Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

IN THE SUPREME COURT OF MISSOURI

| | | |
|---|---|---|
| CHARLES MATTHEW SOEHLKE, | ) | |
| Petitioner/Respondent, | ) | |
| v. | ) | Appeal No. SC92872 |
| ANGELA CRUMER-SOEHLKE, | ) | |
| Respondent/Appellant. | ) | |

ON APPEAL FROM THE SCOTT COUNTY CIRCUIT COURT
HONORABLE W.H.WINCHESTER, III, PRESIDING

# SUBSTITUTE BRIEF OF APPELLANT ANGELA CRUMER-SOEHLKE

**GREG L. ROBERTS, #31793**
**THOMAS H. ROLWING, JR., #47825**
**THE ROBERTS LAW FIRM, P.C.**
215 Chesterfield Business Parkway
Chesterfield, Missouri 63005
Phone: (636) 530-9199
Fax: (636) 530-6805
Email: greg@therobertslawfirm.net
thomas@therobertslawfirm.net

**DANIEL R. SCHRAMM, #28529**
**DANIEL R. SCHRAMM, L.L.C.**
121 Chesterfield Business Parkway
Chesterfield, Missouri 63005
Telephone: (636) 532-2300
Fax: (636) 532-6002
E-Mail: daniel@dschrammlaw.com

**Attorneys for Appellant**

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

## TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES.....6

JURISDICTIONAL STATEMENT.....8

STATEMENT OF FACTS.....9

A. Nature of the Case.....9

B. Procedural History.....9

C. Summary of the Evidence.....14

POINTS RELIED ON.....18

ARGUMENT.....23

STANDARD OF REVIEW FOR ALL POINTS.....23

I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO APPOINT A GUARDIAN AD LITEM *SUA SPONTE* BECAUSE SUCH AN APPOINTMENT WAS MANDATED UNDER §452.423.2 RSMO IN THAT FATHER CHARGED IN HIS PLEADING THAT MOTHER COMMITTED ACTS AMOUNTING TO ABUSE OR NEGLECT, AND MORE SPECIFICALLY, FATHER RAISED INFLAMMATORY ALLEGATIONS MOTHER THREATENED THE CHILD WITH MISSING SCHEDULED ACTIVITIES IF HE SPENT TIME WITH FATHER, THAT MOTHER SHARED A BED WITH A MUSLIM MAN OF SUPPOSEDLY QUESTIONABLE MORALS WHILE THE CHILD WAS PRESENT, THAT MOTHER

REFUSED TO ALLOW THE CHILD TO ATTEND A FUNERAL WITH FATHER'S FAMILY AND THAT MOTHER GENERALLY ALIENATED THE CHILD FROM FATHER; THAT THE TRIAL COURT LATER RAISED THE SPECTER OF EMOTIONAL ABUSE OR NEGLECT ON THE RECORD BY ACCUSING BOTH PARENTS OF INEXCUSABLE CONDUCT AND PLACING THE CHILD IN THE MIDDLE OF THEIR DISPUTES; AND EVEN THOUGH NEITHER MOTHER NOR FATHER REQUESTED THE APPOINTMENT OF A GUARDIAN AD LITEM, THE TRIAL COURT HAD AN OVERRIDING DUTY TO MAKE THE APPOINTMENT TO PROTECT THE INTEREST OF THE CHILD.....24

A. The duty of the trial court to appoint a guardian ad litem under §452.423.2 RSMo.....25

B. Father raised inflammatory allegations about Mother that amounted to charges of abuse or neglect.....27

C. The trial court's own accusations on the record raised the specter of emotional abuse or neglect.....28

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A CONTINUATION OF THE PRIOR CUSTODY EXCHANGES THAT CALL FOR WEEKEND VISITATION TO BEGIN AT 6:00 P.M. AT AN "AGREED UPON LOCATION IN



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

COLUMBIA, MISSOURI," BECAUSE THESE PROVISIONS ARE VAGUE, UNWORKABLE, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE RECORD SHOWED THAT THESE SAME CUSTODY EXCHANGE PROVISIONS HAD PROVEN TO BE UNWORKABLE IN THE PAST, THE TRIAL COURT ACKNOWLEDGED THAT THE PARTIES HAD NOT DEMONSTRATED THE DEGREE OF COOPERATION REQUIRED FOR CONTINUED CUSTODY EXHANGES AT AN "AGREED UPON LOCATION" IN COLUMBIA, AND THE UNDISPUTED EVIDENCE SHOWED LOGISTICAL PROBLEMS THAT THE PARENTS FACE IN TRAVELLING TO COLUMBIA BY 6:00 P.M. CONSISTENT WITH THEIR RESPECTIVE WORK SCHEDULES AND THE CHILD'S SCHOOL SCHEDULE. .....29

A. This Court has authority to reverse vague and unworkable custody provisions.....31

B. The record in this appeal shows that the terms for custody exchanges in Columbia have been and continue to be unworkable.....31

III. THE TRIAL COURT ABUSED ITS DISCRETION IN CHANGING THE RESIDENCE OF THE CHILD FOR MAILING AND EDUCATIONAL PURPOSES TO FATHER'S RESIDENCE



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

**BECAUSE THE TRIAL COURT FAILED TO CONSIDER ALL RELEVANT "BEST INTEREST" FACTORS TO JUSTIFY SUCH A MODIFICATION UNDER §452.375.2 RSMO IN THAT THE TRIAL ADMITTED IN ITS FINDINGS THAT LITTLE OR NO EVIDENCE WAS PRESENTED ON (1) THE CHILD'S HOME SCHOOL AND COMMUNITY; (2) IF EITHER THE PARENT OR THE CHILD SUFFERS FROM ANY PHYSICAL OR MENTAL HEALTH PROBLEM OR (3) THE WISHES OF THIS NINE-YEAR OLD CHILD; AND THE TRIAL COURT DISREGARDED FATHER'S INTENT TO RELOCATE THE CHILD FROM KANSAS TO MISSOURI AS A RELEVANT CONSIDERATION; BUT WHEN MOTHER PRESENTED A POST-TRIAL MOTON WITH A SUPPORTING AFFIDAVIT AND SCHOOL AND PHONE RECORDS TO HIGHLIGHT THE NEED FOR MORE FINDINGS ON THE OMITTED FACTORS, THE TRIAL COURT IMPROPERLY DENIED THE MOTION .....33**

**A. The trial court was obligated to consider those factors bearing on the best interest of the child under §452.375.2 RSMo.....35**

**B. The trial court's own findings reveal that relevant factors were never considered.....36**

C. Mother showed the need for more findings in her motion for a new trial.....37

IV. THE TRIAL COURT ERRED IN ADOPTING ITS AMENDED PARENTING PLAN *NUNC PRO TUNC* WITHOUT PRIOR NOTICE OR HEARING BECAUSE THIS ACTION EXCEEDED THE TRIAL COURT'S AUTHORITY UNDER SUPREME COURT RULE 74.06(a) IN THAT THE POWER OF A COURT TO CORRECT A JUDGMENT *NUNC PRO TUNC* IS LIMITED TO CORRECTING CLERICAL MISTAKES ARISING FROM INADVERTENT ERRORS OR OMISSIONS IN THE RECORD AND CANNOT BE USED, AS HERE, TO IMPOSE SUBSTANTIVE CHANGES IN THE DISCRETIONARY AUTHORITY OF THE COURT TO ADOPT A PHYSICAL CUSTODY SCHEDULE.....39

A. The limited power of a trial court to correct clerical mistakes in a judgment under Supreme Court Rule 74.06(a).....40

B. The trial court exceeded its authority when it imposed substantive changes in the Parenting Plan *nunc pro tunc*..... 41

CONCLUSION.....44

CERTIFICATE UNDER RULE 84.06(c).....45

CERTIFICATE OF SERVICE.....46



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

## TABLE OF AUTHORITIES

**CASE LAW** **PAGE**

*Anderson v. Anderson,* 854 S.W.2d 32 (Mo.App.W.D. 1993).....20, 31

*Capehart v. Capehart,* 110 S.W.3d 920 (Mo.App.S.D. 2003).....23, 30, 34

*Cluck v. Cluck,* 121 S.W.3d 271 (Mo.App.S.D. 2003).....20, 31

*Davis v. Schmidt,* 210 S.W.3d 494 (Mo.App.W.D. 2007).....21, 36

*Dobson v. Riedel Survey & Engineering Co., Inc.,* 973 S.W.2d 918

(Mo.App.W.D. 1998).....40, 41

*Frazier v. Frazier,* 845 S.W.2d 130 (Mo.App.W.D. 1993).....19, 26

*Keck v. Keck,* 996 S.W.2d 652 (Mo.App.E.D. 1999).....22, 41, 43

*Ludvik v. Ludvik,* 969 S.W.2d 284 (Mo.App.E.D. 1998).....19, 26

*Marquez v. Marquez,* 136 S.W.3d 574 (Mo.App.S.D. 2004).....30, 34

*Marriage of Brooke,* 773 S.W.2d 496 (Mo.App.S.D. 1989).....20, 31

*Marriage of Swallows,* 172 S.W.3d 912 (Mo.App.S.D. 2005).....21, 23, 36

*McArthur v. McArthur,* 982 S.W.2d 755 (Mo.App.E.D. 1998).....19, 26, 27

*Pearson v. Koster,* 367 S.W.3d 36 (Mo. banc 2012).....24

*Pirtle v. Cook,* 957 S.W.2d 235 (Mo. banc 1997).....22, 40

*Rinehart v. Rinehart,* 877 S.W.2d 205 (Mo.App.S.D. 1994).....23, 24, 30

*Rombach v. Rombach,* 867 S.W.2d 500 (Mo. banc 1993).....27

*Searcy v. Seedorff,* 8 S.W.3d 113 (Mo. banc 1999).....21, 37

*Seitz v. Seitz,* 107 S.W.3d 478 (Mo.App.S.D. 2003).....22, 41, 43

*Sewell-Davis v. Franklin,* 174 S.W.3d 58 (Mo.App.W.D. 2005).....21, 23, 36, 38

*Siegenthaler v. Siegenthaler,* 761 S.W.2d 262 (Mo.App.E.D. 1988).....42

*Strangeland v. Strangeland,* 33 S.W.3d 696 (Mo.App.W.D. 2000).....30

*Sullivan v. Miner,* 180 S.W.3d 531 (Mo.App.E.D. 2006).....22, 24, 40, 41, 43

*Taylor v. Taylor,* 996 S.W.3d 652 (Mo.App.E.D. 2001).....19, 23, 26, 27

*Womack v. McCullough,* 358 S.W.2d 66 (Mo. 1962).....38

**STATUTES**

§210.110(1) RSMo (1986).....27

§210.110(8) RSMo (1994).....27

§452.375.2 RSMo (2012).....11, 13, 21, 22, 33, 34, 35, 36, 38, 39, 44

§452.423.2 RSMo (2012).....12, 19, 23, 24, 25, 26

**RULES**

Mo.Sup.Ct. R. 74.06(a).....22, 39, 40, 43

Mo.Sup.Ct. R. 75.01.....43

**CONSTITUTIONAL AUTHORITY**

Mo.Const., art. V, §10.....8



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

## JURISDICTIONAL STATEMENT

This is an appeal from a judgment and parenting plan modifying the physical custody of a minor child. (L.F. 69-79.) The marriage between appellant Angela Crumer-Soehlke ("Mother") and respondent Charles Matthew Soehlke ("Father") was dissolved in 2005. (L.F. 69.) The parties shared joint legal custody of their child, but Mother had primary physical custody in Manhattan, Kansas. (L.F. 70.) Father filed motions for contempt and to modify custody. (L.F. 36-55.) On September 14, 2011, Judge W.H. Winchester, III of the Scott County Circuit Court (the "trial court") issued a Judgment of Modification. (L.F. 69-79) The trial court later adopted an Amended Parenting Plan *nunc pro tunc* to formally grant Father primary physical custody in Marble Hill, Missouri. (L.F. 89-99.) On October 12, 2011, Mother filed a motion for a new trial or to amend the Judgment. (L.F. 109-141.) Mother's motion was denied. (L.F. 170.) Mother then filed her notice of appeal on November 21, 2011. (L.F. 171-72.) On September 5, 2012, the Southern District issued an unpublished Memorandum Opinion ("Opinion") affirming the Judgment. The Southern District found defects in Mother's brief and declared that such defects rendered it impossible to the Court to review her specific claims of error. (Opinion, p. 5.) Mother filed a motion for rehearing or transfer, which was denied, and Mother then applied to this Court for transfer. On November 20, 2012, this Court sustained Mother's application for transfer under its discretionary authority pursuant to Article 5, §10 of the Missouri Constitution. (Order Sustaining Application, filed November 20, 2012.)

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

## STATEMENT OF FACTS

### Nature of the Case

This is an appeal from a judgment and amended parenting plan to modify the physical custody of a minor child. (L.F. 69-79, 89-99.) Mother is challenging various aspects of the trial court's decision to grant Father's request for a change in physical custody. (See Points 1-IV, pp. 18-22.) The effect of the modification and amended parenting plan was to relocate the child from Mother's home in Manhattan, Kansas to Father's home in Marble Hill, Missouri. (L.F. 70-71, 77-78, 92.) The Southern District affirmed the judgment, not on the merits, but solely because of a defective brief. (Southern District Opinion, p. 5.) This Court sustained Mother's application for transfer and suggested that Mother could submit this Substitute Brief under Rule 83.08. (Order Sustaining Application, dated November 20, 2012.)

### Procedural History

The marriage between Mother and respondent Father was dissolved in 2005. (L.F. 69.) The parties shared joint legal custody of their minor child, but Mother had primary physical custody. (L.F. 70.) Father filed motions to for contempt and to modify custody. (L.F. 36-55.) At the time Father filed his motions, Mother had primary physical custody of the child in Manhattan, Kansas. (L.F. 70.) The purpose of Father's motions was to obtain primary physical custody and to relocate the principal residence of the child to Father's home in Marble Hill, Missouri. (L.F. 70-71.)

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Mother contends in this appeal that Father raised sufficient allegations to require the appointment of a guardian ad litem. (See, Point I, p. 17; L.F. 42-44.) In his First Amended Motion for Modification, Father alleges that Mother threatened the child with missing activities like attending Cardinal baseball games, family outings, and Tae-Kwon-Do if the child spent more time with Father; that Mother frequently shared a bed with a Muslim man named Imad Khamis while the child was present; that Khamis supposedly had questionable morals and told the child that it was permissible for him to have more than one wife; that Mother refused to allow the child to a attend a funeral with Father's family; and that Mother generally alienated the child from Father. (L.F. 42-44.)

Neither Mother nor Father requested the appointment of a guardian ad litem before trial. (Tr. 3.) And the trial court found nothing in the allegations to justify the appointment of a guardian ad litem *sua sponte*. (Tr. 3.) The trial court made reference to a letter from a prior guardian ad litem showing that she had not been reappointed for this proceeding. (Tr. 3; L.F. 62.)

After the trial, the trial court issued its Judgment of Modification. (L.F. 69-79.) The trial court found it to be in the best interest of the child that the parties continue to share joint legal and physical custody, but that it would be in the child's best interest to change the child's residence for mailing and educational purposes to Father's residence in Marble Hill, Missouri (L.F. 77.) The trial court did not make a formal award of primary physical custody to either parent. (L.F. 77.)

The trial court made findings on some, but not all, the relevant factors for evaluating if the modification was in the best interest of the child under §452.375.2 RS Mo. (L.F. 71-76.) The trial court first made findings on the preliminary factors under the statute. (L.F. 71-75.) For instance, the trial court considered the wishes of the parents. (L.F. 71-72.) The trial court criticized both parents for their hostility to each other and for their failure to make a concerted effort to foster a good relationship between the child and the other parent. (L.F. 71-73.) Yet the court concluded that Mother was more likely than Father to deny the child frequent, continuing and meaningful contact with the other parent. (L.F. 72-75.) The trial court was especially critical of Mother for substituting her judgment for the court on custody exchanges and trying to restrict Father's visitation. (L.F. 72-73.)

The trial court admitted that little or no evidence was presented on the following factors: (1) the child's home, school and community; (2) if either parent or the child suffers from any physical or mental health problem; or (3) the wishes of this nine-year old child. (L.F. 76.). And the trial court disregarded the Father's intent to relocate the child as a relevant consideration. (L.F. 76.)

The trial court adopted a Parenting Plan at the time of the Judgment of Modification. (LF. 80-86.) This original Parenting Plan changed the child's primary residence for mailing and educational purposes, but it did not clearly spell out a schedule for physical custody. (L.F. 80-86.) Upon Father's motion, the trial court then adopted an Amended Parenting Plan *nunc pro tunc* to give Father



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

primary physical custody. (L.F. 87-97.) Just like the prior plan under which the parties had been operating, the Amended Parenting Plan calls for continued custody transfers at 6:00 p.m. on Friday evenings "at an agreed upon location in Columbia, Missouri." (L.F. 89, 91, 97.)

The trial court adopted its Amended Parenting Plan without any prior notice or hearing. (L.F. 87-97.) Because of delays in processing, the Amended Plan was not mailed to counsel until after the deadline for post-trial motions. (L.F. 5.)

Mother filed a timely motion to amend the Judgment or for a new trial. Mother attached to her motion a supporting affidavit and exhibits to highlight the need for more findings on the statutory factors. (L.F. 109-141.) For instance, Mother tried to show that the child was excelling in school and participating in the school's gifted program; that the child had friends in Kansas and was actively involved in extracurricular activities; that the child indeed did have some health problems; that Father had access to school records; and that Father had consistent phone access to the child. (L.F. 115-116.) Mother also raised logistical problems in getting the child to Columbia by the 6:00 p.m. deadline because of the travel distances and the child's school schedule. (L.F. 116.) The trial court denied Mother's motion two days after it was filed, without a hearing. (L.F. 170.)

On appeal, Mother raised four points. Mother argued: (1) that the trial court erred in failing to appoint a guardian ad litem as mandated under §452.423.2 RSMo; (2) that the prior 6:00 p.m. custody exchanges in Columbia on Friday



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

evenings were vague and unworkable; (3) that the trial court failed to consider several relevant factors required for a transfer of physical custody under §452.375.2 RS Mo; and (4) that the trial exceeded its authority in adopting its Amended Parenting Plan *nunc pro tunc* . (See, original Appellant's Brief.)

The Southern District declined to address Mother's claims of error on the merits. Instead, a three-judge panel of the court issued an unpublished Memorandum Opinion affirming the Judgment under Supreme Court Rule 84.16(b)(1) and (5). The court found defects in the Mother's brief and declared that such defects rendered it impossible for the Court review her specific claims of error. (Opinion, p. 5.)

Mother challenged the Southern District's refusal to make any effort to discern the essence of her complaints. (See, Appellant's Motion for Rehearing or Transfer; and Appellant's Application for Transfer to the Missouri Supreme Court.) In her Application for Transfer, Mother contended that her original brief, though deficient, presented sufficient arguments to enable the Southern District to resolve at least two of her points on appeal. (Application, p. 1.) Mother argued that the Southern District, at a minimum, should have considered the custody exchange issue and whether the trial court failed to consider relevant statutory factors. (Application, pp. 6-11.) This Court granted transfer and suggested that Mother could now file this Substitute Brief under Supreme Court Rule 83.08. (See, Order Sustaining Application, dated November 20, 2012.).



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

## Summary of the Evidence

Father resides in a 2001 single-wide manufactured home in Marble Hill, Missouri. (Tr. 4-5.) Father is currently employed by Sears as an in-home service technician and works approximately 40 hours per week. (Tr. 7.) He did not have health insurance for the child and did not know whether Mother had such insurance coverage. (Tr. 10.) He thought that insurance was available for the child through his employment with Sears, but he "didn't really check into it." (Tr. 10.)

Mother is pursuing a Ph.D. in behavioral neuroscience at Kansas State University. (Tr. 94.) At the time of the hearing, Mother was living with the child in Manhattan, Kansas. (Tr. 85.) The child was nine years old. (Tr. 85.) He was in the fourth grade at Northview [sic] Elementary School in Manhattan. (Tr. 85-86.) The child was beginning his second year at this school. (Tr. 86.)

Father testified about specific instances where Mother restricted visitation with Father and his family. (Tr. 17-23.) For instance, Father testified that Mother refused to permit the child to visit with his paternal grandfather in Collinsville when he was terminally ill. (Tr. 17-19.) Father complained that it took a lot of phone calls to get three days with the child during the week of the grandfather's funeral. (Tr. 19-20.) He also complained that his summer visitation started two weeks late in 2009. (Tr. 21-22.) Later, Father testified about three times when he was in the Manhattan area and asked to visit with the child. Mother allowed the visitation on only one of those occasions. (Tr. 56.)

Mother also testified about problems caused when Father obstructed Mother's attempts to exercise visitation. (Tr. 102-109.) Mother complained specifically about Father's refusal to cooperate in permitting Mother to exercise her one week of summer visitation in 2009. (Tr. 102-103.) Father called a couple days prior to the normal exchange and told Mother that he was not going to bring the child to Columbia (Tr. 103.) Mother was forced to travel to Southeast Missouri and seek the intervention of the Bollinger County Sheriff to find the child and eventually get her visitation. (Tr. 105-107.) Mother also complained that Father refused to allow the child to attend the funerals of the child's maternal grandparents. (Tr. 109.)

Father did not know the name of the child's school in Kansas and claimed that Mother never provided him with the information. (Tr. 6.) Father also claimed that Mother moved and the child changed schools without notice of relocation. (Tr. 23.) By contrast, Mother testified that Father knew that the child was changing schools. Mother testified that the child was looking forward to the change. (Tr. 87.) Mother denied that she engaged in any concerted effort to withhold communication from Father. (Tr. 87.)

Father admitted that he was on record at the school as the child's father and had access to the child's school records and information. (Tr. 25.) Father never got report cards from Mother, but the child's school mailed them directly to Father. (Tr. 26.) Mother was aware that Father had received grade reports, calendars and newsletters directly from school. (Tr. 88.) Mother testified that she



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

and had no reason to believe Father was not receiving this information. (Tr. 88.) Indeed, Mother was informed by the school that Father communicated directly with child's teacher. (Tr. 88.)

Father complained that Mother did not communicate with him about the child's medical issues. (Tr. 39.) The child went to the emergency room and received stitches, but Father was not made aware of the emergency room visit. (Tr. 39.) Mother admitted that child received five stitches and spent 30 minutes in the emergency room. (Tr. 90.) But Mother did not consider this to be a serious injury. (Tr. 90.) Mother denied that she had made any major medical decisions for the child since the parties' divorce. (Tr. 90.)

Both parents acknowledged difficulties in communication between them that put the child in the middle. (Tr. 16.; Tr. 133.) Mother complained that Father has refused reasonable phone contact with son. (Tr. 109.) Father kept Mother and the child on speakerphone during the first year of her move to Kansas. (Tr. 109.) The following year, Father hid the child's cell phone that Mother had provided to him. (Tr. 110.)

Both parties testified that Husband had little or no face-to-face contact with the child from July, 2008 to March or April, 2009. (Tr. 12; 94.) Mother testified that Husband did not exercise any visitation during this period; nor did he maintain phone communication with child. (Tr. 95.) Husband testified that he is currently paying child support of $250 per month. (Tr. 7-9.) Husband admitted that he got behind during the 2008 to 2009 time period because he was laid off for



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

several months. (Tr. 8.) The State of Missouri was still collecting arrearages from this period at the time of the hearing. (Tr. 9.)

The parties also both testified that the 6:00 p.m. meeting time in Columbia, Missouri was unworkable. (Tr. 27-29; Tr. 95-96.) Father complained that Mother never met Father by the deadline called for in the judgment. (Tr. 29.) Father recalled several times where he has to wait several hours on exchanges. (Tr. 32.) It is typical for Father to wait a significant period until Mother shows up with the child. (Tr. 32.) Father testified that it takes him about four and one-half hours to drive from Bollinger County to Columbia; and he estimated that it probably would take three and one-half hours for Mother to travel from Manhattan to Columbia. (Tr. 33.) Mother complained that it was unreasonable at times for her to get to Columbia by 6:00 p.m. (Tr. 95.) She testified that school does not let out until four; and it is a four-hour drive for her to Columbia. (Tr. 95.)

Early in the custody proceeding, Mother filed a motion in Riley County, Kansas, to have jurisdiction moved out to Kansas. (Tr. 127.) As part of a parenting plan presented in that case, Mother proposed to cut back Father's summer visitation from four weeks to two weeks. (Tr. 127, 129.)

Father complained earlier in the hearing that the parents should have had some discussion about the child's religious faith. (Tr. 45.) Father has the child attending Christian worship services. (Tr. 44.) Mother denied that she had formally converted to the Islam faith, but testified that she had researched a number of religions. (Tr. 137.)

Father's counsel tried to cross-examine Mother about whether the parents had discussed their religious differences. (Tr. 138.) The trial court interjected: "Honestly, I don't know where you are going with all this. These people cannot discuss anything. And will never be able to discuss anything, you know. I am accepting the fact they can't have any, any discussion or conversation." (Tr. 138.) The trial court went to state: "They say they fight. It is not legal. You listened and it was the same every time. You know, one says black is white and the other say so, it's black. You know, they just don't agree." (Tr. 138-139.)

In concluding, the trial court expressed frustration with the conduct of both parents: "I believe that as a result of the testimony that certain inexcusable things have occurred on both your parts." (Tr. 140.) And the trial court admonished the parties: "If you are not careful you are going to put him in a position in the middle where he will develop some real ideas, warped ideas, that may end up creating problems for him in the future." (Tr. 141.)

## POINTS RELIED ON

### I

**THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO APPOINT A GUARDIAN AD LITEM *SUA SPONTE* BECAUSE SUCH AN APPOINTMENT WAS MANDATED UNDER §452.423.2 RSMO IN THAT FATHER CHARGED IN HIS PLEADING THAT MOTHER COMMITTED ACTS AMOUNTING TO ABUSE OR NEGLECT, AND MORE SPECIFICALLY, FATHER RAISED INFLAMMATORY ALLEGATIONS**



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

**THAT MOTHER THREATENED THE CHILD WITH MISSING SCHEDULED ACTIVITIES IF HE SPENT TIME WITH FATHER, THAT MOTHER SHARED A BED WITH A MUSLIM MAN OF SUPPOSEDLY QUESTIONABLE MORALS WHILE THE CHILD WAS PRESENT, THAT MOTHER REFUSED TO ALLOW THE CHILD TO ATTEND A FUNERAL WITH FATHER'S FAMILY AND THAT MOTHER GENERALLY ALIENATED THE CHILD FROM FATHER; THAT THE TRIAL COURT LATER RAISED THE SPECTER OF EMOTIONAL ABUSE OR NEGLECT ON THE RECORD BY ACCUSING BOTH PARENTS OF INEXCUSABLE CONDUCT AND PLACING THE CHILD IN THE MIDDLE OF THEIR DISPUTES; AND EVEN THOUGH NEITHER MOTHER NOR FATHER REQUESTED THE APPOINTMENT OF A GUARDIAN AD LITEM, THE TRIAL COURT HAD AN OVERRIDING DUTY TO MAKE THE APPOINTMENT TO PROTECT THE INTEREST OF THE CHILD.**

*Taylor v. Taylor*, 996 S.W.3d 652 (Mo.App.E.D. 2001)

*McArthur v. McArthur*, 982 S.W.2d 755 (Mo.App.E.D. 1998)

*Frazier v. Frazier*, 845 S.W.2d 130 (Mo.App.W.D. 1993)

*Ludvik v. Ludvik*, 969 S.W.2d 284, 286 (Mo.App.E.D. 1998)

§452.423.2 R.S.Mo (2012)



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

## II

**THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A CONTINUATION OF THE PRIOR CUSTODY EXCHANGES THAT CALL FOR WEEKEND VISITATION TO BEGIN AT 6:00 P.M. AT AN "AGREED UPON LOCATION IN COLUMBIA, MISSOURI," BECAUSE THESE PROVISIONS ARE VAGUE, UNWORKABLE, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE RECORD SHOWED THAT THESE SAME CUSTODY EXCHANGE PROVISIONS HAD PROVEN TO BE UNWORKABLE IN THE PAST, THE TRIAL COURT ACKNOWLEDGED THAT THE PARTIES HAD NOT DEMONSTRATED THE DEGREE OF COOPERATION REQUIRED FOR CONTINUED CUSTODY EXHANGES AT AN "AGREED UPON LOCATION" IN COLUMBIA, AND THE UNDISPUTED EVIDENCE SHOWED LOGISTICAL PROBLEMS THAT THE PARENTS FACE IN TRAVELLING TO COLUMBIA BY 6:00 P.M. CONSISTENT WITH THEIR RESPECTIVE WORK SCHEDULES AND THE CHILD'S SCHOOL SCHEDULE.**

*Marriage of Brooke*, 773 S.W.2d 496 (Mo.App.S.D. 1989)

*Anderson v. Anderson*, 854 S.W.2d 32 (Mo.App.W.D. 1993)

*Cluck v. Cluck*, 121 S.W.3d 271 (Mo.App.S.D. 2003)

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

## III

**THE TRIAL COURT ABUSED ITS DISCRETION IN CHANGING THE RESIDENCE OF THE CHILD FOR MAILING AND EDUCATIONAL PURPOSES TO FATHER'S RESIDENCE BECAUSE THE TRIAL COURT FAILED TO CONSIDER ALL RELEVANT "BEST INTEREST" FACTORS TO JUSTIFY SUCH A MODIFICATION UNDER §452.375.2 RSMO IN THAT THE TRIAL ADMITTED IN ITS FINDINGS THAT LITTLE OR NO EVIDENCE WAS PRESENTED ON (1) THE CHILD'S HOME SCHOOL AND COMMUNITY; (2) IF EITHER THE PARENT OR THE CHILD SUFFERS FROM ANY PHYSICAL OR MENTAL HEALTH PROBLEM OR (3) THE WISHES OF THIS NINE-YEAR OLD CHILD; AND THE TRIAL COURT DISREGARDED FATHER'S INTENT TO RELOCATE THE CHILD FROM KANSAS TO MISSOURI AS A RELEVANT CONSIDERATION; BUT WHEN MOTHER PRESENTED A POST-TRIAL MOTON WITH A SUPPORTING AFFIDAVIT AND SCHOOL AND PHONE RECORDS TO HIGHLIGHT THE NEED FOR MORE FINDINGS ON THE OMITTED FACTORS, THE TRIAL COURT IMPROPERLY DENIED THE MOTION.**

*Sewell-Davis v. Franklin,* 174 S.W.3d 58 (Mo.App.W.D. 2005)

*Marriage of Swallows*, 172 S.W.3d 912 (Mo.App.S.D. 2005)

*Davis v. Schmidt*, 210 S.W.3d 494 (Mo.App.W.D. 2007)

*Searcy v. Seedorff*, 8 S.W.3d 113 (Mo. 1999)

§452.375.2 RSMo (2012)

**IV**

**THE TRIAL COURT ERRED IN ADOPTING ITS AMENDED PARENTING PLAN *NUNC PRO TUNC* WITHOUT PRIOR NOTICE OR HEARING BECAUSE THIS ACTION EXCEEDED THE TRIAL COURT'S AUTHORITY UNDER SUPREME COURT RULE 74.06(a) AND WAS CONTRARY TO LAW IN THAT THE POWER OF A COURT TO CORRECT A JUDGMENT *NUNC PRO TUNC* IS LIMITED TO CORRECTING CLERICAL MISTAKES ARISING FROM INADVERTENT ERRORS OR OMISSIONS IN THE RECORD AND CANNOT BE USED, AS HERE, TO IMPOSE SUBSTANTIVE CHANGES IN THE DISCRETIONARY AUTHORITY OF THE COURT TO ADOPT A PHYSICAL CUSTODY SCHEDULE.**

*Pirtle v. Cook,* 957 S.W.2d 235 (Mo.banc 1997)

*Sullivan v. Miner,* 180 S.W.3d 531, 533 (Mo.App.E.D. 2006)

*Seitz v. Seitz,* 107 S.W.3d 478 (Mo.App. S.D. 2003)

*Keck v. Keck*, 996 S.W.2d 652, 654 (Mo.App.E.D. 1999)

Mo.Sup.Ct. R. 74.06(a)

Mo.Sup.Ct. R. 75.01



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

## ARGUMENT

### Standard of Review for all Points

The same general standard of review applies to all four points raised by Mother in her appeal. In a court-tried case, this Court reviews the judgment of the trial court to determine if it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Sewell-Davis v. Franklin*, 174 S.W.3d 58, 59 (Mo.App.W.D. 2005). The trial court is afforded broad discretion in awarding child custody. *Id.* at 59. In reviewing the record, this Court will accept as true the evidence and inferences favorable to the judgment and disregard contrary evidence. *Capehart v. Capehart*, 110 S.W.3d 920, 923 (Mo.App.S.D. 2003).

This Court should apply an abuse of discretion standard to the custody issues raised in points one through three of Mother's Substitute Brief. Despite the discretion given to the trial court in such matters, the appellate court will reverse and order a remand if the trial court fails to make sufficient written findings about relevant statutory factors for a custody decision or parenting plan. *Sewell-Davis v. Franklin*, 174 S.W.3d at 61; *Capehart v. Capehart*, 110 S.W.3d at 925; *In re Marriage of Swallows*, 172 S.W.3d 912, 916 (Mo.App.S.D. 2005). The appellate court will reverse if the trial court fails to appoint a guardian ad litem in violation of §452.423.2 RSMo. *Taylor v. Taylor*, 60 S.W.3d 652, 655 (Mo.App.E.D. 2001). And the appellate court will reverse if it is firmly convinced that the welfare of the child requires a different disposition. *Rinehart v. Rinehart,* 877 S.W.2d 205, 208-

09 (Mo.App.S.D. 1994) (holding award of primary physical custody to father was an abuse of discretion).

Mother's fourth point addresses the question of whether the trial court misapplied the law in adopting its Amended Parenting Plan *nunc pro tunc*. *Sullivan v. Miner,* 180 S.W.3d 531, 533 (Mo.App.E.D. 2006) (holding trial court erroneously applied law in substantively modifying judgment with *nunc pro tunc* order). This Court applies *de novo* review to questions of law in court-tried cases. *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012).

**I**

**THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO APPOINT A GUARDIAN AD LITEM *SUA SPONTE* BECAUSE SUCH AN APPOINTMENT WAS MANDATED UNDER §452.423.1 RSMO IN THAT FATHER CHARGED IN HIS PLEADING THAT MOTHER COMMITTED ACTS AMOUNTING TO ABUSE OR NEGLECT, AND MORE SPECIFICALLY, FATHER RAISED INFLAMMATORY ALLEGATIONS THAT MOTHER THREATENED THE CHILD WITH MISSING SCHEDULED ACTIVITIES IF HE SPENT TIME WITH FATHER, THAT MOTHER SHARED A BED WITH A MUSLIM MAN OF SUPPOSEDLY QUESTIONABLE MORALS WHILE THE CHILD WAS PRESENT, THAT MOTHER REFUSED TO ALLOW THE CHILD TO ATTEND A FUNERAL WITH FATHER'S FAMILY AND THAT MOTHER GENERALLY ALIENTATED THE CHILD FROM FATHER; THAT THE**



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

**TRIAL COURT LATER RAISED THE SPECTER OF EMOTIONAL ABUSE OR NEGLECT ON THE RECORD BY ACCUSING BOTH PARENTS OF INEXCUSABLE CONDUCT AND PLACING THE CHILD IN THE MIDDLE OF THEIR DISPUTES; AND EVEN THOUGH NEITHER MOTHER NOR FATHER REQUESTED THE APPOINTMENT OF A GUARDIAN AD LITEM, THE TRIAL COURT HAD AN OVERRIDING DUTY TO MAKE THE APPOINTMENT TO PROTECT THE INTEREST OF THE CHILD.**

The Southern District never addressed the merits of whether the trial court abused its discretion in failing to appoint a guardian ad litem in violation of §452.423.2 RSMo. The statute authorizes the appointment in any custody case, and mandates the appointment where an allegation is raised about abuse or neglect of the child. The duty of the trial court is not discharged just because neither parent requests the appointment. Nor is the duty discharged by ultimate findings that no abuse or neglect occurred. Instead, the statute imposes an overriding duty for the trial court to appointment a guardian ad litem *sua sponte* whenever allegations of abuse or neglect are raised in the pleadings or revealed in the record.

**A. <u>The duty of the trial court to appoint a guardian ad litem under §452.423.2 RSMo.</u>**

Section 452.423 mandates the appointment of a guardian ad litem whenever child abuse or neglect is alleged:

1. In all proceedings for child custody or for dissolution of marriage or legal separation where custody, visitation or support of a child is a contested issue, the court may appoint a guardian ad litem....

2. *The court shall appoint a guardian ad litem in any proceeding in which child abuse or neglect is alleged*....(emphasis supplied.)

§452.423 R.S.Mo (2012)

The philosophy behind the statute is that where abuse or neglect is alleged, the child has rights independent of either of the parents, and these rights are entitled to representation. *Frazier v. Frazier*, 845 S.W.2d 130, 132 (Mo.App.W.D. 1993); accord: *Ludvik v. Ludvik*, 969 S.W.2d 284, 286 (Mo.App.E.D. 1998). Where abuse or neglect is alleged, the appointment of the guardian ad litem thus cannot be waived by either parent. *Frazier v. Frazier*, 845 S.W.2d at 132. The court must make the mandatory appointment even when neither party asks for it. *Taylor v. Taylor*, 60 S.W.3d 652, 655 (Mo.App.E.D. 2001); *McArthur v. McArthur*, 982 S.W.2d 755, 757 (Mo.App.E.D. 1998).

Because the mere allegation triggers the duty to appoint, the court may not wait until the evidence comes in, without any guardian ad litem, and then decide if a parent's allegation of abuse or neglect is supported by the evidence. *Frazier v Frazier*, 845 S.W.2d. at 132. It is the allegation, not the proof of abuse or neglect, which mandates the appointment of the guardian ad litem. *Taylor v. Taylor*, 60 S.W.3d at 655. But even if neither parent alleges abuse or neglect in the pleadings, the trial court still has a duty to appoint the guardian *sua sponte* if the



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

record reveals a sufficient level of abuse or neglect alleged at the hearing. *Id.* The trial court has an overriding duty to make the appointment to protect the best interests of the child. *Id.*

**B. Father raised inflammatory allegations about Mother's treatment of the child that effectively amounted to charges of emotional abuse or neglect.**

The threshold question is whether Father's allegations were sufficient to trigger the duty to appoint a guardian ad litem. In resolving this kind of issue, the courts are guided by the definitions of abuse and neglect in Chapter 210. "Neglect" is broadly defined as "failure to provide, by those responsible for the care, custody, and control of the child, the proper or necessary support, education as required by law, nutrition or medical, surgical, or any other care necessary for the child's well-being." *McArthur v. McArthur*, 982 S.W.2d 755, 756 (Mo.App.E.D. 1998), citing §210.110.8 RSMo. (1994). Child "abuse" is defined as "any physical injury, sexual abuse, or emotional abuse inflicted on the child other than by accidental means by those responsible for his care, custody or control...." *Rombach v. Rombach*, 867 S.W.2d 500, 504 (Mo. banc 1993), citing §210.110(1) RSMo (1986).

In his First Amended Motion for Modification of Judgment, Father made a series of inflammatory allegations about Mother that amounted to charges of neglect or emotional abuse. (L.F. 42-44.) More specifically, Father alleged that Mother threatened the child with missing activities like attending Cardinal



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

baseball games, family outings or Tae-Kwon-Do if the child spent more time with Father; that Mother frequently shared a bed with a Muslim man named Imad Khamis while the child is present; that Khamis supposedly had questionable morals and told the child that it was permissible for him to have more than one wife; that Mother refused to allow the child to a attend a funeral with Father's family; and that Mother generally alienated the child from Father. (L.F. 42-44.)

Despite these inflammatory charges, neither Mother nor Father requested the appointment of a guardian ad litem. (Tr. 3.) And the trial court found nothing in the allegations to justify the appointment of a guardian ad litem *sua sponte*. (Tr. 3.) Given the nature of the allegations and the openly hostile relationship between the parents, the trial court abused its discretion in refusing to make the appointment.

**C. The trial court's own accusations on the record raised the specter of abuse or neglect.**

Even if this Court does not believe that Father's allegations, standing alone, were sufficient to trigger to a duty to appoint, the trial court's own accusations on the record strongly suggest the possibility of emotional abuse or neglect. The trial court expressed frustration with the conduct of both parents: "I believe that as a result of the testimony that certain inexcusable things have occurred on both your parts." (Tr. 140.) And the trial court admonished the parties: "If you are not careful you are going to put him in a position in the middle where he will develop some real ideas, warped ideas, that may end up creating problems for him in the



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

future." (Tr. 141.) In effect, the trial court was accusing both parents of emotionally abusing or neglecting the child by placing him in the middle of their disputes.[1] If the trial court believed its own accusations, it had an affirmative duty to appoint a guardian ad litem to protect the interests of the child.

## II

**THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A CONTINUATION OF THE PRIOR CUSTODY EXCHANGES THAT CALL FOR WEEKEND VISITATION TO BEGIN AT 6:00 P.M. AT AN "AGREED UPON LOCATION IN COLUMBIA, MISSOURI," BECAUSE THESE PROVISIONS ARE VAGUE, UNWORKABLE, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT RECORD SHOWED THAT THESE SAME CUSTODY EXCHANGE PROVISIONS HAD PROVEN TO BE UNWORKABLE IN THE PAST, THE TRIAL COURT ACKNOWLEDGED THAT THE PARTIES HAD NOT DEMONSTRATED THE DEGREE OF COOPERATION REQUIRED FOR CONTINUED CUSTODY EXHANGES AT AN "AGREED UPON LOCATION" IN COLUMBIA, AND THE UNDISPUTED EVIDENCE SHOWED INHERENT LOGISTICAL PROBLEMS THAT THE PARENTS FACE IN TRAVELLING TO**

---

[1] During the trial, both parents acknowledged difficulties in communication between them that put the child in the middle. (Tr. 16.; Tr. 133.)



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

**COLUMBIA BY 6:00 P.M. CONSISTENT WITH THEIR RESPECTIVE WORK SCHEDULES AND THE CHILD'S SCHOOL SCHEDULE.**

The Southern District never addressed the merits of whether the trial court abused its discretion in ordering a continuation of the unworkable custody transfer arrangements in Columbia, Missouri. The Southern District erred in finding it "impossible" to review Mother's second point challenging the unworkable custody exchanges in Columbia, Missouri. (Opinion, p. 5.) The court properly criticized Mother's statement of facts in her original brief because it contained no citations to the evidence adduced at trial. (Opinion, p. 2.) But the court acknowledged that Mother "does occasionally reference the trial transcript in her argument." (Opinion, p. 4.) Indeed, Mother made extensive references to the transcript in challenging the custody exchange provisions of the Amended Parenting Plan. (Appellant's Original Brief, pp. 16-17.) Because this issue involves the welfare of a child, the Southern District should have exercised its duty to resolve the custody exchange issue.[2]

---

[2] Appellate courts are more tolerant about technical briefing requirements when the questions relate to the welfare of children. *Rinehart v. Rinehart*, 877 S.W.2d 205, 206 (Mo.App.S.D. 1994); *Stangeland v. Strangeland*, 33 S.W.3d 696, 703 (Mo.App.W.D. 2000); *Capehart v. Capehart*, 110 S.W.3d 920, 923 (Mo.App.S.D. 2003); *Marquez v. Marquez*, 136 S.W.3d 574, 577-78 (Mo.App.S.D. 2004). The

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

**A. This Court has authority to reverse vague and unworkable custody provisions.**

An appellate court has authority to reverse custody provisions if they are vague and unworkable. The court will strike custody and visitation provisions that are too vague to be enforced. *Marriage of Brooke*, 773 S.W.2d 496, 499 (Mo.App.S.D. 1989) (striking overly vague "family" visitation). And if the parties show an inability to cooperate on physical custody issues, the trial court may reject a parenting plan that is unworkable. *Anderson v. Anderson*, 854 S.W.2d 32, 36 (Mo.App.W.D. 1993). See also, *Cluck v. Cluck*, 121 S.W.3d 271, 275 (Mo.App.S.D. 2003) (criticizing unworkable nature of parenting plan given geographic distance between the parties).

**B. The record in this appeal shows that the terms for custody exchanges in Columbia have been and continue to be unworkable.**

In this appeal, Mother challenges custody exchange provisions that call for weekend visitation to begin at 6:00 p.m., with the exchanges to occur at an "agreed upon location in Columbia, Missouri." (L.F. 91, 97.) These are the same custody exchange provisions that had proven to be unworkable in the past. (Tr. 28-29, 31.) In its findings, the trial court admitted "the parties have agreed that the current physical custody plan in many respects is unworkable...." (L.F. 71.)

---

Southern District erred in failing to follow this more tolerant standard in evaluating Mother's original brief.

The trial court acknowledged, in practical terms, that the parents had not demonstrated the degree of cooperation required for continued custody exchanges at an "agreed upon location" in Columbia. During the trial, the trial court stated: "These people cannot discuss anything. And will never be able to discuss anything, you know." (Tr. 138.). The trial court went on to state: "I am accepting the fact that they can't have any, any discussion or conversation." (Tr. 138.) Finally, the trial court concluded: "They say they fight. It is not legal. You listened and it was the same every time. You know, one says black is white and the other say so, it's black. You know, they just don't agree." Tr. 138-139.)

The logistical problem with the 6:00 p.m. exchanges is the distance that both parents have to travel to meet in Columbia. Father testified that it takes him around four and one-half hours to get to Columbia from his home in Bollinger County. (Tr. 32.) And he estimated that it would take Mother around three and one-half hours to get from Manhattan to Columbia. (Tr. 32.) Mother complained that it was unreasonable at times for her to get to Columbia by 6:00 p.m. (Tr. 95.) She testified that school does not let out until four; and it is a four-hour drive for her to Columbia. (Tr. 95.) The trial court seemed to acknowledge this logistical problem with school when it later declared: "[S]chool is dismissed when it is out." (Tr. 141.) The custody exchanges do not become any more workable with the child's primary residence changed to Bollinger County.

Even viewing the record most favorably to the Judgment, the undisputed evidence shows that custody exchanges in Columbia have been and continue to be



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

unworkable. The trial court abused its discretion in ordering that the same custody exchange provisions continue in the new parenting plan. Mother requests that the custody exchange provisions be reversed.

**III**

**THE TRIAL COURT ABUSED ITS DISCRETION IN CHANGING THE RESIDENCE OF THE CHILD FOR MAILING AND EDUCATIONAL PURPOSES TO FATHER'S RESIDENCE BECAUSE THE TRIAL COURT FAILED TO CONSIDER ALL RELEVANT "BEST INTEREST" FACTORS TO JUSTIFY SUCH A MODIFICATION UNDER §452.375.2 RSMO IN THAT THE TRIAL ADMITTED IN ITS FINDINGS THAT LITTLE OR NO EVIDENCE WAS PRESENTED ON (1) THE CHILD'S HOME SCHOOL AND COMMUNITY; (2) IF EITHER THE PARENT OR THE CHILD SUFFERS FROM ANY PHYSICAL OR MENTAL HEALTH PROBLEM OR (3) THE WISHES OF THIS NINE-YEAR OLD CHILD; AND THE TRIAL COURT DISREGARDED FATHER'S INTENT TO RELOCATE THE CHILD FROM KANSAS TO MISSOURI AS A RELEVANT CONSIDERATION; BUT WHEN MOTHER PRESENTED A POST-TRIAL MOTON WITH A SUPPORTING AFFIDAVIT AND SCHOOL AND PHONE RECORDS TO SHOW THE NEED FOR MORE FINDINGS ON THE OMITTED FACTORS, THE TRIAL COURT IMPROPERLY DENIED THE MOTION.**



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

The Southern District also failed to address the question of whether the trial court abused its discretion in failing to consider several relevant factors required for a modification of physical custody under §452.375.2 RS Mo. Even if point three of Mother's original brief might have been presented more clearly, the Southern District was wrong in finding it "impossible" to review the question of whether the trial court abused its discretion in failing to consider all the relevant statutory factors. (See, Opinion, p. 5.) Mother presented sufficient citations to the custody statute, a supporting case and relevant parts of the record to permit review of this issue.[3] (See, Appellant's Original Brief, pp. 18-25.)

---

[3] By applying its more tolerant standard to briefing deficiencies in other appeals, the Southern District has reversed and vacated custody awards when the trial court failed to make mandated statutory findings. *Capehart v. Capehart,* 110 S.W.3d 920, 923 (Mo.App.S.D. 2003) (holding trial court failed to include all the prerequisites for a parenting plan and failed to make findings required under § 452.375.6 R.S.Mo); *Marquez v. Marquez,* 136 S.W.3d 574, 578-9 (Mo.App.S.D. 2004) (remanding case because trial court failed to make findings required in cases of domestic violence under § 452.375.13 R.S.Mo). The Southern District declined to follow this more tolerant approach to Mother's claim here that the trial court failed to make sufficient findings under §452.375.2 RSMo.

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

**A. <u>The trial court was obligated to consider those factors bearing on the best interest of the child under §452.375.2 RSMo.</u>**

Section 452.375.2 compelled the trial court to consider all relevant factors bearing on the best interest of the child:

> The court shall determine custody in accordance with 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 best interest 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…;

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

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

§452.375.2 RSMo (2012)

While the trial court need not discuss factors that are not relevant, the court must make findings on those factors that are relevant. *Sewell-Davis v. Franklin,* 174 S.W.3d 58, 61, at n. 4 (Mo.App.W.D. 2005) (reversing trial court for failing to make mandated findings); *Marriage of Swallows*, 172 S.W.3d 912, 916 (Mo.App.S.D. 2005) (reversing this same trial judge for not detailing specific relevant factors that rendered custody modification in child's best interest); see also, *Davis v. Schmidt*, 210 S.W.3d 494, 504 (Mo.App.W.D. 2007) (reversing trial court for failing to detail those relevant factors resulting in the rejection of a father's proposed custody arrangement). And where the need for such findings is noted in a motion for a new trial, the rejection of the motion also is error. *Id.* at 504.

**B. The trial court's own findings reveal that relevant factors were never considered.**

Here, the trial court admitted in its findings that little or no evidence was presented on the following relevant factors: (1) the child's home, school and community; (2) if either parent or the child suffers from any physical or mental health problem; or (3) the wishes of this nine-year old child. (L.F. 76.). And the court erred in finding that "[n]either party expressed any immediate intent to



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

relocate the principal residence of the minor child." (L.F. 76.) The trial court acknowledged that the whole purpose of Father's motions was to uproot the child from his existing home, school and community in Kansas and to relocate his principal residence to Missouri. (L.F. 70-71.) Yet the trial court disregarded the Father's intent to relocate the child as a relevant consideration. (L.F. 76.)

**C. Mother showed the need for more findings in her motion for a new trial.**

Father bore the burden of proving a substantial change in circumstances justifying his proposed custody modification. *Searcy v. Seedorff*, 8 S.W.3d 113, 117 (Mo. 1999). Mother highlighted in her post-trial motion how little evidence had been presented on several statutory factors. (L.F. 109-113.) Mother tried to fill the void by attaching to her motion an affidavit with supporting school and phone records. (L.F. 115-141.) For instance, Mother tried to show that the child was excelling in school and participating in the school's gifted program; that the child had friends in Kansas and was actively involved in extracurricular activities; that the child indeed did have some health problems; that Father had access to school records; and that Father had consistent phone access to the child. (L.F. 115-116.) The trial court summarily denied Mother's motion only two days after it was filed, without a hearing. (L.F. 6, 170.)

Just like in *Davis,* the trial court erred in denying Mother's motion for a new trial when that motion revealed a need for more findings. (L.F. 170.) Father argues against consideration of Mother's affidavit or her supporting documents on



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

the general theory that they did not constitute newly discovered evidence. (See, Respondent's Original Brief, pp. 48-49, citing *Womack v. McCullough*, 358 S.W.2d 66, 88 (Mo. 1962).) But Father's *Womack* decision had nothing to do with new evidence bearing upon relevant statutory factors under §452.375.2 RS Mo. The trial court here admitted that little or no evidence was presented at trial on factors the court had to consider. (L.F. 76.) Because the welfare of a child was at stake, Mother contends it was error not to reopen the case.

Father cannot rely on the trial court's extensive findings on some statutory factors to justify its decision to discount the importance of the others.[4] Mother understands that this Court must defer to the discretion of the trial court to the extent it made findings on relevant factors. See, *Sewell-Davis v. Franklin*, 174 S.W.3d 58, 59 (Mo.App.W.D. 2005). Yet the trial court's comments from the bench and its findings in the Judgment reveal that the court was overly absorbed in trying to assess relative blame for what it called the "inexcusable" conduct of both parents. (Tr. 140; LF. 71-75.)

By failing to reopen the record to take more evidence on the omitted factors, the trial court gave insufficient consideration to the potential disruptive effects that the court's experiment in flipping the child's residence would have on the boy's welfare. (See, L.F. 75-76; 109-113.) The trial court admitted "there was

[4] In his original Respondent's Brief, Father quoted the trial court's findings on five of the eight statutory factors verbatim. (Respondent's Original Brief, pp. 42-47.)



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

no evidence to suggest that the child was ill adjusted in Mother's care." (L.F. 8.) And the trial court was left to rely on speculation for its belief that the child "would have no problem adjusting to Father's home, school and community." (L.F. 76.)

Mother requests a remand to ensure that the trial court make written findings on all relevant "best interest" factors bearing on its custody decision under §452.372.2 RSMo.

**IV**

**THE TRIAL COURT ERRED IN ADOPTING ITS AMENDED PARENTING PLAN *NUNC PRO TUNC* WITHOUT PRIOR NOTICE OR HEARING BECAUSE THIS ACTION EXCEEDED THE TRIAL COURT'S AUTHORITY UNDER SUPREME COURT RULE 74.06(a) IN THAT THE POWER OF A COURT TO CORRECT A JUDGMENT *NUNC PRO TUNC* IS LIMITED TO CORRECTING CLERICAL MISTAKES ARISING FROM INADVERTENT ERRORS OR OMISSIONS IN THE RECORD AND CANNOT BE USED, AS HERE, TO IMPOSE SUBSTANTIVE CHANGES THE DISCRETIONARY AUTHORITY OF THE COURT TO ADOPT A PHYSICAL CUSTODY SCHEDULE.**

Just like with Mother's other points, the Southern District never addressed the question of whether the trial court exceeded its authority in adopting the Amended Parenting Plan *nunc pro tunc*. The Southern District was wrong is concluding that this question of law was "impossible" to discern. (Opinion, p. 5.)

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

The power of a court under Supreme Court Rule 74.06(a) to correct a judgment *nunc pro tunc* is strictly limited to correcting clerical mistakes and typographical errors. This power should not be used to amend the Judgment by imposing substantive changes in a physical custody schedule.

**A. The limited power of a trial court to correct clerical mistakes in a judgment under Supreme Court Rule 74.06(a).**

Supreme Court Rule 74.06(a) embodies the common law power of a court to enter a *nunc pro tunc* order to correct a clerical mistake or omission in limited situations:

> Clerical mistakes in judgments, orders or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

The court only has the power to issue its *nunc pro tunc* order to correct a clerical mistake to reflect the true judgment of the court. *Pirtle v. Cook*, 956 S.W.2d 235, 240-41 (Mo banc 1997). The power may not be used to alter or amend the rendered judgment. *Id.* at 241. The purpose of a *nunc pro tunc* order thus is to "correct some error or inadvertence in the recording of that which was actually done, but which, because of that error or omission was not properly recorded." *Sullivan v. Miner,* 180 S.W.3d 531, 533 (Mo.App.E.D. 2006).

The determination of whether an order corrects the record or amends the judgment is not made on a level playing field. *Dobson v. Riedel Survey &*

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

*Engineering Co., Inc.*, 973 S.W.2d 918, 922 (Mo.App.W.D. 1998). The courts indulge in a presumption against clerical errors in judgments. *Id.* at 922. Because of the public policy protecting the stability of judgments, the party seeking to uphold a change must rebut the presumption. *Id.* The clerical error must be discernable from the record. *Seitz v. Seitz,* 107 S.W.3d 478, 486 (Mo.App.S.D. 2003).

In applying these rules, the courts will refuse to permit a *nunc pro tunc* order to correct anything resulting from the exercise of discretion because this would result in a change in the judgment. *Sullivan v. Miner,* 180 S.W.3d at 533 (refusing to permit correction of mathematical error to change child support amount); *Seitz v. Seitz,* 107 S.W.3d at 486 (refusing to permit modification of fees to GAL or designation of maintenance as "modifiable"). Nor will the courts permit use of a *nunc pro tunc* order to correct judicial inadvertence, omission, oversight or error, or to show what the court might or should have done as distinguished from what it actually did, or to conform to what the court intended to do but did not do. *Keck v. Keck*, 996 S.W.2d 652, 654 (Mo.App.E.D. 1999) (refusing to permit order purporting to retroactively transform commissioner's findings and recommendations into final appealable judgment).

**B. The trial court exceeded its authority when it imposed substantive changes in the Parenting Plan *nunc pro tunc*.**

The trial court is afforded broad discretion in awarding child custody. *Sewell-Davis v. Franklin*, 174 S.W.3d 58, 59 (Mo.App.W.D. 2005). It is well-

established that this discretion extends to the trial court's authority to adopt of a plan for physical custody and visitation. See, *Siegenthaler v. Siegenthaler*, 761 S.W.2d 262, 266 (Mo.App.E.D. 1988).

In this appeal, The trial court did not make a formal award of primary physical custody to either parent in its Judgment of Modification. (L.F. 77.) Although the Judgment and the original Parenting Plan changed the child's primary residence for mailing and educational purposes, neither document spelled out a clear schedule for physical custody. (L.F. 80-86.)

By adopting the Amended Parenting Plan, the trial court improperly tried to use its *nunc pro tunc* power to impose a substantive change in its discretionary authority to adopt a physical custody plan. The trial court amended the Judgment and Parenting Plan by inserting the following language into its Option C:

> THE MINOR CHILD SHALL BE PRIMARILY IN THE MOTHER'S PHYSICAL CARE, CUSTODY AND CONTROL DURING THOSE PERIODS SET ASIDE TO MOTHER UNDER THE CUSTODY SCHEDULE WHICH IS ATTACHED HERETO AS "EXHIBIT 1-A" AND INCORPORATED HERIN BY THIS REFERENCE. THE MINOR CHILD SHALL BE PRIMARILY IN FATHER'S PHYSICAL CARE, CUSTODY AND CONTROL, AT FATHER'S RESIDENCE IN THE STATE OF MISSOURI (OR WHEREVER FATHER MAY BE) AT ALL TIMES NOT SPECIFIALLY SET ASIDE TO MOTHER UNDER THE



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

ATTACHED CUSTODY SCHEDULE (EXHIBIT 1-A).

(L.F. 92.)

Father can speculate with an "educated guess" about whether the trial court failed to insert this language into its original Parenting Plan by judicial inadvertence, omission, oversight or error. (See, Respondent's Original Brief, p. 55.) But the record reveals that this was more than a "clerical mistake" covered by Rule 76.04(b). Father failed his burden of proving in his motion a clerical error discernable from the record. (See, L.F. 87-88.) *Keck* teaches that the trial court cannot use its *nunc pro tunc* power to make a substantive change to reflect what the court might have or should have done, as opposed to what it actually did do. *Keck v. Keck*, 996 S.W.2d at 654. And *Sullivan* and *Seitz* teach that the trial court cannot use its *nunc pro tunc* power to correct the exercise of its discretion in something like the adoption of a physical custody plan because this would result in a change in the judgment. *Sullivan v. Miner,* 180 S.W.3d at 533; *Seitz v. Seitz,* 107 S.W.3d at 486.

As a practical matter, this Court still had the power to amend the Parenting Plan under Supreme Court Rule 75.01. This is because thirty days had not yet expired from the date of the Judgment of Modification. (L.F. 5.) For the trial court to have amended the Plan under Rule 75.01, however, would have required that Mother be given notice and an opportunity to be heard before the Judgment became final for purposes of appeal. The trial court exceeded its power under Rule 76.04(a) when it tried to bypass this procedure and adopt its Amended



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

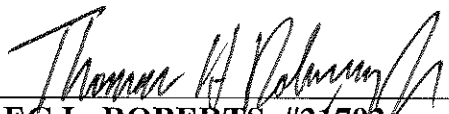
Parenting Plan *nunc pro tunc*. Because the trial court misapplied the law, this Court should conclude that the Amended Parenting Plan is void.

## CONCLUSION

Mother requests this Court to reverse the Judgment of Modification and Amended Parenting Plan, or in the alternative, to reverse the Judgment and to find that the Amended Parenting Plan is void. This case should be remanded with instructions for the trial court to appoint a guardian ad litem, to reopen the record and make findings on all relevant factors under §452.375.2 RSMo, and to develop a more workable plan for custody exchanges in Columbia, Missouri.

Respectively submitted,

**THE ROBERTS LAW FIRM, P.C.**



**GREG L. ROBERTS, #31793**
**THOMAS H. ROLWING, JR., #47825**
215 Chesterfield Business Parkway
Chesterfield, Missouri 63005
Phone: (636) 530-9199
Fax: (636) 530-6805
Email: greg@therobertslawfirm.net

**DANIEL R. SCHRAMM, #28529**
**DANIEL R. SCHRAMM, L.L.C.**
121 Chesterfield Business Parkway
Chesterfield, Missouri 63005
Telephone: (636) 532-2300
Fax: (636) 532--6002
E-Mail: daniel@dschrammlaw.com

**Attorneys for Appellant**



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST

## CERTIFICATE UNDER RULE 84.06(c)

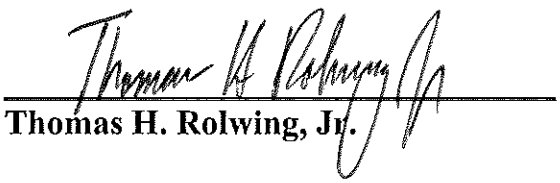
I, Thomas H. Rolwing, Jr., hereby certify that I am one of the attorneys for Appellant Angela Crumer-Soehlke, and that the foregoing Substitute Brief of Appellant:

(1) Includes the information required by Rule 55.03;

(2) Complies with the limitations contained in Rule 84.06(b); and

(3) Contains 9,563 words.

The undersigned further certifies that the electronic file for this Brief has been scanned for viruses and is virus-free.

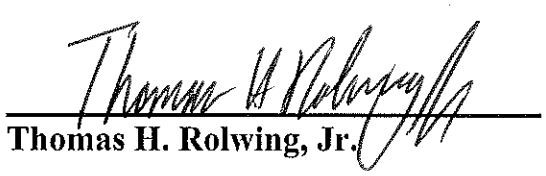


**Thomas H. Rolwing, Jr.**

## CERTIFICATE OF SERVICE

I, **Thomas H. Rolwing, Jr.,** hereby certify that I am one of the attorneys for Appellant Angela Crumer-Soehkle, and that on the 7 day of December, 2012, I caused one copy of the aforesaid Substitute Brief of Appellant to be served upon the following counsel for the Respondent in accordance with Supreme Court Rules for electronic filing:

Michael L. Jackson
Law Offices of Michael L. Jackson, L.C.
415B West Main Street
P.O. Box 287
Jackson, Missouri 63755
E-Mail: mlj@mjacksonlaw.com



**Thomas H. Rolwing, Jr.**



Electronically Filed - Supreme Court - December 07, 2012 - 04:03 PM CST