

IN THE SUPREME COURT OF MISSOURI

JOSEPH SZRAMKOWSKI,)

Appellant/Cross-Respondent,)

vs.)

DOROTHY SZRAMKOWSKI,)

Respondent/Cross-Appellant.)

Supreme Court No. SC91108

APPELLANT/CROSS-RESPONDENT’S SUBSTITUTE REPLY BRIEF

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ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT/CROSS-APPELLANT HAD THE MENTAL CAPACITY TO INSTITUTE THE ACTION FOR DISSOLUTION OF MARRIAGE BECAUSE THE FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT THE EVIDENCE ADDUCED AT TRIAL CLEARLY ESTABLISHED THAT RESPONDENT/CROSS-APPELLANT WAS INCAPACITATED PRIOR TO THE FILING OF THE PETITION FOR DISSOLUTION OF MARRIAGE.

It must be initially observed that Respondent/Cross-Appellant apparently refuses to acknowledge the presence of her Alzheimer's disease, choosing to instead talk about "the effects of age" and "certain difficulties from age." *Respondent/Cross-Appellant's Substitute Brief*, p. 29; p. 30. In fact, Respondent/Cross-Appellant was diagnosed with this debilitating disease in 2006. *See Appellant/Cross-Respondent's Substitute Brief*, p. 35; *Appendix*, pp. A28-A31.

Contrary to Respondent/Cross-Appellant's assertion, Appellant/Cross-Respondent is not seeking a "legal framework" to protect his own litigation interests. *Respondent/Cross-Appellant's Substitute Brief*, p. 29. Actually, Appellant/Cross-Appellant has pointed out that this case presents the Court with the opportunity to establish the framework under which Missouri courts will address the issue of whether an

Alzheimer's sufferer has the capacity to institute an action for dissolution of marriage. *See Appellant/Cross-Respondent's Substitute Brief, p. 32.* Respondent/Cross-Appellant's argument solely focuses on the rights of the party seeking the dissolution of marriage. However, any legal framework must balance the rights of the Alzheimer's sufferer and those of the long-time spouse who is the subject of specious and fanciful abuse allegations. This is especially true where, like here, the Alzheimer's sufferer is taken from the marital home and sequestered from the long-time spouse. *Transcript, pp. 149-150; p. 194; pp. 150-151; pp. 154-155.*

Ironically, Respondent/Cross-Appellant ascribes ill-intent to Appellant/Cross-Respondent's efforts to seek a guardianship for his wife. *Respondent/Cross-Appellant's Substitute Brief, p. 30.* Appellant/Cross-Respondent only took this step after several troubling incidents involving his wife, alleging that she suffered from Alzheimer's disease. *See Appellant/Cross-Respondent's Substitute Brief, pp. 14-15; Transcript, p. 137; p. 138; Appendix, p. A1-A4.*

In fact, the Probate Division agreed with Appellant/Cross-Respondent, finding that Respondent/Cross-Appellant was “. . . an incapacitated and disabled person by reason of dementia . . .” *Appendix, pp. A5.*

On December 11, 2006, Appellant/Cross-Respondent specifically raised in a timely fashion the issue of Respondent/Cross-Appellant's capacity to proceed with the Petition for Dissolution of Marriage. *Legal File, pp. 14-15.* An Amended Motion for Lack of Capacity was filed on October 30, 2007. *Legal File, pp. 16-19.*

The trial court denied these Motions and in the Judgment simply stated that Respondent/Cross-Appellant “had the mental capacity to file her [Petition] . . .” *Legal File, p. 144.*

Contrary to Respondent/Cross-Appellant’s implication, Appellant/Cross-Respondent has not suggested that the July, 2007, adjudication gave rise to a presumption of incompetence. *Respondent/Cross-Appellant’s Substitute Brief, pp. 32-33.*

Instead, Appellant/Cross-Respondent argues in his Substitute Brief that the trial court failed to address in any way the evidence showing that Respondent/Cross-Appellant’s cognitive problems were manifested as early as November, 2005, a year prior to the filing of the Petition for Dissolution of Marriage.

Appellant/Cross-Respondent cites specific evidence which support his contention that Respondent/Cross-Appellant lacked the capacity to file the Petition for Dissolution of Marriage. *Appellant/Cross-Respondent’s Substitute Brief, pp. 34-36.* As such, the Petition was not verified. *See 452.310.1 RSMo 2009.*

Respondent/Cross-Appellant cites Dr. Wilson’s Interrogatory answer regarding whether Respondent/Cross-Appellant was “incompetent” as evidence in support of the trial court’s finding that Respondent/Cross-Appellant had the “mental capacity” to file the Petition. *Respondent/Cross-Appellant’s Substitute Brief, p. 33, Legal File, p. 144.*

It is reasonable to infer from this argument that Respondent/Cross-Appellant concurs that Dr. Wilson’s Interrogatory answers based on her observations between August 10, 2006, and August 31, 2006, are relevant to the issue of whether Respondent/Cross-Appellant had the capacity to file the Petition.

Respondent/Cross-Appellant does not address in her Substitute Brief the Interrogatory answer in which Dr. Wilson specifically opines that Respondent/Cross-Appellant was “disabled” and “incapacitated.” *Appellant/Cross-Respondent’s Appendix, p. 30, Appellant/Cross-Respondent’s Substitute Brief, p. 35.*¹

Respondent/Cross-Appellant invokes Rule 73.01(c) in an attempt to excuse the trial court’s failure to make findings regarding certain evidence. *Respondent/Cross-Appellant’s Substitute Brief, pp. 36-37.* However, Appellant/Cross-Appellant has taken issue with the specific finding that Respondent/Cross-Appellant had the “mental capacity” to file the Petition, arguing that said finding is not supported by substantial evidence and pointing out that there was substantial evidence supporting a finding that Respondent/Cross-Appellant was incapacitated at the time the Petition was filed.

Finally, Respondent/Cross-Appellant misrepresents Appellant/Cross-Respondent’s argument as raised in his Substitute Brief. He is not suggesting that those with Alzheimer’s disease “automatically be deemed to lack capacity to sue.” *Respondent/Cross-Appellant’s Substitute Brief, p. 38.* To the contrary, Appellant/Cross-Respondent believes it is appropriate that a framework is established to determine whether the sufferers of a prevalent cognitive disease have the capacity to institute an

¹ Respondent/Cross-Appellant’s testimony is recounted as evidence of her capacity.

Respondent/Cross-Appellant’s Substitute Brief, p. 33-35. However, Appellant/Cross-Respondent contends that Respondent/Cross-Appellant should not have been permitted to testify. *See Appellant/Cross-Respondent’s Substitute Brief, pp. 38-41.*

action to dissolve a long-term marriage where there is evidence of delusional and paranoid thoughts.

The trial court erred in finding that Respondent had the mental capacity to institute the dissolution of marriage action because the evidence adduced at trial clearly demonstrated Respondent's incapacity prior to November 14, 2006.

II.

THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT/CROSS-APPELLANT DID NOT LACK THE MENTAL CAPACITY TO TESTIFY IN HER OWN BEHALF BECAUSE THE TRIAL COURT'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT RESPONDENT/CROSS-RESPONDENT FAILED TO REBUT THE PRESUMPTION THAT SHE WAS INCOMPETENT TO TESTIFY.

It may reasonably be inferred from Respondent/Cross-Appellant's Substitute Brief that she concedes that the July, 2007, adjudication by the Probate Division of the St. Louis County Circuit Court resulted in a presumption of incompetence to testify and that Respondent/Cross-Appellant had the burden to rebut the presumption. *Respondent/Cross-Appellant's Substitute Brief, pp. 39-40. See Section 475.078.3, RSMo 2009.*

This presumption may be overcome “. . . by extrinsic evidence that the witness

both (1) understands the obligation of the oath, and (2) has sufficient mind and memory to notice, recollect, and communicate the events.” *Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo.App.W.D. 1993).

It is important to note that the trial court simply found that Respondent/Cross-Appellant did “. . . not lack the mental capacity to testify in her own behalf as to the issue of whether the parties’ marriage is irretrievably broken.” *Legal File*, p. 144.

The trial court did not specifically find that Respondent/Cross-Appellant had carried her burden to rebut the presumption of incompetence and that she was therefore *competent* to testify. In fact, no evidence is cited in the Judgment from which it even could be inferred that Respondent/Cross-Appellant carried her burden in this regard. *Legal File*, pp. 138-146.

Respondent/Cross-Appellant only addresses in her Substitute Brief the *capacity* to testify but does not address the *competency* and fails to (and simply cannot) demonstrate that the (1) the trial court found the presumption rebutted and (2) that there was substantial evidence to demonstrate the rebuttal of the presumption.²

² Respondent/Cross-Appellant uses the terms interchangeably. For instance, Respondent/Cross-Appellant states that the “. . . trial court here properly found that Respondent[/Cross-Appellant] had the capacity to testify . . .” and in the next sentence states that “[t]he determination of Respondent[/Cross-Appellant]’s competency to testify was properly a matter for the trial court . . .” *Respondent/Cross-Appellant’s Substitute Brief*, p. 43.

Respondent/Cross-Appellant cites Sivils v. Sivils, 659 S.W.2d 525 (Mo.App.W.D. 1983), in support of the trial court's decision. *Respondent/Cross-Appellant's Substitute Brief*, p. 41. However, a careful reading of the case reveals that there is no reference to Section 475.078 of the Revised Statutes of Missouri or any mention of the presumption of incompetence to testify after adjudication. This is understandable in light of the fact that the Sivils decision pre-dated the effective date of Section 475.078 in 1983.³ Thus, Sivils is not applicable in this case.

As more detailed in Appellant/Cross-Respondent's Substitute Brief, the evidence at trial demonstrated that Respondent/Cross-Appellant was not oriented to time and space and had great difficulty recalling significant events. She did not know the date. *Transcript*, p. 74. She contradicted herself while testifying regarding her eyesight, the alleged abuse and the availability of food. *Transcript*, p. 58; p. 63; p. 64; p. 66; p. 76; p. 77; pp. 60-61; p. 69. Respondent/Cross-Appellant was unable to recall her doctor's name and had no recollection of testifying in the Probate Division matter. *Transcript*, p. 72; 78.

Absolutely no evidence was presented at trial which corroborated Respondent/Cross-Respondent's testimony and Appellant/Cross-Respondent presented evidence contradicting his wife's testimony. Thus, Respondent/Cross-Appellant failed to rebut the incompetence presumption and the trial court should not have permitted her to testify.

³ See L. 1983, S.B. Nos. 44&45, p. 872, § 1.

III.

THE TRIAL COURT ERRED IN PERMITTING THE DISSOLUTION OF MARRIAGE MATTER TO PROCEED BECAUSE THE TRIAL COURT’S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT THERE WAS NOT A PROPER REAL PARTY IN INTEREST.

Respondent/Cross-Appellant has raised an objection to Appellant/Cross-Respondent’s Point Relied On, contending that it is “so vague as to render a responsive argument nearly impossible.” *Respondent/Cross-Appellant’s Substitute Brief*, pp. 47-48.

Rule 84.04(d)(1) of the Rules of Civil Procedure provides:

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

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

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

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

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

the legal reasons, in the context of the case, support the claim of reversible error].”

“Thus, the rule requires that each point relied on: (1) identify the trial court’s ruling or action that the appellant is challenging on appeal; (2) state the legal reasons for the appellant’s claim of reversible error; and (3) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.” Wilson v. Carnahan, 25 S.W.3d 664, 666 (Mo.App.W.D. 2000)(*citations omitted*).

“The function of this rule is to give notice to the opposing party of the precise matters which must be contended with and to inform the court of the issues presented for review.” Wilkerson v. Prelutsky, 943 S.W.2d 643, 647 (Mo.banc 1997)(*citations omitted*).

In the present case, Appellant/Cross-Respondent’s Point Relied On III specifically identifies the trial court’s action which Appellant/Cross-Respondent is challenging (permitting the dissolution matter to proceed), alleges that this action is not supported by substantial evidence, is against the weight of the evident and erroneously applies the law and summarizes that the reason for the error is that there was not a proper real party in interest. Appellant/Cross-Respondent’s Substitute Brief, p. 41. Clearly, Respondent/Cross-Appellant had notice as to with what precisely she had to contend. The Point Relied On adequately informs the Court of the issue Appellant/Cross-Appellant has presented for review.

Unlike in the case cited by Respondent/Cross-Appellant, Stickley v. Auto Credit,

Inc., 53 S.W.3d 560 (Mo.App.W.D. 2001), Appellant/Cross-Respondent’s Point Relied On III is coherent, brief and concise and does not require this Court to speculate or serve as an advocate to discern the issue Appellant/Cross-Respondent has asserted. *See also Loumiet v. Loumiet*, 103 S.W.3d 332, 344-345 (Mo.App.W.D. 2003).

It should be noted that Respondent/Cross-Appellant apparently was able to respond to Point III. Her response covers nearly seventeen (17) pages of the Substitute Brief and takes issue with Appellant/Cross-Respondent’s contention raised in Point III that there was not a proper real party in interest. *Respondent/Cross-Appellant’s Substitute Brief*, pp. 49-65.

Accordingly, Appellant/Cross-Respondent respectfully requests that Respondent/Cross-Appellant’s objection to Point Relied On III be denied and that the Court consider Appellant/Cross-Respondent’s Point III and his argument in support thereof.

Respondent/Cross-Appellant incorrectly asserts that Appellant/Cross-Respondent’s argument regarding the lack of a real party in interest puts “a lock on the courthouse door” and in support alleges that “Missouri law allows a person under a presumption of incompetence to rebut that presumption.” Respondent/Cross-Appellant cites *Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo.App.W.D. 1993), as authority for her assertion. *Respondent/Cross-Appellant’s Substitute Brief*, p. 49.

However, the issue before the court in *Clark* was the presumption of incompetence to testify pursuant to Section 491.060(1). This statutory section provides that “[a] person

who is mentally incapacitated at that time of his or her production for examination” shall be “incompetent to testify.” *See Preston v. State*, 33 S.W.3d 574, 580 (Mo.App.W.D. 2000). This section does not address whether a person adjudicated incapacitated may pursue litigation in her name.

Thus, contrary to Respondent/Cross-Appellant’s position, a person adjudged incapacitated would still have an opportunity to rebut the Section 491.060(1) presumption as to testimony during litigation prosecuted by the person’s guardian and/or conservator.

Furthermore, Respondent/Cross-Appellant’s hypothetical situation is not applicable in this case. Here, the Probate Division adjudicated Respondent/Cross-Appellant to be incapacitated and appointed a guardian and conservator for her. *Legal File*, pp. 25-26.

These individuals, under the appropriate circumstances, could have properly and timely sought substitution as the real party in interest and if substituted adduced evidence at trial to rebut the presumption of incompetence to testify. Respondent/Cross-Appellant would not be locked out of the courthouse.

Additionally, Respondent/Cross-Appellant spends much time discussing the issues of capacity to sue and standing to sue and cites *City of Wellston v. SBC Communications*, 203 S.W.3d 189 (Mo. banc 2006), a case dealing with third and fourth class cities’ right to prosecute litigation in their own names. *Respondent/Cross-Appellant’s Brief*, pp. 50-53.

However, in the present case the issue is whether the dissolution of marriage action filed by Respondent/Cross-Appellant should proceed in her name after a guardian and conservator were appointed by the Probate Division.

It appears that it is Respondent/Cross-Appellant who “misunderstands” Rule 52.13(b) of the Rules of Civil Procedure. *Respondent/Cross-Appellant’s Brief*, p. 57. She correctly recognizes that the Rule distinguishes between death and incapacity but fails to apply logic and common sense to the distinction.

In the context of Rule 52.13(a), the litigant is dead and therefore there is no one to pursue the case *unless* someone seeks to be substituted as the party. There is no requirement that a substitution of party be sought – if no one comes forward for the deceased within ninety (90) days the case is dismissed. Dismissal is mandatory.

Under Rule 52.13(b) an “incompetent” *must* have someone seek substitution as the party and the court then has the discretion to permit the case to go forward. The discretion lies in deciding whether the case continues, not in the need for substitution for an incompetent.⁴ Dismissal is permissible.

Contrary to Respondent/Cross-Appellant’s suggestion, *Walters v. Walters*, 113 S.W.3d 214, 216 (Mo.App.S.D. 2003), is relevant because it demonstrates the proper substitution for a incapacitated party and prosecution of a dissolution of marriage action

⁴ Section 475.078.3 of the Revised Statutes of Missouri states that “[a] person who has been adjudicated incapacitated or disabled or both shall be presumed to be incompetent.”

by a real party in interest. *See Respondent/Cross-Appellant's Substitute Brief, p. 58.* These are exactly the issues before this Court.

Respondent/Cross-Appellant suggests that the Court should treat her December, 2008, Motion for Leave “. . . as both a motion for leave to amend the pleadings and a motion to substitute.” *Respondent's Brief, p. 60.*

However, Respondent/Cross-Appellant ignores Section 452.314 which permits a guardian to file a petition for dissolution of marriage (or for legal separation if the ward has a history of religious objection to divorce) only if the guardian has reasonable cause to believe that the incapacitated person has been the victim of abuse by the spouse.

The original Petition did not allege abuse. *Legal File, pp. 11-13.* The only information that guardian might have gleaned in this regard would have been from the incapacitated person at or near the time of incapacity, rendering its veracity highly suspect. *Transcript, p. 99.*⁵

In order to prosecute the dissolution of marriage action the guardian would have been required to plead specific allegations of abuse and demonstrated “reasonable cause” to believe Respondent/Cross-Appellant had been a victim of abuse. The guardian never did this.

Respondent/Cross-Appellant acknowledges that the December 5, 2008, proposed Amended Petition and the February 5, 2009, proposed Petition for Dissolution of

⁵ Appellant/Cross-Respondent did timely object to Respondent/Cross-Appellant's testimony at trial. *Transcript, pp. 51-53.*

Marriage (Amended by Interlineation) were not verified. *Respondent/Cross-Appellant's Substitute Brief*, pp. 60-61, *Legal File*, pp. 40-45, pp. 89-94. See 452.310.1 RSMo 2009. Respondent/Cross-Appellant contends that she is “. . . entitled to the inference that, had the trial court granted the leave requested, Petitioner would have then filed the necessary verified amended pleadings. *Respondent/Cross-Appellant's Substitute Brief*, p. 61.

However, Respondent/Cross-Appellant does not provide any support for this purported entitlement. She brushes off the contention that the failure to verify the pleadings is an admission of incapacity by relying on Rule 73.01(c), without any support for the application of the Rule in this context. *Respondent/Cross-Appellant's Substitute Brief*, p. 61.

Additionally, Respondent/Cross-Appellant does not address the fact that in May, 2007, the trial court appointed a guardian ad litem for Respondent/Cross-Appellant pursuant to Rule 52.02(k) of the Rules of Civil Procedure but later decided that in December, 2008, over a year later, that she did not lack the capacity to testify.

Finally, Respondent/Cross-Appellant once again improperly uses “incapacity” and “incompetence” interchangeably. Appellant/Cross-Respondent is not “essentially” having the Court find that Respondent/Cross-Appellant was “competent” at one point in time and then incompetent at a later date. *Respondent/Cross-Appellant's Substitute Brief*, p. 65.

It is Appellant/Cross-Respondent's contention that Respondent/Cross-Appellant was “incapacitated” as of July, 2007, and therefore presumed incompetent. This is supported by substantial evidence and properly applies the law. See 475.078.3 RSMo

2009. The duly-appointed guardian should have sought substitution as the real party in interest, assuming that she has reasonable cause to believe that Respondent/Cross-Appellant was a victim of abuse. *See 452.314 RSMo 2009.*

IV.

THE TRIAL COURT ERRED IN FINDING THE PARTIES' MARRIAGE WAS IRRETRIEVABLY BROKEN BECAUSE THE FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT RESPONDENT FAILED TO ADDUCE EVIDENCE IN SUPPORT OF THE APPLICATION OF ANY OF THE FIVE FACTORS IN SECTION 452.320.2(1).

“While the trial court must make a finding that the marriage is irretrievably broken, it need not make a finding concerning the specific statutory ground upon which it based that conclusion. Nevertheless, the decree must be supported by substantial evidence, must not be against the weight of the evidence, and must not erroneously declare or apply the law.” *In re Marriage of Thompson*, 894 S.W.2d 255, 256 (Mo.App.S.D. 1995)(citations omitted).

Most importantly, “[t]here must be factual support found in one or more of the five factors when one party denies the marriage is irretrievably broken.” *Lawrence v. Lawrence*, 938 S.W.2d 333,336 (Mo.App.W.D. 1997)(citations omitted).

Although the Judgment is silent as to which factor in Section 452.305.1 upon which it relied in finding the marriage irretrievably broken, Respondent/Cross-Appellant

suggests in her Substitute Brief that “. . . substantial evidence in the record demonstrates that Appellant[/Cross-Respondent] has behaved in such a way that Respondent[/Cross-Appellant] cannot reasonably be expected to live with him.” *Respondent/Cross-Appellant’s Substitute Brief, p. 70.*

This is the first time in this litigation that there has been any indication as to the provision in Section 452.320.2(1) upon which Respondent/Cross-Appellant relies to support her position that the marriage is irretrievably broken. It is reasonable to infer that Respondent/Cross-Appellant has abandoned any claim as to the application of any of the other four (4) factors in Section 452.320.2(1).

Respondent/Cross-Appellant cites Wagoner v. Wagoner, 76 S.W.3d 288, 290-291(Mo.App.W.D. 2002), in support of her position. *Respondent/Cross-Appellant’s Brief, p. 69.*

It should be noted that in Wagoner the wife had specifically alleged, pursuant to Section 452.320.2(1)(b), that her husband had behaved in such a way that she could not reasonably be expected to live with him.” 76 S.W.3d at 290.

In the present case, Respondent/Cross-Appellant did not plead facts to support any of the factors listed in Section 452.320.2(1). Instead, the Petition simply states the conclusion that “[t]here is no reasonable likelihood that the marriage can be preserved and, therefore, the marriage is irretrievably broken.” *Legal File, pp. 11-13.*

Since the Judgment is silent as to the factor on which the trial court based the irretrievably broken finding, Respondent/Cross-Respondent attempts in her Substitute

Brief to now suggest that the evidence adduced at trial supports the application of Section 452.320.2(1)(b).

However, in Wagoner the evidence presented at trial to specifically support the application of this factor included the husband's lack of participation in couples' retreats and activities, his failure to attend church with his wife and refusal to attend marriage counseling with the wife. There was evidence of the lack of communication between the parties. 76 S.W.3d at 290-291. The husband acknowledged the lack of communication and admitted some of the wife's allegations. 76 S.W.3d at 291.

There was a finding by the trial court that there was testimony from both parties about the husband's refusal to communicate and his "intentional isolation". Basically, the parties' disagreement was not about the husband's conduct, but rather whether the conduct was "egregious enough" that the wife could not be expected to live with the husband. *Id.*

In the present case, the trial court's Judgment simply recites some of the testimony presented at the trial without specifying whether it constituted a "finding" of the trial court. *Legal File, pp. 138-144.* There was no finding by the trial court that Appellant/Cross-Respondent admitted any of the allegations that Respondent/Cross-Appellant raised in her testimony.

The evidence demonstrated that Appellant/Cross-Respondent specifically denied Respondent/Cross-Appellant's allegations. However, in her Substitute Brief Respondent/Cross-Appellant recounts at length the trial testimony she perceives

beneficial and conveniently neglects to include Appellant/Cross-Respondent's denials and the contrary evidence.⁶ *Respondent/Cross-Appellant's Substitute Brief*, pp. 10-21.

Citing 8000 Maryland, LLC v. Huntleigh Financial Services, Inc., 292 S.W.3d 439, 445 (Mo.App.E.D. 2009), Respondent/Cross-Appellant suggests that “. . . Appellant[/Cross-Appellant's] testimony as well as his characterizations of the entire record during this appeal, should be disregarded.” *Respondent's Brief*, p. 73.

However, the trial court decision must still be supported by substantial evidence, cannot be against the weight of the evidence, erroneously declare the law or erroneously apply the law. Murphy v Carron, 536 S.W.2d. 30, 32 (Mo.banc 1976).

“Substantial evidence is competent evidence from which the trial court could reasonably decide the case.” Bauer v. Bauer, 38 S.W.3d 449, 455 (Mo.App.E.D. 2001)(*citations omitted*). “Weight of the evidence’ means its weight in probative value, not the quantity or amount of evidence. The weight of evidence is not determined by mathematics, but on its effect in inducing belief.” Waddell v. Dir. of Revenue, 856 S.W.2d 94, 95 (Mo.App.S.D.1993)(*citations omitted*).

In the present case, Respondent/Cross-Appellant's allegations of abuse were unsubstantiated, contradictory and fanciful. Contrary to Respondent/Cross-Appellant's implication, the trial court did not make a finding as to whether Respondent/Cross-

⁶ In Respondent/Cross-Appellant's Statement of Facts Appellant/Cross-Appellant's trial evidence is reduced to three (3) sentences. *Respondent/Cross-Appellant's Substitute Brief*, p. 19. This does not appear to be a “fair” statement of the facts. See Rule 84.04(c).

Appellant should be expected to live with Appellant/Cross-Respondent. *Respondent/Cross-Appellant's Substitute Brief, p. 73; Legal File, pp. 138-146.*

Respondent/Cross-Appellant failed to carry her burden of demonstrating to the trial court that Appellant/Cross-Respondent behaved in such a way that she could not be expected to live with him. As such, there was no basis on which the trial court could determine that the parties' marriage was irretrievably broken.

Accordingly, the trial court erred in finding the marriage irretrievably broken since Respondent/Cross-Appellant failed to adduce evidence in support of the application of any of the five (5) statutory factors.

V.

THE TRIAL COURT ERRED IN AWARDING FEES TO THE GUARDIAN AD LITEM BECAUSE THE TRIAL COURT LACKED JURISDICTION TO CONTINUE THE GUARDIAN AD LITEM'S PARTICIPATION IN THE DISSOLUTION OF MARRIAGE MATTER AND THEREFORE THE AWARD OF FEES IS VOID AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS AGAINST THE WEIGHT OF THE EVIDENCE AND ERRONEOUSLY APPLIES THE LAW IN THAT THE PROBATE DIVISION APPOINTED A GUARDIAN FOR RESPONDENT/CROSS-APPELLANT.

It appears that Respondent /Cross-Appellant does not take a position on the issue of whether the trial court erred in awarding fees to the guardian ad litem. *Respondent/Cross-Appellant's Brief, p. 78.*

However, to the extent Respondent/Cross-Appellant objects to Appellant/Cross-Respondent's reasoning in support of Point Relied On V Appellant/Cross-Respondent hereby restates and incorporates herein his reply to Respondent/Cross-Appellant's comments, suggestions and arguments in regard to Appellant/Cross-Respondent's Points Relied On I, II, III and IV.

Furthermore, it should be noted that nowhere in her Substitute Brief does Respondent/Cross-Appellant address the specific issue raised by Appellant/Cross-Respondent in Point Relied on V of his Substitute Brief that the guardian ad litem's participation in this matter should have ceased in July, 2007.

As more fully discussed in Appellant/Cross-Appellant's Substitute Brief, the guardian ad litem's involvement and participation in this litigation became unnecessary and improper after the Probate Court appointed a guardian for Respondent/Cross-Appellant and the trial court lacked jurisdiction to continue the guardian ad litem's appointment beyond July 9, 2007. *Appellant/Cross-Respondent's Substitute Brief*, pp. 57-59.

“Where an order appointing a guardian ad litem is rendered void for want of jurisdiction, the order allowing fees and costs for services of the guardian ad litem is also void.” *In re Estate of Scott*, 932 S.W.2d 413, 414 (Mo.App.E.D. 1996)(citation omitted).

The trial court erred in awarding fees to the GAL because his participation in this matter was improper after the Probate Division's July 9, 2007, guardian appointment and the Judgment in this regard is void.

VI.

REGARDING RESPONDENT/CROSS-APPELLANT'S CROSS-APPEAL, THE TRIAL COURT DID NOT ERR IN DENYING RESPONDENT/CROSS-APPELLANT'S DECEMBER 5, 2008, MOTION FOR LEAVE TO FILE AMENDED PETITION BECAUSE THERE HAD BEEN NO SUBSTITUION OF PARTY IN THAT SAID MOTION WAS FILED BY THE GUARDIAN AD LITEM AND HE DID NOT HAVE STANDING TO PROSECUTE THE ACTION OR TO PARTICIPATE IN THE PROCEEDINGS BEYOND JULY 9, 2007.

Initially, Appellant/Cross-Respondent hereby restates and incorporates herein his Substitute Brief and Reply Brief in response to Respondent/Cross-Appellant's Cross-Appeal.

On December 5, 2008, Respondent/Cross-Appellant's trial counsel filed a Motion for Leave to File Amended Petition and an Amended Petition for Dissolution of Marriage. The caption of this Motion included the names of Respondent/Cross-Appellant and the guardian ad litem. *Legal File, pp. 40-45.*

The caption of this unverified Amended Petition included the names of Respondent/Cross-Appellant, the guardian ad litem and the duly-appointed guardian and conservator. *Legal File, p. 40.* The reason stated in support of the Leave request was the May 31, 2007, appointment as guardian ad litem for Respondent/Cross-Appellant. *Legal File, p. 44.*

Respondent/Cross-Appellant's Point Relied On implies that a substitution motion was filed before or with the Motion for Leave. *Respondent/Cross-Appellant's Substitute Brief*, p. 79. This did not happen. In fact, in response to Appellant/Cross-Respondent's counsel's argument at trial Respondent/Cross-Appellant's counsel made an oral motion to substitute the guardian for the guardian ad litem. *Transcript*, p. 12.

Post-trial, on February 5, 2009, Respondent/Cross-Appellant filed a Motion for Substitution of Parties, seeking to have Ms. Fowler substituted as the petitioner. *Legal File*, pp. 95-96. The trial court properly denied these motions and no substitution was effected. *Legal File*, p. 144.

Section 475.078.3 of the Revised Statutes of Missouri states that “[a] person who has been adjudicated incapacitated or disabled or both shall be presumed to be incompetent.” Section 475.078.2 provides in part that “[a]n adjudication of incapacity or disability does operate to impose upon the ward or protectee all legal disabilities provided by the law.”

Therefore, it is clear that this matter should not have proceeded with Respondent/Cross-Appellant as the party in interest as she had been adjudged incapacitated and disabled and therefore was presumed to be incompetent.

Rule 52.02(k) of the Rules of Civil Procedure provides that a guardian ad litem shall be appointed whenever a mental or physical infirmity makes a party incapable of caring for her own interests in the litigation. However, this only applies when the person does not have a “duly appointed guardian.”

Thus, the guardian ad litem lacked standing to seek Leave to file the amended pleading or even to proceed with the pending Petition. His participation in the litigation became unnecessary and improper when Margaret Fowler was duly-appointed by the Probate Court to serve as Respondent/Cross-Appellant's guardian.

As previously discussed, Rule 52.01 of the Rules of Civil Procedure requires that every civil action be prosecuted in the name of the real party in interest, but permits a guardian to proceed with the case. However, Rule 52.13(b) provides that “[i]f a party become incompetent, upon *motion for substitution . . .*, the court may allow the action to be continued by or against the party's representative. (*emphasis added*)

No effort was made prior to trial to substitute the guardian for Respondent/Cross-Appellant as required by Rule 52.13(b). Instead, Respondent/Cross-Appellant simply attempted to file an amended petition and based the Motion for Leave solely on the May 31, 2007, guardian ad litem appointment.

There was absolutely no mention in the Motion that subsequent to the guardian ad litem's appointment the Probate Division declared Respondent/Cross-Appellant incapacitated and disabled. Instead, Respondent/Cross-Appellant chose in the Motion to unilaterally change the case style to indicate that the petitioner was “DOROTHY SZRAMKOWSKI By her G.A.L. BRIAN DUNLOP.” *Legal File, p. 44*. This was not a proper substitution and the pleading listed someone without standing to proceed on Respondent/Cross-Appellant's behalf.

Section 452.314 permits a guardian to file a petition for dissolution of marriage (or for legal separation if she has a history of religious objection to divorce) only if the guardian has reasonable cause to believe that the incapacitated person has been the victim of abuse by the spouse.

The Petition for Dissolution was silent in regard to allegations of abuse and the only information the guardian might have gleaned would have been from the incapacitated person at or near the time of incapacity, rendering its veracity highly suspect. *Legal File, pp. 11-13.*

Respondent/Cross-Appellant suggests that the provisions of Section 452.314 are not applicable because the action was “initially brought by Respondent[/Cross-Appellant].” *Respondent/Cross-Appellant’s Substitute Brief, p. 81.*

However, there is nothing in Section 452.314 to suggest that the constraints on the guardian’s actions are not applicable simply because the case was pending prior to the adjudication. The statute seems clear that a guardian may only prosecute a dissolution of marriage action on behalf of the ward if she has the requisite “reasonable cause” about abuse.

Respondent/Cross-Appellant appears to conclude that the real party in interest issue may be easily resolved by simply permitting Respondent/Cross-Appellant to amend her pleadings “. . . to conform to the evidence, and order that judgment be entered in favor of Respondent[/Cross-Appellant].” *Respondent/Cross-Appellant’s Substitute Brief, p. 82.*

However, Respondent/Cross-Appellant fails to adequately address in her Substitute Brief the substitution issue. A proper and timely substitution motion should have been filed seeking to have the guardian serve as the petitioner. Any amended pleading filed by the guardian after substitution should have reflected the guardian's "reasonable cause" (if any existed) to believe that Respondent/Cross-Appellant was a victim of abuse. *See Section 452.314 RSMo 2009.*

It should be noted that Respondent/Cross-Appellant filed an unverified "Petition for Dissolution of Marriage (Amended by Interlineation)" on February 5, 2009. This pleading alleged for the first time, nearly two (2) months after the trial, that certain provisions of Section 452.320.2 were met and that Respondent/Cross-Appellant was an abuse victim. *Legal File, pp. 89-92.*

Clearly, Appellant/Cross-Respondent would have been prejudiced if the trial court would have permitted the substitution and the filing of the February 5, 2009, Petition. Prior to trial Appellant/Cross-Respondent was not put on notice as to these specific allegations and therefore did not have an opportunity to conduct discovery on the specific issue of whether the guardian had reasonable cause regarding abuse and, if so, the basis for said cause.⁷

⁷ The February 5, 2009, Petition indicated that Respondent/Cross-Appellant, not the guardian, was bringing the cause of action and does not allege that the guardian had reasonable cause to believe that the Ward was a victim of abuse at the hands of Appellant/Cross-Respondent. *Legal File, pp. 89-90.*

CONCLUSION

As set out more fully in Appellant/Cross-Respondent's Substitute Brief, the trial court's Judgment should be reversed and the Petition for Dissolution of Marriage be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Signature above is also certification that a true and correct copy of the above and foregoing document has been mailed, postage prepaid, this 27th day of January, 2011, to:

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IN THE SUPREME COURT OF MISSOURI

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

CERTIFICATION

I, *M. Zane Yates*, pursuant to Rule 84.06(c) do hereby certify:

1. That Appellant/Cross-Respondent’s Reply Brief complies with the information required by Rule 55.03, and is within the Rule 84.06(c) limitations by containing 6,969 words in said Substitute Reply Brief;

2. That Appellant/Cross-Respondent’s Substitute Reply Brief was saved on a 3.5” disk and labeled with the case caption and is hereto attached;

3. That the disk has been scanned and is virus free;

4. That the word processing program utilized to create and save the brief was Microsoft Word.

Respectfully Submitted,

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