:14-21).

Respondent repeatedly raped and sodomized S.S. from November, 1997, until he was caught and arrested therefor in July, 1999. (Tr. IV 527:10-15). At

the time he was caught and arrested, Respondent was preparing to become a Missouri Highway Patrol officer. (Tr. II 45:2-3). After being caught and arrested, he denied his crimes to law-enforcement officers and claimed that S.S. came on to him; however, he later admitted his crimes. (Tr. I 47:4-11; Tr. V 680:18-22).

The parties divorced on December 1, 2000. (L.F. I 14, ¶ 1). Because of Respondent's sex crimes committed against S.S., Ms. Randall was awarded sole legal and physical custody of M.C. and A.C., while Respondent was allowed supervised visitation only at Ms. Randall's discretion. (Id. at ¶ 2). The version of Mo. Rev. Stat. § 452.375.3 in effect at the time Respondent pled guilty provided, in pertinent part, that

The court shall not award custody of a child to a parent if such parent has been found guilty of, or pled guilty to, a felony violation of chapter 566, RSMo, when the child was the victim

Mo. Rev. Stat. § 452.375.3 (Cum. Supp. 2001). (Appx. 22). Respondent was not ordered to pay Ms. Randall child support. (Id.). About one month later, Respondent was sentenced to serve seven years in prison after pleading guilty to having repeatedly raped and sodomized S.S.. (Tr. III 294:17-24). Respondent

admitted specifically to felony violations of Mo. Rev. Stat. §§ 566.032 and 566.062. (Id.).

While in prison, Respondent completed the Missouri Sexual Offenders Treatment Program ("MOSOP"). (Tr. IV 507:6-13). MOSOP exists basically to manage sex-offenders and to minimize their risks, rather than provide curative treatment because there is no cure for sex offenders such as Respondent. (Tr. IV 563:12-23). The MOSOP recommendation was that Respondent be supervised in the presence of underage females upon release, without a time limit thereto. (Tr. IV 508:6-11). After serving four years of his seven-year prison sentence, Respondent was paroled. (Tr. III 295:11-14). His visitation with M.C. and A.C. thereafter remained supervised at Ms. Randall's discretion because of his having pled guilty to repeatedly raping and sodomizing S.S.. (Tr. III 324:2-4; 374:20-24). Since being caught and arrested therefor, he has never been allowed unsupervised contact with the children. (Id.).

On June 8, 2005, the trial court entered a judgment modifying certain terms of the judgment entered on December 1, 2005. (L.F. I 19-25). The modification judgment was entered upon the parties' agreement that the visitation be supervised by a counselor, Barb Abshier, or as otherwise agreed. (L.F. I 22). Ms. Randall retained sole legal and physical custody. (Id.).

Neither the parties' said agreement nor the trial court's said judgment addressed the issue of child support. (L.F. I 19-25). Although the parties also agreed that the trial court could enter an order requiring counseling, the judgment did not contain such an order. (Id.). Respondent's visitation continued supervised. (Tr. III 296:23-297:9).

On September 18, 2006, Respondent filed his motion to modify the said judgment of June 8, 2005. (L.F. I 2, 14-18). Respondent alleged that his visitation should be gradually transformed from supervised to unsupervised "based on the progress made between Respondent and the minor children and due to his compliance with all terms of probation and parole, as well as the rehabilitated courses and counseling that he has completed." (L.F. I 16, ¶ 7.d). Respondent also filed with his motion a parenting plan in which he expected joint legal custody (L.F. I 27) and unsupervised visitation (L.F. I 30-32). He and his mother claimed that Ms. Randall would not share information with him about the children's lives and that Ms. Randall and Respondent do not have the ability to make joint decisions regarding the children's health, education, and welfare. (Tr. III 354:3-6; Tr. II 208:20-201:1). Respondent also expected to pay Ms. Randall an uncertain amount of child support. (L.F. I 32). The version of § 452.375.3 in effect on September 18, 2006, provided in pertinent part that

(1) In any court proceedings relating to custody of a child, the court shall not award custody or unsupervised visitation of a child to a parent if such parent or any person residing with such parent has been found guilty of, or pled guilty to, any of the following offenses when a child was the victim:

(a) A felony violation of section . . . 566.032, . . . 566.062, . . . , RSMo;

Mo. Rev. Stat. § 452.375.3 (Cum. Supp. 2006) (rev. H.B. 568, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005), eff. August 28, 2005)). (Appx. 18).

Respondent filed a first amended motion on November 9, 2006; however, there was no substantive amendment other than to allege that it would be in the best interest of the children that the visitation arrangement be modified. (L.F. I 40-44, ¶ 7.c)). To that, Ms. Randall filed an answer to Respondent's motion, together with a counter-motion alleging that child support should be paid by Respondent and alleging that the supervised visitation not be modified. (L.F. I 50-52). Respondent filed a second amended motion on April 4, 2007, which contained significant substantive amendments, to wit: that Ms. Randall had abused and neglected the children; that one of Ms. Randall's daughters who was present in the home while Respondent raped and sodomized S.S. was involved

with the illicit use of drugs while supervising the parties' children; and that Ms. Randall has refused to allow contact between Respondent and the children. (L.F. I 91-93, ¶ 7.a-n)). His parenting plan accompanying said motion proposed that Respondent assume sole legal and physical custody of the children (L.F. I 97), or, alternatively, that the parties share joint legal custody (L.F. I 100-102). Said parenting plan also provided that Ms. Randall have visitation (L.F. I 99-100), or, alternatively, that she have sole physical custody subject to Respondent's proposed right of unsupervised visitation (L.F. I 102-104). Said parenting plan further provided that Respondent pay Ms. Randall child support, apparently under either alternative scenarios. (L.F. I 104-105).

Barb Abshier in fact acted as a supervisor for Respondent's visitation from the date of the entry of the judgment at issue, June 8, 2005, until at least July 22, 2008. (Tr. II 112:16-113:3). Her main function was to ensure the children's safety and to protect them. (Tr. I 25:17-21). She also attempted to act as a mediator concerning visitation and supervision issues. (Tr. I 26:6; Tr. II 113:19-22). She further was to observe the children's and Respondent's behavior. (Tr. II 113:7-13). She would then provide the guardian *ad litem* with recommendations and inform involved therapists of her observations. (Tr. II 113:23-114:1). Ms. Abshier's stated main concern was the best interest of the

children. (Tr. II 114:2-6).

Ms. Abshier believed that the sole impediment to Respondent's goals of family therapy and unsupervised contact with the children was Ms. Randall's desire to not have anything to do with Respondent, to include counseling. (Tr. II 163:7-22; 164:25-165:6). This was so because Respondent had repeatedly raped and sodomized S.S.. (Tr. III 410:20-25; 412:17-20). Because of Respondent's crimes, Ms. Randall abhorred the idea of any counseling with him. (Tr. II 61:24-62:3). She believed "that any reasonable person would have extreme difficulty in moving past the rape of a child." (Tr. II 24:17-19). Although Ms. Abshier stated that she understood Ms. Randall's distrust of Respondent, she nevertheless believed that Ms. Randall should help Respondent achieve his goals of family therapy and unsupervised contact because Ms. Abshier had seen other similarly-situated mothers "buck up their own issues, buck up their feelings, and get out there and do what they need to do to help their children through this." (Tr. I 33:18-20, 36:7-10).

Others have been proposed by Respondent as supervisors during his visitations, one of whom was his mother, Mary Ann Brock. (Tr. III 339:231-340:5). Ms. Brock is a resident of the state of Massachusetts. (Tr. II 273:6-8). Ms. Brock believed that Respondent never raped or sodomized S.S., but that

they had a consensual sexual relationship. (Tr. II 285:24-286:1). Going further, Ms. Brock stated that S.S. "had sexual affairs with other people in addition to my child" (Respondent).¹ (Tr. II 285:4-8). Respondent believed that other unfortunate events in his life "allowed" him to repeatedly rape and sodomize S.S.. (Tr. III 386:13-387:1). Like Respondent, Ms. Brock believes that Respondent's repeated rape and sodomy of S.S. were unfortunate things that happened to Respondent — not S.S.. For example, Respondent stated, "Everybody that's in Jeff City that I know that have children know . . . what happened to me." (Tr. III 369:13-15); and his expert witness stated, "[I]n his mind he believes obstacles have been placed in his path and in his children's path that are unjustified and unreasonable." (Tr. V 656:7-9). Ms. Brock stated, "And he's trying to overcome what's happened in the past." (Tr. II 286:22-23).

At trial, each party presented expert testimony regarding Respondent's diagnosis of Axis I pedophilia made in late 1999 at the psychiatric ward at St. John's Hospital, after Respondent was caught and arrested. (Tr. IV 517:5-9, 518:13-23; Tr. V 709:13-23). Axis I "is the axis reserved for the major psychiatric disorders or major mental disorders that occur. They can occur at

¹ Respondent was 34 years old at the time of trial and 24 years old when he began raping and sodomizing S.S. (L.F. I 158).

any time of life, but they tend to be more severe, just in general, and cause more disruptions in a person's life in their ability to get along with others." (Tr. IV 517:12-17). Although Respondent was also diagnosed with "bipolar disorder mixed," this was never seen in him until after he was caught and arrested. (Tr. IV 516:14-19).

Ms. Randall's expert, Bruce Harry, M.D., is a forensic psychiatrist who has worked with sex offenders his entire professional career since 1981. (Tr. IV 477:4-12, 483:15-18). Dr. Harry reviewed Respondent's medical records from St. John's and found them to contain reliable medical information on which he could base his opinions. (Tr. IV 542:1-15). Based on that information, Respondent appeared to manifest "Cluster B-type" behavior; that is, behavior which is "erratic and unpredictable and different from time to time and under different circumstances," including histrionic, narcissistic, anti-social, and borderline behavior. (Tr. IV 538:7-21). Respondent qualifies for inclusion in Cluster B because he misrepresented himself "in different circumstances and under different contexts," where he "was saying one thing, doing something else." (Id.). Dr. Clark emphatically agreed that Respondent has a history of manipulative behavior. (Tr. V 699:18-23). Respondent was ultimately diagnosed as a pedophile. (Tr. IV 542:13-15).

Dr. Harry has treated hundreds of persons diagnosed with pedophilia. (Tr. IV 542:16-19). He described pedophilia as a condition wherein a person has a "preferred sexual interest and arousal to children." (Tr. IV 477:1-12, 481:15-18, 525:18-19). Dr. Harry and Respondent's expert, David B. Clark, PhD. — a forensic psychologist who has had very little experience with sex offenders (five or six) during his career and whom Respondent paid \$10,000.00 to testify on his behalf — agreed that there is no cure for pedophilia. (Tr. IV 526:11-13; Tr. V 590:18-19, 671:6-8, 676:1-5, 684:11-13; 697:16-19).

Dr. Harry testified that pedophilia can be diagnosed by ascertaining three identifiable criteria. First, that the person "must have, over a period of at least six months, recurrent, intense, sexually-arousing fantasies, sexual urges or behaviors involving sexual activity with a pre-pubescent -- or children generally age 13 years or younger." (Tr. IV 521:25-522:4). Second, "that the person has acted on these urges or that the urges caused marked distress or interpersonal difficulty." (Tr. IV 522:5-7). Because Respondent repeatedly raped and sodomized S.S. for at least 18-20 months, and because he continued to have sexual thoughts about S.S. after getting caught and arrested, he satisfied both criteria. (Tr. IV 527:11-528:7, 530:11-12). The third criterion is "that the person . . . is at least 16 years of age, and at least five years older than the child

or children in criterion A," but this criterion does not include "individuals in late adolescence who were involved in an ongoing sexual relationship with a 12 or 13-year-old." (Tr. IV 528:6-19). Respondent met this criterion, as well. (L.F. I 158, showing that he was born on January 26, 1973).

Dr. Clark acknowledged the three diagnostic criteria for pedophilia. (Tr. V. 681:4-9). Dr. Clark indicated that he believed Respondent did not meet the first criterion only because Respondent reported to him that S.S. was "fully developed" during the period he raped and sodomized her, although there was no dispute that S.S. was under the age of 13 when Respondent began such sexual assaults and the criterion does not mention the child's developmental stage but only the child's age. (Tr. V 681:10-18, 700:4-14). He never inquired of anyone other than Respondent whether S.S. was fully developed when Respondent began raping and sodomizing her. (Tr. V 681:10-18). Dr. Clark believed that "those attracted to females usually prefer nine to ten-year-olds" and that S.S. at that time would have been "pretty old for a pedophile," even though the criterion's range is up to age 18. (Tr. V 681:13-16, 682:1-21). Dr. Clark offered no support for this belief. Dr. Clark agreed that Respondent met the other two criteria for a pedophilia diagnosis. (Tr. V 683:15-21).

Although Dr. Clark, a psychologist, acknowledged that Respondent was in fact medically diagnosed as a pedophile by psychiatrists at St. John's in late 1999, he disagreed that Respondent was accurately diagnosed, at least from a psychological perspective. (Tr. V 605:18-24, 653:16-654:2). He never inquired of anyone at St. John's as to how that diagnosis was made. (Tr. V 684:7-10). At most, Dr. Clark considered Respondent only a child molester because "[a] child molester is not automatically a pedophile" in that "[s]ome people who molest children are primarily attracted to adults." (Tr. V 652:6-11). He considered Respondent's "attraction template" to be to adult females. (Id.). This was because Dr. Clark "didn't see anything in [St. John's] file that supported that diagnosis [pedophilia]," other than "all they knew was that he sexually molested an underage child." (Tr. V 653:16-654:2 (material in brackets added)). He does not believe that Respondent can be cured as a child molester. (Tr. V 691:2-6).

From a further psychological perspective, Dr. Clark did not believe that there was any need for Respondent's contacts with M.C. and A.C. to be supervised. (Tr. V 605-18-24). This was because when Dr. Clark saw Respondent in late 2004 and 2005, he believed Respondent no longer had any diagnosable psychological disorder, and although Respondent "was a very

disturbed fellow for a very long time . . . the history showed that changed during the incarceration," due to what he learned in MOSOP notwithstanding MOSOP's sex-offender-management function and its recommendation that he be supervised indefinitely in the presence of underage females upon his release. (Tr. IV 508:6-11; Tr. V 605:4-10, 689:19-23). Dr. Clark believed that Respondent had "[n]othing beyond a level of distress and frustration and general anxiety that was pretty much in proportion to the legal situation that he was in," and that "he's okay now." (Tr. V 605:12-15, 652:21). He further stated, "If you have somebody who molested a child, but is not a pedophile and somebody who has made the changes in their life like Mr. Cannon has, that's a much more positive prognosis for the future," although he also stated that Respondent will always be a child molester. (Tr. V 655:17-20, 691:2-6).

Dr. Clark relied on what is called a "Static-99" test. (Tr. IV 544:19-20). The Static-99 is an actuarial study of groups of persons previously convicted of sex crimes, which study purports to predict percentage risks of re-conviction. (Tr. IV 545:1-546:7). The study specifically addresses the chances of re-conviction after plea or trial, and not merely the chances of re-offending. (Tr. IV 546:18-20). Furthermore, its percentages apply only to groups of persons, not individuals, although Dr. Clark believed "a person's score on this test is a

meaningful piece of information about their level of risk." (Tr. V 685:14-16, 687:15-17). According to Dr. Clark, Respondent's result on this test showed a risk of re-conviction to be at least a 1 in 16 chance, but perhaps at least twice that (1 in 8) because the test would consider him to have perpetrated incest. (Tr. IV 552:21-553:1; Tr. V 687:7). Dr. Harry explained, however, that tests such as Static-99 are meaningless because "they have poor precision on an individual level and the margins of error are so great. . . ." (Tr. IV 554:24-555:5). This explanation was based on his years of treatment experience with sex offenders, including his familiarity with MOSOP's goals of sex-offender management in general and Respondent's records at MOSOP in particular, which recommended supervision in the presence of underage females upon release. (Tr. IV 561:19-563:23). It was also based on the fact that there is "no cure for any sex offender." (Tr. IV 563:20-21).

In addition to Ms. Abshier and Ms. Brock, all of the other witnesses called by Respondent who had personal knowledge of his post-arrest visitation testified that Respondent appeared to pose no danger to the children. (Henry Laws, an associate of Ms. Abshier, Tr. II 92:9-19; William Cannon, Respondent's brother, Tr. II 249:14-19; and Shellie Lehmen, William Cannon's fiancée, Tr. II 269:23-270:1). No one testified that the parties were able to make joint decisions

regarding the children's health, education, and welfare. Respondent acknowledged that a court order requiring Ms. Randall to share the children's information with him would be an option, rather than joint legal custody. (Tr. III 354:7-12). Respondent even acknowledged that he did not want the court to seriously consider granting him any custody rights, both because of his sex crimes against S.S. and because the parties live significantly far from each other.. (Tr. III 361:9-24). According to Respondent, the only issue in this case was whether he would have supervised or unsupervised visitation. (Tr. III 361:25-362:6).

Because Respondent's visitation has always been supervised since he was caught and arrested for raping and sodomizing S.S., no one has observed Respondent interact alone with underage females, although there was some uncertainty as to whether he was left alone with M.C. during one visit supervised by Ms. Abshier. (Tr. III 324:5-325:7). While the children were reported to have eventually accepted Respondent's involvement in their lives during their supervised visitation, A.C. clearly stated to the guardian *ad litem* before trial that he did not want to see Respondent and that he did not care whether Respondent lived or died. (Tr. III 392:10-13; Tr. V 713:2-13, 714:24-715:3). A.C. also told Ms. Randall that he wished Respondent were dead. (Tr.

III 460:20-23). Both children had stated that they did not want to visit Respondent. (Id.; Tr. III 429:13-15). Based on M.C.'s age and size, the guardian *ad litem* recommended that Respondent's visitation with her continue supervised; however, despite A.C.'s desire to not see Respondent, the guardian *ad litem* nonetheless recommended that Respondent have the opportunity to exercise unsupervised visitation with A.C. should A.C. so choose. (Tr. V 716:18-718:11). At least part of the guardian *ad litem*'s recommendation was based on Respondent's persistence in litigating this case. (Tr. V 714:16-715:3). The guardian *ad litem* made such recommendations under an assumption the trial court might find § 452.375.3 unconstitutional. (Tr. V 712:19-24).

On February 13, 2008, the trial court entered its judgment. (Appx. 1). The court found, among other things, that the children "have developed a relationship with and emotional ties to Respondent," (Appx. 3, ¶ 11); that the children would become more open to Respondent the further they travelled from Ms. Randall, (Appx. 3, ¶ 10); that Dr. Clark found nothing wrong with Respondent, (Appx. 3-4, ¶¶ 14-16); and that there has thus been a substantial and continuing change of circumstances making the June 8, 2005, judgment unreasonable. (Appx. 4, ¶ 17). The court found that Respondent "is not a pedophile;" has "persistently" exercised visitation; has "successfully

rehabilitated" his relationship with the children; and is "vested" in their lives such that he should have unsupervised visitation. (Appx. 4, ¶¶ 16-17).

The trial court considered the various factors in § 452.375.2 in making its findings. (Appx. 4-6, ¶¶ 18 a)-h)). The court found in favor of Respondent regarding subsection (b), as to the needs of the children for a frequent, continuing and meaningful relationship for both parents and the ability and willingness of the parents to actively perform their function for the needs of the children; and subsection (d), as to which parent is to more likely allow frequent, continuing and meaningful contact with the other parent. (Appx. 5). The court found for neither parent as to the other subsections. It also found that the statements the children made to the guardian *ad litem* were not credible. (Appx. 6, ¶ 18 h)). It further found that no evidence was presented regarding the parties' incomes. (Appx. 6, ¶ 19).

The trial court then ruled that, although § 452.375.3(1) precluded unsupervised visitation, it was unconstitutional as applied to Respondent because it "serves to 'retroactively' take away Respondent's fundamental right to associate with his own children . . . without due process of law." (Appx. 7-8, ¶ 20 a)-b)). In opining on the constitutionality of the statute, the court found that, "When Respondent pled guilty to committing the sexual offenses in 2001, there

were no statutes in effect that said he could *never* have unsupervised visitation with his children. He was provided with no opportunity to be heard . . . because it occurred without notice after he entered his plea of guilty." (Appx. 8, ¶ 20 b) (emphasis in original)). The court continued, ruling that the statute also "violates the Equal Protection Clause of the Fifth Amendment of the U.S. Constitution and Article I, Section 10 of the Missouri Constitution which requires that similarly situated person [*sic.*] must be treated similarly." (Appx. 8, ¶ 20 c)). It said, "Specifically, it impinges on Respondent's fundamental right to associate with his own children and maintain a relationship with them." (Id.).

The trial court then awarded Respondent joint legal and physical custody along with Ms. Randall. (Appx. 9, ¶ 2). It also incorporated a parenting plan specifying the terms of joint legal and physical custody. (Appx. 11-16). As part of said parenting plan, the court ordered the parties and the children to participate in counseling "which encourages and supports therapeutic rehabilitation of the relationship between all parties and children." (Appx. 12). It further awarded no child support to be paid by either party. (Appx. 9, ¶ 3).

On February 19, 2008, Ms. Randall filed a motion to amend the judgment which pointed out that, as a matter of law, § 452.375.3 is not impermissibly

retrospective as applied to Respondent because the statute already precluded unsupervised visitation by the time Respondent filed the subject motion to modify, and because he had never had anything other than supervised visitation since the parties' divorce. (L.F. II 308-311). On February 21, 2008, the trial court denied the motion. (L.F. I 12).

Ms. Randall filed her timely notice of appeal that same day. (L.F. II 329-30). Upon Ms. Randall's subsequent motion, this Court issued a stay of the trial court's judgment as to custody and visitation, which stay order remains in effect. (L.F. I 13).

POINTS RELIED ON

Point I.

The trial court erroneously declared and applied the law in awarding Respondent joint custody and rights of unsupervised contact with his children based upon its finding that, due to Respondent's convictions in 2001 of sex crimes against a child, Mo. Rev. Stat. § 452.375.3 unconstitutionally denied Respondent due process and equal protection by retrospectively depriving him of vested rights of unsupervised contact and custody of his children, because the version of § 452.375.3 in effect at the time Respondent filed his motion to modify did not retrospectively deprive Respondent of any vested rights regarding his children in that:

- a. Respondent filed his motion to modify after § 452.375.3 was amended to preclude unsupervised contact and to preclude custody; and
- b. prior to filing his motion to modify Respondent had only ever had nothing more than vested rights of supervised contact and no vested rights of custody, which rights were not deprived by the amendment of § 452.375.3.

Hoskins v. Box, 54 S.W.3d 736 (Mo. App. W.D. 2001)

State ex rel. Schottel v. Harman, 208 S.W.3d 889 (Mo. 2006)

Mehra v. Mehra, 819 S.W.2d 351 (Mo. 1991)

Doe v. Phillips, 194 S.W.3d 833 (Mo. 1993)

Point II.

The trial court erred in awarding Respondent joint legal and physical custody along with rights of unsupervised contact with the children because said award is not supported by substantial evidence and is against the weight of the evidence in that:

- a. Respondent abandoned his claim for joint legal and physical custody by admitting that the only issue in this case was whether he would have supervised or unsupervised visitation;
- b. there was no evidence that the parties had a commonality of beliefs concerning parental decisions and that the parties had the ability to function as a parental unit in making such decisions; and
- c. each of the parties' respective expert witnesses presented uncontroverted testimony that Respondent is either an incurable pedophile or an incurable child molester such that Respondent poses an absolute danger to the children if he were allowed custody or unsupervised contact.

Krinard v. Westerman, 216 S.W. 938 (Mo. 1919)

L.J.S. v. F.R.S., 247 S.W.3d 921, 925 (Mo. App. S.D. 2008)

In re Marriage of M.A., 149 S.W.3d 562 (Mo. App. E.D. 2004)

ARGUMENT

Point I.

The trial court erroneously declared and applied the law in awarding Respondent joint custody and rights of unsupervised contact with his children based upon its finding that, due to Respondent's convictions in 2001 of sex crimes against a child, Mo. Rev. Stat. § 452.375.3 unconstitutionally denied Respondent due process and equal protection by retrospectively depriving him of vested rights of unsupervised contact and custody of his children, because the version of § 452.375.3 in effect at the time Respondent filed his motion to modify did not retrospectively deprive Respondent of any vested rights regarding his children in that:

- a. Respondent filed his motion to modify after § 452.375.3 was amended to preclude unsupervised contact and to preclude custody; and**
- b. prior to filing his motion to modify Respondent had only ever had nothing more than vested rights of supervised contact and no vested rights of custody, which rights were not deprived by the amendment of § 452.375.3.**

A. Standard of Review.

On review, a trial court's judgment will be reversed if there is no substantial evidence to support it, if it is against the weight of the evidence, if it erroneously declares the law, or if it erroneously applies the law. *See Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). As to matters of fact, this Court will generally defer to the trial court. *See Wright-Jones v. Johnson*, 256 S.W.3d 177, 180 (Mo. App. E.D. 2008).

The interpretation of a statute is purely a question of law, not fact. *See State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409, 411 (Mo. 2007) (citing *Delta Air Lines, Inc. v. Dir. of Revenue*, 908 S.W.2d 353, 355 (Mo. 1995)). As to questions of law, this Court does not defer to the trial court and reviews its findings *de novo*. *See Wolfrum v. Wiesman* at 411. Although the trial court found § 452.375.3 unconstitutional, this Court presumes that the legislature enacts constitutional laws which "will be held otherwise only if they clearly contravene a constitutional provision." *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. 1999).

B. Respondent's vested rights are unaffected by § 452.375.3.

Respondent is an admitted, convicted, and incurable child rapist. His calculated, deliberate control of S.S. was designed for one thing, and one thing

only: the satisfaction of his depraved fantasies of sexually exploiting an innocent, vulnerable child. With such sickening facts in mind, the trial court's judgment awarding Respondent joint legal custody and unsupervised visitation is not merely erroneous but is outrageously so.

Certainly, the parent-child relationship is an "'associational right[] . . . of basic importance in our society'" deserving of due-process protection. *In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999) (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996)). Based on Respondent's horrific abuse of S.S., it is unfortunate that Respondent has any associational rights regarding his children. Be that as it may, he nonetheless managed to obtain supervised visitation rights since he was caught and arrested for having repeatedly raped and sodomized S.S., which rights exist to this day. (Tr. III 324:2-4, 374:20-24; L.F. I 14, ¶ 2). He has never had any custody rights. (L.F. I 14, ¶ 2; L.F. I 22). The modification judgment of June 8, 2005, was based on the parties' agreement that visitation continue supervised. (L.F. I 19-25). It has always been supervised. (Tr. III 296:23-297:9). Section 452.375.3 assures him that he maintains such rights, which rights are indisputably fundamental rights to associate with his own children. The trial court's finding that § 452.375.3 "serves to 'retroactively' take away Respondent's fundamental right to associate

with his own children" without due process is clear error as a matter of law. (Appx. 7-8, ¶ 20 a)-c)).

"A retrospective law is: '[O]ne which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired.'" *State ex rel. Schottel v. Harman*, 208 S.W.3d 889, 892 (Mo. 2006) (citations omitted). "The prohibition against retrospective laws prevents laws that 'impair vested rights acquired under existing laws,' but 'no one has a vested right that the law will remain unchanged.'" *Id.* (quoting *Doe v. Phillips*, 194 S.W.3d 833, 850-51 (Mo. 1993)).

"'[A] vested right 'must be something more than a mere expectation based upon an anticipated continuance of existing law.'" *Id.* (quoting *Doe* at 852, and *Fisher v. Reorganized Sch. Dist.*, 567 S.W.2d 647, 649 (Mo. banc 1978)).

"Furthermore, 'neither persons nor entities have a vested right in a general rule of law or legislative policy that would entitle either to insist that a law remain unchanged.'" *Silcox, supra*, 6 S.W.3d at 904 (citation omitted). "A statute which does not take away or impair a 'vested right' or impose a new or greater duty is not unconstitutionally retrospective merely because it relates to prior

facts or transactions." *State Bd. of Reg. for Healing Arts v. Boston*, 72, S.W.3d 260, 265-66 (Mo. App. W.D. 2002) (quoting *Hoskins v. Box*, 54 S.W.3d 736, 739 (Mo. App. W.D. 2001)).

The version of Mo. Rev. Stat. § 452.375.3 in effect at the time Respondent pled guilty provided, in pertinent part, that

The court shall not award custody of a child to a parent if such parent has been found guilty of, or pled guilty to, a felony violation of chapter 566, RSMo, when *the child* was the victim

Mo. Rev. Stat. § 452.375.3 (Cum. Supp. 2001) (emphasis added). (Appx. 22).

Had Respondent sought unsupervised visitation during such time that this version of § 452.375.3 was in effect, the statute itself would not have prevented him from obtaining unsupervised visitation because "the child" was not either of the children at issue but was Ms. Randall's other child, S.S.. Section § 452.375.3 was amended in 2005 in pertinent part to provide that

(1) In any court proceedings relating to custody of a child, the court shall not award custody or unsupervised visitation of a child to a parent if such parent or any person residing with such parent has been found guilty of, or pled guilty to, any of the following offenses when *a child*

was the victim:

(a) A felony violation of section . . . 566.032, . . . 566.062, . . . ,
RSMo;

Mo. Rev. Stat. § 452.375.3 (Cum. Supp. 2006) (rev. H.B. 568, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005), eff. August 28, 2005)) (emphasis added). (Appx. 18). Section 452.375.3 has not been amended since, and it was in effect when Respondent filed his motion to modify herein on September 18, 2006. (L.F. I 2, 14-18). This Court and Missouri's appellate courts uniformly hold that an applicable statute in effect at the time of filing of a cause of action controls, rather than an earlier or later incarnation thereof. *See Mehra v. Mehra*, 819 S.W.2d 351, 353 (Mo. 1991); *Walsh v. Walsh*, 184 S.W.3d 156, 157 (Mo. App. E.D. 2006); *Keeran v. Myers*, 172 S.W.3d 466, 469 (Mo. App. W.D. 2005); *Hoskins v. Box*, *supra*, 54 S.W.3d at 740; *Brown v. Brown*, 19 S.W.3d 717, 723 (Mo. App. W.D. 2000); *Ross v. Ross*, 772 S.W.2d 890, 892 (Mo. App. W.D. 1989); *Goldberg v. Goldberg*, 691 S.W.2d 312, 315 (Mo. App. E.D. 1985); *Hempe v. Cape*, 702 S.W.2d 152, 156 (Mo. App. S.D. 1985); *Elliott v. Elliott*, 612 S.W.2d 889, 893 (Mo. App. S.D. 1981); *L.H.Y. v. J.M.Y.*, 535 S.W.2d 304, 307 (Mo. App. E.D. 1976); *Kanady v. Kanady*, 527 S.W.2d 704, 706 (Mo. App. W.D. 1975). This legal principle applies to motions to modify, which are

deemed independent actions. See *Hoskins v. Box*, *Brown v. Brown*, *Hempe v. Cape*, *Elliott v. Elliott*, *L.H.Y. v. J.M.Y.*, *Kanady v. Kanady*, *supra* (applies to motions to modify); *State ex rel. Dreppard v. Jones*, 215 S.W.3d 751, 752 (Mo. App. E.D. 2007) (motions to modify are independent actions).

In *Hoskins v. Box*, the Missouri Court of Appeals, Western District, was faced with an identical set of circumstances wherein the father claimed that the version of Mo. Rev. Stat. § 452.400 in effect at the time he pled guilty to child abuse would not have precluded visitation and that the amended statute, if applied to the time he pled guilty, would retrospectively deny him a vested right to visitation. *Hoskins* at 738. The court said

Father's reasoning is flawed. As noted, *supra*, a vested right is one that is "fixed, accrued, settled or absolute." A vested right "must be something more than a mere expectation based upon an anticipated continuance of the existing law.'" In order to seek visitation, Father first had to file a motion to modify. Prior to doing so, the best that can be said is that Father had a "mere expectation" that he could seek visitation. And a "mere expectation" is not a vested right.

Hoskins at 740-41 (internal citations omitted).

As in *Hoskins*, the most that can be said in this case is that Respondent had

a "mere expectation" that he could seek unsupervised visitation and custody based upon his anticipated continuance of the law existing at the time he pled guilty to repeatedly raping and sodomizing S.S.. His "mere expectation" is not a vested right. *Id.* He does, however, have an acknowledged, vested right of supervised visitation, and the statute plainly does not deprive him of that right. Because his vested rights of visitation are not affected by § 452.375.3, any rights to due process are not implicated herein.

C. Section 452.375.3 does not deprive Respondent of equal protection.

"All persons are created equal and are entitled to equal rights and opportunity under the law." MO. CONST., art. I, § 2. "[T]his constitutional protection, like that in the Fourteenth Amendment . . . requires that laws 'operate[] on all alike' and 'not subject the individual to an arbitrary exercise of the powers of government.'" *Doe v. Phillips, supra*, 194 S.W.3d at 845 (citations omitted). "A law may properly treat different groups differently, but it may not treat similarly situated persons differently unless such differentiation is adequately justified." *Id.* "If the law . . . affects a 'fundamental right,' a court must apply strict scrutiny to determine 'whether the statute is necessary to accomplish a compelling state interest,' . . . and whether the chosen method is narrowly tailored to accomplish that purpose." *Id.* (citations omitted).

The trial court likened Respondent — a convicted child rapist — to the adult rapist or murderer as support for its contention that § 452.375.3 treats Respondent and others similarly-situated differently, going so far as to say that, "A person could be convicted of the murder or rape of an adult or some other violent crime or even the murder of *his or her own child* and still be eligible to receive unsupervised visitation with his or her children." (Appx. 8, ¶ 20 c)).

The trial court missed the mark as to who is similarly-situated to Respondent. It is the group of those who have sexually assaulted children who are similarly-situated to Respondent, not the group of adult rapists or murderers. Without a doubt, "[p]rotecting children is a compelling state interest." *Gibson, et al. v. Brewer*, 1996 WL 364795, 18 (Mo. App. W.D., July 2, 1996) (unreported) (overruled on other grounds, *Gibson, et al. v. Brewer*, 952 S.W.2d 239 (Mo. 1997)). Child rapists will not be having "visitation" with an adult rape victim, and they most certainly will not be having visitation with a murdered child. All similarly-situated child-sex offenders are precluded from having unsupervised contact. This preclusion is a clear, compelling state interest in protecting children from sexual assault and is clearly narrowly-tailored to achieve that result. Respondent is plainly not denied equal protection. By all accounts as elicited by Respondent, his supervised visitation has been quite

satisfactory to him. (Tr. V 714:24-715:3). Respondent's restriction to supervised visitation could have been avoided had he the simple foresight to predict that trouble of this sort could befall him should he choose to betray Ms. Randall's trust and proceed to repeatedly rape and sodomize S.S..

The Court should reverse the trial court's judgment and enter a judgment denying Respondent's motion to modify.

Point II.

The trial court erred in awarding Respondent joint legal and physical custody along with rights of unsupervised contact with the children because said award is not supported by substantial evidence and is against the weight of the evidence in that:

- a. Respondent abandoned his claim for joint legal and physical custody by admitting that the only issue in this case was whether he would have supervised or unsupervised visitation;**
- b. there was no evidence that the parties had a commonality of beliefs concerning parental decisions and that the parties had the ability to function as a parental unit in making such decisions; and**
- c. each of the parties' respective expert witnesses presented uncontroverted testimony that Respondent is either an incurable pedophile or an incurable child molester such that Respondent poses an absolute danger to the children if he were allowed custody or unsupervised contact.**

A. Standard of Review.

The standard of review of judgments modifying child custody, visitation,

and support issues is governed by *Murphy v. Carron, supra*, 536 S.W.2d at 32. *See Milone v. Duncan*, 245 S.W.3d 297, 299 (Mo. App. W.D. 2008). Thus, the judgment of the trial court will be reversed if there is no substantial evidence to support it, if it is against the weight of the evidence, if it erroneously declares the law, or if it erroneously applies the law. *See Murphy v. Carron*, 536 S.W.2d at 32. This Court will presume that the trial court considered the best interest of the children in issuing its decision, and this Court will reverse the decision only if it is "firmly convinced that the welfare and best interests of the children require otherwise." *Durbin v. Durbin*, 226 S.W.3d 876, 879 (Mo. App. W.D. 2007) (citation omitted).

B. Respondent abandoned his claims for joint legal and physical custody.

Even without the foregoing analysis regarding the fact that § 452.375 does not affect Respondent's vested rights, Respondent acknowledged that he did not want the court to seriously consider granting him any custody rights, both because of his sex crimes against S.S. and because the parties live significantly far from each other. (Tr. III 361:9-24). He admitted that the only issue in this case was whether he would have supervised or unsupervised visitation. (Tr. III 361:25-362:6). His own admission clearly constitutes an express abandonment of his claims for any custody rights, and issues expressly abandoned at trial

cannot form the basis for a trial court's judgment. See *Krinard v. Westerman*, 216 S.W. 938, 940 (Mo. 1919); *Stiens v. Stiens*, 231 S.W.3d 195, 198-99 (Mo. App. W.D. 2007); *Strauss v. Hotel Continental Co. Inc.*, 610 S.W.2d 109, 112 (Mo. App. W.D. 1980). On this issue alone, the Court should reverse the trial court's judgment awarding Respondent joint legal and physical custody.

C. There was no evidence to support an award of joint legal custody.

Notwithstanding Respondent's abandonment of his claim for joint legal custody, the trial court had no evidence before it to support an award of joint legal custody to Respondent, much less substantial evidence thereof.

"Imperative to the best interests of the child in a joint custody arrangement are '[t]he commonality of beliefs concerning parental decisions and the ability of parents to cooperate and function as a parental unit.'" *L.J.S. v. F.R.S.*, 247 S.W.3d 921, 925 (Mo. App. S.D. 2008) (quoting *Mehra v. Mehra*, *supra*, 819 S.W.2d at 353). "If the parties are unable to communicate or cooperate and cannot make shared decisions concerning their children's welfare, joint legal custody is inappropriate." *L.J.S.* at 925.

Here, the only evidence touching on the subject of joint legal custody was that neither party could effectively cooperate in this regard. Respondent and his mother claimed that Ms. Randall would not share information with him about

the children's lives and that Ms. Randall and Respondent do not have the ability to make joint decisions regarding the children's health, education, and welfare. (Tr. III 354:3-6; Tr. II 208:20-201:1). No one testified that the parties were able to make such decisions jointly. Moreover, Respondent acknowledged that a court order requiring Ms. Randall to share the children's information with him would be an option, rather than joint legal custody. (Tr. III 354:7-12).

"Joint legal custody is not always or necessarily inappropriate merely because there is some level of personal tension and hostility between the former spouses, 'provided that there is substantial evidence that despite this acrimony the parties nonetheless have the ability and willingness to fundamentally cooperate in making decisions concerning their child's upbringing." *In re Marriage of M.A.*, 149 S.W.3d 562, 596 (Mo. App. E.D. 2004) (citations omitted). Without *any* evidence of a commonality of beliefs concerning parental decisions and the ability of the parties to cooperate and function as a parental unit, no award of joint legal custody can ever be appropriate. *M.A.* at 570 ("If the record is devoid of such evidence, it is error for the trial court to award joint legal custody.").

Based on the foregoing, this Court should reverse the trial court's award of joint legal custody.

D. Respondent is a danger to children because he is either an incurable pedophile or an incurable child molester.

Considering Respondent's abandonment of his claim to custody, and in keeping with this state's compelling interest in protecting children, Respondent must not be allowed joint physical custody — at least that which contemplates unsupervised contact — because he is incurable as either a pedophile or a child molester. Both experts who testified at trial, Drs. Harry and Clark, attested so. (Tr. IV 563:12-23; Tr. V 684:11-13; 691:2-6, 697:16-19).

Both experts also testified that Respondent met each of the criteria for a diagnosis of pedophilia, even though Dr. Clark attempted to qualify the diagnosis as to criterion one with an unsupported reference to S.S. being "pretty old for a pedophile." (Tr. IV 521:25-522:7, 527:11-528:7, 530:11-12, 528:6-19; Tr. V. 681:4-18, 682:1-21, 700:4-14). Dr. Clark agreed without qualification that Respondent met the other two criteria for a pedophilia diagnosis. (Tr. V 683:15-21). Both experts testified that pedophilia is incurable. (Tr. IV 563:12-23; Tr. V 684:11-13). The trial court's finding that Respondent is not a pedophile is wholly against the weight of the evidence.

Assuming *arguendo* that Respondent's expert, Dr. Clark, did not consider Respondent a pedophile, he considered Respondent to be at least a child

molester, stating that, "A child molester is not automatically a pedophile" in that "[s]ome people who molest children are primarily attracted to adults." (Tr. V 652:6-11). While Dr. Clark may have believed Respondent's "attraction template" to be to adult females — contradicting his acknowledgment that Respondent fit all the criteria for a diagnosis of pedophilia and ignoring the medical diagnosis of the same at St. John's — he also believed that child molesters cannot be cured. (Tr. V 652:6-11, 691:2-6). The trial court's judgment makes no acknowledgment whatsoever about Respondent's identification as a child molester, which identification would obviously be critical to any award of unsupervised visitation rights. Being an incurable child molester, alone, would be sufficient to warrant denying Respondent unsupervised contact, and the trial court's judgment awarding him such contact is wholly without substantial evidence in this regard.

In the context of considering whether to extend unsupervised visitation rights to a convicted child rapist, there is no meaningful distinction to be made between a pedophile and a child molester where neither condition can be cured. In fact, any attempt to have distinguished the two conditions for the purpose of showing Respondent's fitness to exercise unsupervised visitation is clearly absurd. Much ado was made about Respondent not posing a danger to the

children during his supervised visitation. (Tr. II 92:9-19; 249:14-19; 269:23-270:1). Respondent's mother, Mary Ann Brock, took such ado to the highest heights of absurdity by alleging that S.S. had an "affair" with Respondent and that S.S. in fact was sexually exploiting *Ms. Brock's child, Respondent*. (Tr. II 285:4-8).

No one has observed Respondent interact alone with underage females since he was caught and arrested for repeatedly raping and sodomizing S.S.. Supervised visitation, if any, is the lone available option for Respondent under the instant circumstances because he is either an incurable pedophile or an incurable child molester. His "persistence" herein may very well be in again attaining his demonstrated goals of raping and sodomizing little girls. After all, the last time he was left alone with an underage female, the little girl was isolated and controlled by Respondent for the sole purpose of subjecting her to the depths of his lewd, lascivious depravity. Out of an abundance of caution regarding the children's best interest, this Court should not give Respondent the opportunity to "allow" this again. (Tr. III 386:13-387:1). The trial court's judgment granting Respondent joint physical custody and unsupervised visitation rights must be reversed.

CONCLUSION

As a matter of law, § 452.375.3 is constitutional as applied to Respondent because Respondent was only ever entitled to nothing more than supervised visitation with his children, and the policy of precluding unsupervised visitation to those convicted of sex crimes against children evinces a compelling state interest in protecting children from harm. Furthermore, notwithstanding Respondent having expressly abandoned his claim for any custody rights, the judgment awarding him joint legal and physical custody with unsupervised visitation rights is without substantial evidence and is against the weight of the evidence in that the parties cannot jointly make parental decisions and Respondent presents an incurable threat to children being free from sexual assault. The trial court's judgment in its entirety must be reversed, and the Court should direct the trial court to enter an order denying Respondent's motion to modify.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Mo. Ct. R. 84.06(c) in that:

- (A) It contains 8,271 words, as calculated by the undersigned's word-processing program;
- (B) A copy of this brief is on the attached 3½-inch diskette; and that
- (C) The diskette has been scanned for viruses by the undersigned's anti-virus program and is free from any virus.

WILLIAM P. NACY

CERTIFICATE OF SERVICE

I hereby certify that I did, on August 11, 2008, forward true copies of the foregoing brief, as required, by 1st class U.S. mail and/or electronic service to:

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APPENDIX

CONTENTS — APPENDIX

Cole County Circuit Court judgment A1

Mo. Rev. Stat. § 452.375 (Cum. Supp. 2006) A17

Mo. Rev. Stat. § 452.375 (Cum. Supp. 2006) A21

1. The Court finds that the marriage of the parties was dissolved on or about December 1, 2000, pursuant to a Judgment and Order of Dissolution of Marriage (“Judgment”) entered by this Court.
2. That pursuant to a Separation Agreement incorporated into said Judgment, the legal and physical custody of the minor children born of the marriage, Alekzander Storm Cannon and Mercedes Brooke Cannon, was awarded to Petitioner and the Respondent was granted supervised visitation on such conditions as determined by the Petitioner. Respondent did not agree to and was not ordered to pay child support at the time.
3. That heretofore, on or about the 8th day of June, 2005, this Court entered a Modified Decree of Dissolution and Judgment (“the Modification”) pursuant to a *stipulation* entered into by the parties which granted Respondent specific rights of visitation, to wit: supervised visitation “by a supervisor to be professional in the field of counseling, family services or the like. Said supervisors are to be chosen by the guardian ad litem, Jon Beetem, and the supervisor and Jon Beetem are to establish a schedule for said supervised visitation with input from the parties”.
4. That these provisions relating to visitation were entered as a result of Respondent’s pleas of guilty and subsequent convictions for the statutory rape and sodomy of Petitioner’s fourteen year old daughter from another marriage. Specifically, on January 17, 2001, Respondent pled guilty to and was subsequently sentenced to seven years confinement for violations of Section 566.032 and 566.062 RSMO in regards to said child. He was released from prison in 2004 and from parole in February of 2007.
5. That effective July 1, 2004, the Missouri General Assembly amended Section 452.375 RSMO by adding subsection 3, subparagraph 1, which provides, in part that “[i]n any court proceeding relating to custody of a child, the court shall not award custody or unsupervised visitation of a child to a parent if such parent...has been found guilty of, or pled guilty to, any of the following offenses when a child was a victim: (a) felony violation of 566.032....566.062”.
6. Pursuant to the Modification entered in 2005, Respondent began having supervised visits with the minor children which were supervised primarily by Respondent’s brother, William “Billy” Cannon, Barb Apshire and Buddy Laws. Respondent spent very

little time with the minor children prior to beginning these visitation periods because Petitioner did not want Respondent to see the children.

7. That according to all three who supervised these visits, the Respondent did nothing inappropriate with the children and Respondent did nothing that endangered their health, safety or well-being.
8. At first, the children did seem to have difficulty interacting with Respondent but as there were more visits, the children "warmed-up" to Respondent. The children started referring to Respondent as "dad".
9. On one supervised visitation in 2007, Barbara Apshire witnessed the minor child, Mercedes, take her shoes off, show her feet to Respondent and say to him "look at my toes, Dad".
10. That during Respondent's supervised visits, the children seemed to talk and interact with Respondent more openly and freely once they got a few miles from Petitioner's residence. On the return trips in the car at the end of the visits, the children became quiet and less responsive to Respondent as they got closer to Petitioner's home. The Petitioner's desire that the Respondent not see the children is responsible for this difference in how the children interact with Respondent.
11. That as a result of the supervised visitations with Respondent, the minor children have developed a relationship with and emotional ties to Respondent.
12. That the minor children have not participated in family counseling with Petitioner and Respondent because Petitioner has been unwilling to participate. Petitioner does not trust therapists.
13. That Respondent underwent extensive therapy and counseling while in prison and after being released.
14. That in 2007, Dr. David B. Clark, a forensic psychiatrist, interviewed Respondent three times for a total of 4.6 hours and concluded that Respondent's mental status was normal and that he showed "self-restraint" which was an indicator he was unlikely to re-offend.
15. Dr. Clark also administered certain tests to Respondent and concluded that there was nothing that would cause Respondent to compromise his fitness as a parent. Those tests likewise indicated Respondent would not likely act impulsively and that he had a high

sense of moral responsibility or social consciousness. One test indicated Respondent had no sexual violent tendencies.

16. That based on his evaluation and the tests he administered, Dr. Clark concluded that although Respondent may have had psychological problems in 1998 and 1999 at about the time he committed the sexual offenses against Petitioner's daughter, Respondent is not a pedophile and that neither of the minor children are at risk when they are with Respondent.
17. That based on the this and other evidence presented at trial, there has been a substantial and continuing change of circumstances in that the minor children have previously been exercising supervised visitation with Respondent and that it is appropriate and in the best interest of the minor children that Respondent be granted unsupervised visitation with the minor children. The Court finds that the schedule which is set forth in the court ordered Parenting Plan, attached hereto and incorporated herein by reference, is in the minor children's best interest for the following reasons:
 - a) That Respondent has persistently and continuously exercised supervised visitation with the minor children and such supervised visitation has shown to not be a threat or harm to the minor children and, in fact, contact with the Respondent has served the children's best interests.
 - b) That the relationship between Respondent and the minor children has been successfully rehabilitated and Respondent can meet the needs of the minor children while they are in his care.
 - c) That Respondent is vested in the children's lives and should be considered a viable member of the children's family for purpose of being involved in the children's activities, education and the like.
18. Pursuant to Section 452.375.2 RSMo, the Court has considered the following factors when making this determination.
 - a) The desires of the children's parents as to the custody and proposed parenting plan submitted by both parties. Respondent requested that his custody schedule be modified so as to afford him unsupervised visitation with his children. Petitioner requested that Respondent's custody be terminated. The Court finds that the schedule, as proposed by Petitioner, does not serve the children's best interest

- taking into account the fact that they have established a relationship with Respondent and are not at risk while in Respondent's care. This factor favors the *Respondent*.
- b) The needs of the children for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of the parents to actively perform their function for the needs of the children. Said factor further favors Respondent in that, as is clear from the evidence, Petitioner has failed to encourage a relationship between the children and Respondent. Furthermore, Petitioner's household and family members have further discouraged a relationship between the minor children and Respondent. This factor favors the *Respondent*.
- c) The interaction and relationship of the children with parents, siblings, and any other person who may significantly affect the children's best interest. The children's half siblings, Petitioner's daughter and son from another marriage, have a good relationship with the minor children as does Petitioner's current husband. However, causing Respondent's visitation to increase and changing said visitation to unsupervised would not substantially affect the interaction and relationship the minor children have with the half siblings and step-father. Additionally, the minor children have a good relationship with Respondent's brother, William "Billy" Cannon, who has supervised some of the visits with Respondent. Therefore, this factor favors *neither* of the parties.
- d) Which parent is to more likely allow the child frequent, continuing and meaningful contact with the other parent. As stated above, Petitioner has inhibited Respondent's relationship with the minor children. Petitioner's family has further attempted to damage the children's relationship with Respondent. This factor favors *Respondent*.
- e) The children's adjustment to the children's home, school and community. This factor favors *neither* parent since Respondent is not requesting a relocation or significant change in the children's primary residence.
- f) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved.

Although Petitioner expressed concern regarding Respondent's prior sexual abuse of Petitioner's daughter from another marriage, based on the testimony of Respondent's expert, Dr. David B. Clark, the Court believes that Respondent has been rehabilitated and therefore, does not pose a threat to the minor children. Although the Court finds that neither party suffers from any significant mental or physical defects, the Court does find that it is appropriate for the children, Petitioner and Respondent to be involved in counseling, including family therapy in a setting which encourages and supports therapeutic rehabilitation of the relationship between all parties and the children. Petitioner and Respondent are to agree on a such a family therapist or counselor and if they are unable to so agree, Barbara Apshire will decide. This factor favors *neither* parent.

- g) The intention of either parent to relocate the principal residence of the minor children. Again, because there is no evidence that neither parent intends to relocate the residence of the children, this factor also favors *neither* Petitioner or Respondent.
- h) The wishes of the child as to the child's custodian. The children are twelve and ten years old respectively. The guardian ad litem, Mr. Snider, testified that the children told him that they did not want to see Respondent. However, this occurred prior to the time period in which Respondent had numerous visits with the children wherein they developed a strong bond or relationship with him. Additionally, Petitioner has made a constant effort to discourage the children from seeing Respondent and the children have been affected by Petitioner's efforts. The statements by the minor children to Mr. Snider are not credible. This factor favors *neither* parent.

- 19. No evidence was presented as to Petitioner or Respondent's gross monthly income and therefore, the Court can make no findings as to the same.

20. That although Section 452.375.3 (1) RSMo precludes unsupervised visitation between Respondent and the minor children, the Court hereby finds that said preclusion does not serve the best interests of the minor children and, in addition, the Court finds said statute to be unconstitutional for the following reasons:

- a) Section 452.375.3 (1) serves to “retroactively” take away Respondent’s fundamental right to associate with his own children. This violates Article I, Section 13 of the Missouri Constitution which has been held to prohibit the enactment of any law that is “retrospective in its operation”. Jane Doe I v. Phillips, 194 S.W. 3d 833, 852 (Mo. banc 2006); Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W. 2d 338, 340 (Mo. banc 1993). “Retrospective laws” are generally defined as laws which take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty or attach a new disability in respect to transactions or considerations already past. *Id.* [Citations omitted.]. Even though Respondent did not receive unsupervised visitation with the minor children under the terms of the original Judgment in 2000, he *voluntarily* relinquished such right on his own accord. The General Assembly’s enactment of Section 452.375.3 (1) *involuntarily* took from Respondent the right to seek unsupervised visitation with the children in the future in a modification such as this one.
- b) Section 452.375.3 (1) denies Respondent a fundamental right without due process of law. Respondent’s right to maintain a parental relationship with the minor children, which is universally recognized by courts in this state and by the U.S. Supreme Court [See Wisconsin v. Yoder, 406 U.S. 645, 651 (1972); Quilloin v. Walcott, 434 U.S. 205, 232 (1972); Marriage of Kohring, 999 S.W. 2d 228, 232 (Mo banc. 1999)], is denied, by the General Assembly’s enactment of the statute, without proper notice to Respondent and a corresponding right to be heard. Where a denial of a fundamental right is affected by statute, the affected individual is entitled to notice and a right to be heard prior to any action that would result in his losing that right. Hamdi v. Rumsfeld, 542 U.S. 507, 533, 1124 S.Ct.

2633, 2648 (2004). When Respondent pled guilty to committing the sexual offenses in 2001, there were no statutes in effect that said he could *never* have unsupervised visitation with his children. He was provided with no opportunity to be heard with respect to losing his fundamental right to maintain a relationship with his children because it occurred without notice after he entered his plea of guilty.

- c) Section 452.375.3 (1) violates the Equal Protection Clause of the Fifth Amendment of the U.S. Constitution and Article I, Section 10 of the Missouri Constitution which requires that similarly situated person must be treated similarly. The class of persons the General Assembly sought to affect in enacting the statute is clearly those who had been convicted of or had pled guilty to the enumerated crimes, as Respondent had been. However, this classification “impinges upon a fundamental right explicitly or implicitly protected by the Constitution. *In the Matter of Norton, 123 S.W. 3d 170, 173 (Mo banc. 2004)*. Specifically, it impinges on Respondent’s fundamental right to associate with his children and maintain a relationship with them. Furthermore, “(t)o pass strict scrutiny review, a governmental intrusion must....be narrowly drawn to express the compelling state interest at stake. *Id.*

A person could be convicted of the murder or rape of an adult or some other violent crime or even the murder of *his or her own child* and still be eligible to receive unsupervised visitation with his or her children. But, if the person, as was Respondent, is convicted of one of the enumerated crimes in the statute, he or she can never have unsupervised visitation. The effect is to strip Respondent, and those similarly situated, of a fundamental right without a chance to prove his fitness to have visitation with his children.

The General Assembly appears to contradict itself in enacting Section 452.375.3 because the statute goes on to say, in paragraph 4, that “(t)he general assembly finds and declares it is in the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in

the best interest of the child.In order to effectuate these policies, the court shall determine the custody arrangements which will best assure both parents ...have frequent and meaningful contact with their children so long as it is in the best interest of the child". The General Assembly appears to single out parents like Respondent and deny them the opportunity to a meaningful relationship with their children but then announce that its public policy is to foster such a relationship with every parent at the discretion of the jurisdictional court.

IT IS THEREFORE ORDERED, ADJUGED AND DECREED as follows:

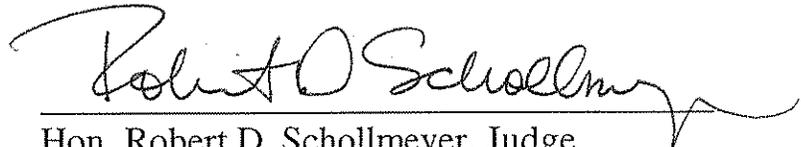
1. The Court hereby orders that the parties shall comply with any and all terms of the Judgment and Order of Dissolution of Marriage dated the 1st day of December, 2000, where said terms are not in contradiction to the terms herein.
2. The Court hereby modifies said Judgment and orders that the parties shall exercise the joint legal and physical custody of the minor children, to wit: Alekzander Storm Cannon, born July 4, 1995, and Mercedes Brooke Cannon, born December 26, 1997, pursuant to a specific schedule of custody and visitation as set forth in the Court ordered Parenting Plan attached hereto as Exhibit "A" and incorporated herein by reference, and that said Court Ordered Plan is in the best interests of the minor children.
3. That no child support shall be paid by either party to the other in that the Court has no basis for which to make a finding of the award of child support in that no income information was provided to the Court and any prayer that Petitioner originally made for an award of child support seems to be abandoned as no evidence was presented as to the same.
4. Petitioner shall continue to maintain the health insurance on the minor children and the parties shall equally divide the extraordinary expenses of the children, including, but not limited to, uncovered medical, dental, vision, and psychological expenses. The parties shall

further equally divide all agreed upon educational and extraordinary expenses of the minor children.

5. Each party is to pay their own attorneys fees.

6. The parties shall equally divide all costs, including the previously Ordered guardian ad litem fees incurred herein.

Dated: 2-13-08



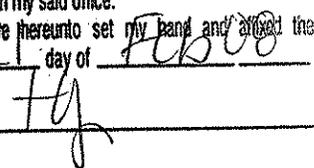
Hon. Robert D. Schollmeyer, Judge

STATE OF MISSOURI }
COUNTY OF COLE } SS

I, BRENDA A. UMSTATTD, Clerk of the Circuit Court of Cole County, Missouri, hereby certify that the above and foregoing is a full true and correct copy of

Judgment
as fully as the same remains of record in my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of my said office this 11 day of Feb 2008
BRENDA A. UMSTATTD, Clerk



Deputy Clerk
Circuit Court of Cole County, Missouri

EXHIBIT A

COURT ORDERED PARENTING PLAN

A. Children Subject to Plan (Name, social security number, and age of each child for whom this plan is proposed):

1. Alekzander Storm Cannon, born July 4, 1995
2. Mercedes Brooke Cannon, born December 26, 1997

B. Standard Orders for Parenting:

1. Each parent shall always keep the other parent informed of his or her actual residence address, mailing address if different, and home and work telephone numbers.

2. Each parent shall provide the other parent with a basic itinerary, destinations, and telephone numbers for emergency purposes when traveling out-of-town with the children.

3. Each parent shall confer on major issues regarding the children's training, education and rearing, including choice or change of school, college, special tutoring, psychological or psychiatric treatment or counseling, doctors, surgeons (other than minor illnesses), and all other material matters affecting the health, education and welfare of the children.

4. Each parent may make decisions regarding the day-to-day care and control of the children and in emergencies affecting the health and safety of the children while the children are residing with him or her.

5. Recognizing the needs of the children for a continuing relationship with each parent, each parent shall attempt to use their best efforts to foster the respect, love and affection of the children toward each parent. Each party agrees to take no action which would obviously demean the other and shall not allow others to do so. Each party shall attempt to set aside any issues and feeling of mutual antipathy for the sake of cooperating in the rearing of their children.

6. Neither party shall interfere with, or in any way hinder, the children's desire to call and speak with either parent over the telephone at any time.

7. All court related and financial communications between the parents shall occur at a time when the children are not present and , therefore, shall not occur at times of exchanges of the children or during telephone visits with the children.

8. Each parent shall inform the other parent as soon as possible of all school, sporting and other special activity notices and cooperate in the children's consistent attendance at such events.

9. Each party shall be equally entitled to school records, medical records, and any other records concerning the minor children kept by any individual or institution.

10. At least 24 hours notice of any schedule changes shall be given to the other parent, and the parent requesting a change shall be responsible for any additional child care that results from the change.

11. The children, Petitioner and Respondent are to be involved in counseling, including family therapy in a setting which encourages and supports therapeutic rehabilitation of the relationship between all parties and children, said provider(s) to be based upon the recommendation(s) of Barb Apshire.

C. Legal Responsibilities:

The parents shall share joint legal responsibility for the children, which requires that they consult and cooperate with each other in making decisions and sharing information related to the health, education and welfare of the children.

(a) JOINT LEGAL CUSTODY.

The parties wish to continue to share the responsibility for the care of their minor children and to each fully participate in all major decisions affecting their children's residence, health, education and welfare.

All major decision concerning the children's education, cultural and artistic training, participation in sports, non-emergency health treatment (excluding minor illnesses), and general welfare shall be made by both parents jointly. Each parent agrees to make no unilateral decision in these areas. The parents further agree to consult and confer with one another in a good faith effort to reach a unanimous decision on such subjects.

(b) NON-RESIDENTIAL PARENT'S RIGHTS.

At any time, the parent with whom the children are/is not residing shall have reasonable and liberal rights of communication, including unlimited contact by mail and reasonable telephone contact during the children's normal waking hours.

(c) COOPERATION ON PHYSICAL CUSTODY.

The parties agree to cooperate in the implementation of this physical custody plan so as to allow the children to enjoy the maximum benefit to be derived from the care, love and association with each parent.

(d) RECOGNITION OF THE CHILDREN'S BEST INTERESTS.

Recognizing the needs of the children for a continuing relationship with each parent, both parties shall attempt to use their best efforts to foster the respect, love and affection of the children toward each parent, and shall cooperate fully in implementing a relationship with the children that will give the children a maximum feeling of security.

Each parent shall accommodate the social and academic commitments of the children.

Each party agrees to take no action which would obviously demean the other.

FATHER and MOTHER agree that they shall attempt to set aside any issues and feeling of mutual antipathy and marital discord toward each other for the sake of cooperating in the rearing of their children.

(e) OBLIGATION TO KEEP OTHER INFORMED.

So long as the children are/is a minors, both FATHER and MOTHER shall keep the other informed as to the exact place where each of them resides, the telephone numbers of their residences, their place of employment, and if either party travels out of town for any extended periods of time (ten days or more), then such person shall notify the other of his or her destination and provide a telephone number where he or she may be reached.

Each shall attempt to notify the other of any activity such as school conferences, programs, etc., where parents are invited to attend. The presence of each at such functions shall be encouraged and welcomed by the other.

Each shall advise the other of any serious illness or injury suffered by their children as soon as possible after learning of the same and shall give the other the details of said injury or illness and the name and telephone number of the attending physician, if any. Each shall direct all doctors involved in the care and treatment to give the other all information regarding any illness or injury if either requests the same.

(f) DEATH OF A PARENT.

So long as the children are/is a minors, should one parent die, the sole legal and physical custody shall immediately transfer to the surviving parent and not be subject to any claims from any third-person claiming a custodial right to the minor child.

(g) CHILDREN'S PRIMARY RESIDENCE FOR EDUCATIONAL PURPOSES.

For educational purposes only, MOTHER's residence shall be designated the children's primary residence. The children's schools shall be informed by both MOTHER and FATHER that both parents are entitled to the children's educational mailings and information.

(h) CHANGE OF SCHOOLS.

The children shall continue to attend the schools where they are currently enrolled. However, any decision regarding a change in the schools attended by the children shall be determined by mutual decision.

(i) NON-RECURRING ACTIVITIES.

Each parent shall make the determination as to the children's participation in non-recurring school, organized activities or social events while in the actual physical custody of that parent. However, each parent will communicate information concerning those activities to the other parent so that the other parent is aware of and may attend such activities and events.

(j) RECURRING ACTIVITIES.

Neither parent shall arbitrarily enroll or commit the minor children to any recurring, organized activities, within the school or community, which would impact the other parent's periods of custody and visitation, without the express permission of the other parent.

D. Residential and Visitation Schedule:

1. PHYSICAL CUSTODY. MOTHER and FATHER shall have joint physical custody of the minor children, subject to the periods of temporary custody of FATHER.

2. CUSTODY SCHEDULE. FATHER shall have temporary custody with the minor children at all times as agreed upon by the parties. In the event of disagreement, then FATHER shall have visitation at a minimum as follows:

(a) WEEKENDS: Every other weekend beginning at 5:00 p.m. on Friday through 5:00 p.m. on Sunday. The first weekend shall be on the first weekend following the date of the Judgment and Decree.

(b) HOLIDAYS AND SPECIAL DAYS:

i. Holiday and special day custody shall prevail over weekend, weekday, and summer visitation.

ii. Mother shall have custody of the minor child on her birthday (unless it is a school day and then the birthday visitation shall commence at 5:00 p.m. and end at 9:00 p.m.) and on Mother's Day each year from 9:00 a.m. to 9:00 p.m.; plus Holiday Group A in even-numbered years and Holiday Group B in odd-numbered years.

iii. Father shall have custody of the minor child on his birthday (unless it is a school day and then the birthday visitation shall commence at 5:00 p.m. and end at 9:00 p.m.) and on Father's Day each year from 9:00 a.m. to 9:00 p.m.; plus Holiday Group A in odd-numbered years and Holiday Group B in even-numbered years.

HOLIDAY GROUP A

1. MARTIN LUTHER KING DAY weekend from 6:00 p.m. the Friday prior through 6:00 p.m. on the Monday holiday.
2. MEMORIAL DAY weekend from 6:00 p.m. the Friday prior through 6:00 p.m. on the Monday holiday.
3. LABOR DAY weekend from 6:00 p.m. the Friday prior through 6:00 p.m. on the Monday holiday.
4. CHRISTMAS vacation from December 25 beginning at 10:00 a.m. through 9:00 a.m. on December 31.
5. The Saturday before EASTER from 9:00 a.m. until 9:00 p.m.
6. THANKSGIVING DAY from 9:00 a.m. until 9:00 p.m.

HOLIDAY GROUP B

1. PRESIDENT'S DAY/WASHINGTON'S BIRTHDAY (OBSERVED) weekend from 6:00 p.m. the Friday prior through 6:00 p.m. on the Monday holiday.
2. INDEPENDENCE DAY (July 4) holiday from 9:00 a.m. on July 4 until 9:00 a.m. on July 5.
3. EASTER Sunday from 9:00 a.m. until 9:00 p.m.
4. The Friday immediately following THANKSGIVING from 9:00 a.m. until 9:00 p.m.
5. Christmas vacation from 6:00 p.m. the day the child's school Christmas vacation begins through 10:00 a.m. on December 25 and December 31 beginning at 9:00 a.m. through 6:00 p.m. the day before the child's school Christmas vacation ends.
6. The child's birthday from 9:00 a.m. until 9:00 p.m. if not on a school day, and from 5:00 p.m. to 9:00 p.m. if on a school day.

(c) SUMMER VACATION: FATHER shall have the minor child each summer for six (6) weeks, in three (3) blocks of two (2) weeks each. The custodial parent shall be given sixty (60) days advance notice of weeks desired.

(d) TRANSPORTATION AND PUNCTUALITY: MOTHER and FATHER shall each equally contribute to the costs associated with the transportation of the minor children for the purposes of exchange. If the parties are unable to agree, they shall meet at a point half-

way between their respective residences at the beginning and end of the visitation periods set out herein to FATHER.

E. Dispute Resolution

1. Parents shall attempt to resolve any matters on which they disagree or which involve interpreting the parenting plan through the following alternative dispute resolution process prior to any court action:

- a. Counseling by ; or
 Mediation by a mutually agreed to mediator, or if no agreement, then each party shall select their own mediator and those mediators shall select a third mediator to mediate the dispute accordingly.
- b. The cost of this process shall be allocated between the parties as follows:
50 % Mother 50 % Father; or
 based on each party's proportional share of income; or
 as determined in the dispute resolution process
- c. The process shall be started by notifying the other party by:
 written request certified mail other (specify)

2. Subsequent to the above mediation clause, all matters on which the parents disagree or which involve interpreting the parenting plan and for which the court has authority to act shall be resolved through appropriate court action.

▶ Vernon's Annotated Missouri Statutes Currentness

Title XXX. Domestic Relations

▣ Chapter 452. Dissolution of Marriage, Divorce, Alimony and Separate Maintenance (Refs & Annos)

▣ Dissolution of Marriage (Refs & Annos)

→ **452.375. Custody of children--standard--relevant factors--public policy-- parental exchange of information--preferences--joint custody--access to records--domestic violence**

1. As used in this chapter, unless the context clearly indicates otherwise:

(1) **"Custody"** means joint legal custody, sole legal custody, joint physical custody or sole physical custody or any combination thereof;

(2) **"Joint legal custody"** means that the parents share the decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child, and, unless allocated, apportioned, or decreed, the parents shall confer with one another in the exercise of decision-making rights, responsibilities, and authority;

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

(4) **"Third-party custody"** means a third party designated as a legal and physical custodian pursuant to subdivision (5) of subsection 5 of this section.

2. The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

(1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;

(2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;

(3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;

(4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;

(5) The child's adjustment to the child's home, school, and community;

(6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved. If the court finds that a pattern of domestic violence has occurred, and, if the court also finds that awarding custody to the abusive parent is in the best interest of the child, then the court shall enter written findings of fact and

V.A.M.S. 452.375

conclusions of law. Custody and visitation rights shall be ordered in a manner that best protects the child and any other child or children for whom the parent has custodial or visitation rights, and the parent or other family or household member who is the victim of domestic violence from any further harm;

(7) The intention of either parent to relocate the principal residence of the child; and

(8) The wishes of a child as to the child's custodian.

The fact that a parent sends his or her child or children to a home school, as defined in section 167.031, RSMo, shall not be the sole factor that a court considers in determining custody of such child or children.

3. (1) In any court proceedings relating to custody of a child, the court shall not award custody or unsupervised visitation of a child to a parent if such parent or any person residing with such parent has been found guilty of, or pled guilty to, any of the following offenses when a child was the victim:

(a) A felony violation of section 566.030, 566.032, 566.040, 566.060, 566.062, 566.064, 566.067, 566.068, 566.070, 566.083, 566.090, 566.100, 566.111, 566.151, 566.203, 566.206, 566.209, 566.212, or 566.215, RSMo;

(b) A violation of section 568.020, RSMo;

(c) A violation of subdivision (2) of subsection 1 of section 568.060, RSMo;

(d) A violation of section 568.065, RSMo;

(e) A violation of section 568.080, RSMo;

(f) A violation of section 568.090, RSMo; or

(g) A violation of section 568.175, RSMo.

(2) For all other violations of offenses in chapters 566 and 568, RSMo, not specifically listed in subdivision (1) of this subsection or for a violation of an offense committed in another state when a child is the victim that would be a violation of chapter 566 or 568, RSMo, if committed in Missouri, the court may exercise its discretion in awarding custody or visitation of a child to a parent if such parent or any person residing with such parent has been found guilty of, or pled guilty to, any such offense.

4. The general assembly finds and declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child, except for cases where the court specifically finds that such contact is not in the best interest of the child, and that it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children, and to resolve disputes involving their children amicably through alternative dispute resolution. In order to effectuate these policies, the court shall determine the custody arrangement which will best assure both parents participate in such decisions and have frequent, continuing and meaningful contact with their children so long as it is in the best interests of the child.

5. Prior to awarding the appropriate custody arrangement in the best interest of the child, the court shall consider each of the following as follows:

(1) Joint physical and joint legal custody to both parents, which shall not be denied solely for the reason that one parent

V.A.M.S. 452.375

opposes a joint physical and joint legal custody award. The residence of one of the parents shall be designated as the address of the child for mailing and educational purposes;

(2) Joint physical custody with one party granted sole legal custody. The residence of one of the parents shall be designated as the address of the child for mailing and educational purposes;

(3) Joint legal custody with one party granted sole physical custody;

(4) Sole custody to either parent; or

(5) Third-party custody or visitation:

(a) When the court finds that each parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires, and it is in the best interests of the child, then custody, temporary custody or visitation may be awarded to any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child. Before the court awards custody, temporary custody or visitation to a third person under this subdivision, the court shall make that person a party to the action;

(b) Under the provisions of this subsection, any person may petition the court to intervene as a party in interest at any time as provided by supreme court rule.

6. If the parties have not agreed to a custodial arrangement, or the court determines such arrangement is not in the best interest of the child, the court shall include a written finding in the judgment or order based on the public policy in subsection 4 of this section and each of the factors listed in subdivisions (1) to (8) of subsection 2 of this section detailing the specific relevant factors that made a particular arrangement in the best interest of the child. If a proposed custodial arrangement is rejected by the court, the court shall include a written finding in the judgment or order detailing the specific relevant factors resulting in the rejection of such arrangement.

7. Upon a finding by the court that either parent has refused to exchange information with the other parent, which shall include but not be limited to information concerning the health, education and welfare of the child, the court shall order the parent to comply immediately and to pay the prevailing party a sum equal to the prevailing party's cost associated with obtaining the requested information, which shall include but not be limited to reasonable attorney's fees and court costs.

8. As between the parents of a child, no preference may be given to either parent in the awarding of custody because of that parent's age, sex, or financial status, nor because of the age or sex of the child.

9. Any judgment providing for custody shall include a specific written parenting plan setting forth the terms of such parenting plan arrangements specified in subsection 7 of section 452.310. Such plan may be a parenting plan submitted by the parties pursuant to section 452.310 or, in the absence thereof, a plan determined by the court, but in all cases, the custody plan approved and ordered by the court shall be in the court's discretion and shall be in the best interest of the child.

10. Unless a parent has been denied custody rights pursuant to this section or visitation rights under section 452.400, both parents shall have access to records and information pertaining to a minor child, including, but not limited to, medical, dental, and school records. If the parent without custody has been granted restricted or supervised visitation because the court has found that the parent with custody or any child has been the victim of domestic violence, as defined in section 455.200, RSMo, by the parent without custody, the court may order that the reports and records made available pursuant to this subsection not include the address of the parent with custody or the child. Unless a parent has been denied custody rights pursuant to this section or visitation rights under section 452.400, any judgment

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of dissolution or other applicable court order shall specifically allow both parents access to such records and reports.

11. Except as otherwise precluded by state or federal law, if any individual, professional, public or private institution or organization denies access or fails to provide or disclose any and all records and information, including, but not limited to, past and present dental, medical and school records pertaining to a minor child, to either parent upon the written request of such parent, the court shall, upon its finding that the individual, professional, public or private institution or organization denied such request without good cause, order that party to comply immediately with such request and to pay to the prevailing party all costs incurred, including, but not limited to, attorney's fees and court costs associated with obtaining the requested information.

12. An award of joint custody does not preclude an award of child support pursuant to section 452.340 and applicable supreme court rules. The court shall consider the factors contained in section 452.340 and applicable supreme court rules in determining an amount reasonable or necessary for the support of the child.

13. If the court finds that domestic violence or abuse, as defined in sections 455.010 and 455.501, RSMo, has occurred, the court shall make specific findings of fact to show that the custody or visitation arrangement ordered by the court best protects the child and the parent or other family or household member who is the victim of domestic violence or abuse, as defined in sections 455.010 and 455.501, RSMo, and any other children for whom such parent has custodial or visitation rights from any further harm.

CREDIT(S)

(L.1973, p. 189, H.B. No. 315, § 16, eff. Jan. 1, 1974. Amended by L.1982, p. 641, S.B. No. 468, § A; L.1983, p. 783, S.B. No. 94, § 1; L.1984, p. 732, H.B. No. 1513, § 1; L.1986, H.B. No. 1479, § 1; L.1988, H.B. Nos. 1272, 1273 & 1274, § A; L.1989, H.B. No. 422, § A; L.1990, H.B. Nos. 1370, 1037 & 1084, § A; L.1993, S.B. No. 180, § A; L.1995, S.B. No. 174, § A; L.1998, S.B. No. 910, § A; L.2004, H.B. No. 1453, § A; L.2005, H.B. No. 568, § A.)

or modification of child dissolution decree was not the basis that, in general, the older but must present of the children for which *v. Farris*, 733 S.W.2d 819

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marriage or legal separation and the custody or visitation of a minor child is involved, the court shall order all parties to the action to attend educational sessions pursuant to section 452.605. Parties to a modification proceeding who previously have attended educational sessions pursuant to section 452.605 may also be required to attend such educational sessions.

2. In cases involving custody or visitation issues, the court may, except for good cause shown or as provided in subsection 3 of this section, order the parties to the action to participate in an alternative dispute resolution program pursuant to supreme court rule to resolve any issues in dispute or may set a hearing on the matter. As used in this section, "good cause" includes, but is not limited to, uncontested custody or temporary physical custody cases, or a finding of domestic violence or abuse as determined by a court with jurisdiction after all parties have received notice and an opportunity to be heard, but does not mean the absence of qualified mediators.

3. Any alternative dispute resolution program ordered by the court pursuant to this section may be paid for by the parties in a proportion to be determined by the court, the cost of which shall be reasonable and customary for the circuit in which the program is ordered, and shall:

- (1) Not be binding on the parties;
- (2) Not be ordered or used for contempt proceedings;
- (3) Not be ordered or utilized for child support issues; and
- (4) Not be used to modify a prior order of the court, except by agreement of the parties.

4. Within one hundred twenty days after August 28, 1998, the Missouri supreme court shall have a rule in effect allowing, but not requiring, each circuit to establish an alternative dispute resolution program for proceedings involving issues of custody and temporary physical custody relating to the child.

(L. 1998 S.B. 910)

452.375. Custody — definitions — factors determining custody — prohibited, when — public policy of state — custody options plan, when required — findings required, when — exchange of information and right to certain records, failure to disclose — fees, costs assessed,

when — joint custody not to preclude child support — support, how determined — domestic violence or abuse, specific findings. — 1. As used in this chapter, unless the context clearly indicates otherwise:

(1) "Custody", means joint legal custody, sole legal custody, joint physical custody or sole physical custody or any combination thereof;

(2) "Joint legal custody" means that the parents share the decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child, and, unless allocated, apportioned, or decreed, the parents shall confer with one another in the exercise of decision-making rights, responsibilities, and authority;

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

(4) "Third-party custody" means a third party designated as a legal and physical custodian pursuant to subdivision (5) of subsection 5 of this section.

2. The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

- (1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;
- (2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
- (3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;

(4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;

(5) The child's adjustment to the child's home, school, and community;

(6) The mental and physical health of all individuals involved, including any history of

abuse of any individuals involved. If the court finds that a pattern of domestic violence has occurred, and, if the court also finds that awarding custody to the abusive parent is in the best interest of the child, then the court shall enter written findings of fact and conclusions of law. Custody and visitation rights shall be ordered in a manner that best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm;

(7) The intention of either parent to relocate the principal residence of the child; and

(8) The wishes of a child as to the child's custodian.

The fact that a parent sends his or her child or children to a home school, as defined in section 167.031, RSMo, shall not be the sole factor that a court considers in determining custody of such child or children.

3. The court shall not award custody of a child to a parent if such parent has been found guilty of, or pled guilty to, a felony violation of chapter 566, RSMo, when the child was the victim, or a violation of chapter 568, RSMo, except for section 568.040, RSMo, when the child was the victim.

4. The general assembly finds and declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child, except for cases where the court specifically finds that such contact is not in the best interest of the child, and that it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children, and to resolve disputes involving their children amicably through alternative dispute resolution. In order to effectuate these policies, the court shall determine the custody arrangement which will best assure both parents participate in such decisions and have frequent, continuing and meaningful contact with their children so long as it is in the best interests of the child.

5. Prior to awarding the appropriate custody arrangement in the best interest of the child, the court shall consider each of the following as follows:

(1) Joint physical and joint legal custody to both parents, which shall not be denied solely for the reason that one parent opposes a joint physical and joint legal custody award. The residence of one of the parents shall be designated as the address of the child for mailing and educational purposes;

(2) Joint physical custody with one party granted sole legal custody. The residence of one of the parents shall be designated as the address of the child for mailing and educational purposes;

(3) Joint legal custody with one party granted sole physical custody;

(4) Sole custody to either parent; or

(5) Third-party custody or visitation:

(a) When the court finds that each parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires, and it is in the best interests of the child, then custody, temporary custody or visitation may be awarded to any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child. Before the court awards custody, temporary custody or visitation to a third person under this subdivision, the court shall make that person a party to the action;

(b) Under the provisions of this subsection, any person may petition the court to intervene as a party in interest at any time as provided by supreme court rule.

6. If the parties have not agreed to a custodial arrangement, or the court determines such arrangement is not in the best interest of the child, the court shall include a written finding in the judgment or order based on the public policy in subsection 4 of this section and each of the factors listed in subdivisions (1) to (8) of subsection 2 of this section detailing the specific relevant factors that made a particular arrangement in the best interest of the child. If a proposed custodial arrangement is rejected by the court, the court shall include a written finding in the judgment or order detailing the specific relevant factors resulting in the rejection of such arrangement.

7. Upon a finding by the court that either parent has refused to exchange information with the other parent, which shall include but not be limited to information concerning the health,

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education and welfare of the child, the court shall order the parent to comply immediately and to pay the prevailing party a sum equal to the prevailing party's cost associated with obtaining the requested information, which shall include but not be limited to reasonable attorney's fees and court costs.

8. As between the parents of a child, no preference may be given to either parent in the awarding of custody because of that parent's age, sex, or financial status, nor because of the age or sex of the child.

9. Any judgment providing for custody shall include a specific written parenting plan setting forth the terms of such parenting plan arrangements specified in subsection 7 of section 452.310. Such plan may be a parenting plan submitted by the parties pursuant to section 452.310 or, in the absence thereof, a plan determined by the court, but in all cases, the custody plan approved and ordered by the court shall be in the court's discretion and shall be in the best interest of the child.

10. Unless a parent has been denied custody rights pursuant to this section or visitation rights under section 452.400, both parents shall have access to records and information pertaining to a minor child, including, but not limited to, medical, dental, and school records. If the parent without custody has been granted restricted or supervised visitation because the court has found that the parent with custody or the child has been the victim of domestic violence, as defined in section 455.200, RSMo, by the parent without custody, the court may order that the reports and records made available pursuant to this subsection not include the address of the parent with custody or the child. Unless a parent has been denied custody rights pursuant to this section or visitation rights under section 452.400, any judgment of dissolution or other applicable court order shall specifically allow both parents access to such records and reports.

11. Except as otherwise precluded by state or federal law, if any individual, professional, public or private institution or organization denies access or fails to provide or disclose any and all records and information, including, but not limited to, past and present dental, medical and school records pertaining to a minor child, to either parent upon the written request of such parent, the court shall, upon its finding that the

individual, professional, public or private institution or organization denied such request without good cause, order that party to comply immediately with such request and to pay to the prevailing party all costs incurred, including, but not limited to, attorney's fees and court costs associated with obtaining the requested information.

12. An award of joint custody does not preclude an award of child support pursuant to section 452.340 and applicable supreme court rules. The court shall consider the factors contained in section 452.340 and applicable supreme court rules in determining an amount reasonable or necessary for the support of the child.

13. If the court finds that domestic violence or abuse, as defined in sections 455.010 and 455.501, RSMo, has occurred, the court shall make specific findings of fact to show that the custody or visitation arrangement ordered by the court best protects the child and the parent or other family or household member who is the victim of domestic violence or abuse, as defined in sections 455.010 and 455.501, RSMo, from any further harm.

(L. 1973 H.B. 315 § 16, A.L. 1982 S.B. 468, A.L. 1983 S.B. 94, A.L. 1984 H.B. 1513 subsecs. 1 to 5, 7, A.L. 1986 H.B. 1479, A.L. 1988 H.B. 1272, et al., A.L. 1989 H.B. 422, A.L. 1990 H.B. 1370, et al., A.L. 1993 S.B. 180, A.L. 1995 S.B. 174, A.L. 1998 S.B. 910)

(1976) The desirability of awarding custody of children of tender years, especially girls, to their mother should not be indulged in to the extent of excluding all other relevant matters. *R.G.T. v. Y.G.T.* (A.), 543 S.W.2d 330.

(1976) This section does not change the ruling case law that general custody of a child must be awarded to one parent or the other unless they are both unfit. Decree awarding joint custody held void. *Cradic v. Cradic* (A.), 544 S.W.2d 605.

(1976) Child support portion of decree ordering husband to "maintain and provide for the necessities for the two children born of this marriage" held to be indefinite and void. Since it is a judgment for money, decree must specify with certainty the amount for which it is rendered. *Cradic v. Cradic* (A.), 544 S.W.2d 605.

(1977) Held, giving father temporary custody of children five times a year was abuse of discretion when children lived in Maine and father in Missouri. *Taylor v. Taylor* (A.), 548 S.W.2d 866.

(1985) Held that this section does not require agreement between the parties as a prerequisite of joint custody. The court may order joint custody over the objection of a parent. *Goldberg v. Goldberg* (A.), 691 S.W.2d 312.

(1987) Husband was properly awarded the house and custody of the children and wife's visitation rights were properly limited in view of wife's decision to openly practice homosexuality and court was not in error for amending judgment of decree ten days after it had been entered into the record taking the home, custody of the children, maintenance and support away from wife after husband discovered his wife's homosexual relations. *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo.App.E.D.).

452.376. Noncustodial parent's right to receive child's school progress reports — administrative fees to be set by school, when —