IN THE SUPREME COURT OF MISSOURI

PAUL L. PASTERNAK, Appellant, vs. DENISE M. PASTERNAK, Respondent.	))))))))))	Appeal No. SC94488 Appeal from the Circuit Court of St. Francois County, Missouri 24th Judicial Circuit

SUBSTITUTE BRIEF OF APPELLANT, PAUL L. PASTERNAK

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JURISDICTIONAL STATEMENT

This is an appeal from the trial court's Judgment approving Respondent's request for relocation and modifying a divorce decree regarding child custody. The Judgment of the trial court was dated August 7, 2013. Appellant filed a timely appeal of that Judgment with the Missouri Court of Appeals for the Eastern District of Missouri.

This appeal does not involve the validity of a treaty or statute of the United States, construction of the Constitution of the United States or the Constitution of the State of Missouri and does not involve any other claim within the exclusive jurisdiction of the Supreme Court of Missouri. St. Francois County lies within the geographic boundary of the Court of Appeals for the Eastern District of Missouri. Section 477.050, RSMo. Therefore, venue for this appeal lies within the general appellate jurisdiction of the Missouri Court of Appeals for the Eastern District under the provisions of Article V, Section 3 of the Constitution of the State of Missouri.

By Order dated August 19, 2014, the Missouri Court of Appeals, Eastern District, reversed the Circuit Court's Judgment on the basis that the trial court's finding that relocation was in the best interests of the children was not supported by substantial evidence. (A-45) On September 22, 2014, the Court of Appeals subsequently denied Respondent's Motion for Rehearing or Application for Transfer to the Missouri Supreme. (A-70) On November 25, 2014, this Court sustained Respondent's Application for Transfer to this Court. (A-92)

This Court has jurisdiction under Mo. Const. art. V, Sec. 10, which gives this Court authority to transfer a case from the Court of Appeals before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to Supreme Court rule.

STATEMENT OF FACTS

Appellant, Paul Pasternak, (Father) and Respondent, Denise Pasternak, (Mother) were divorced on September 21, 2011. (Supp.L.F. 1-13) They have two sons, Austin Jon Pasternak, born on March 23, 2005, and Andrew Paul Pasternak, born on March 7, 2008. (Supp.L.F. 2) At the time of the divorce, the boys were six and three years of age. (Supp.L.F. 1) Both parties are devoted parents to the children. (L.F. 62)

The parties entered into a negotiated settlement regarding the custody of the minor children at the time of the divorce. (Supp.L.F. 1-13) They received joint legal and physical custody of the children. (Supp.L.F. 10) During the school year, Father had custody of the children every other weekend from Friday at 5 p.m. until Monday at 8 a.m., every Wednesday at 3:15 p.m. to Thursday at 7:15 a.m., alternating holidays, seven "floating holidays" to be chosen by Father, and alternating weeks in the summer. (Supp.L.F. 10) Mother had custody the remainder of the time. (Supp.L.F. 10)

Father was awarded the marital home in Farmington, Missouri, in the dissolution action and continued to live there. (T. 53-54) The children had resided there all of their lives. (T. 54) Father described it as a quiet neighborhood with many children nearby for the boys to play with. (T. 59-60) Mother rented a condominium approximately ten miles from the marital home. (T. 60)

Both parents are teachers. Father teaches sixth grade science at the North County School District in Farmington, Missouri, where he has been employed for twenty-one years.

(T. 55) Mother was employed at the Central R-III School District in Park Hills, Missouri, at the time of the dissolution. (Pet's Exh. 6) She began this employment in 2002. She teaches special education. (Pet's Exh. 6) Both boys attended School in the Central R-III School District. Austin had just completed second grade and Andrew was set to commence kindergarten. (T. 56, 254; Pet.'s Exh. 7)

Father's family is Catholic and he grew up in the Catholic church. (T. 63) The parties were married in the Catholic church and both boys were baptized in the Catholic church. (T.63, 370) Father testified that both boys attend the Parish School of Religion at Immaculate Conception Catholic Church in Park Hills, Missouri. (T. 62) Both parties acknowledged that there was an educational process for children in the Catholic church called PSR which was a two-year process which had to be completed prior to a child's receiving his first communion. (T. 62, 371) Father took Austin to these classes on the Wednesdays he had custody. (T. 62, 371, 373) Mother was not involved in this process. (T. 371) Austin completed the two year class in May, 2013, and received his first communion in May, 2013. (T. 62) Mother did not attend this ceremony. (T. 374) Andrew was scheduled to commence PSR training in the Fall of 2013. (T. 63) Mother testified she did not intend to transport Andrew for these classes. (T. 372)

Father continued to be involved in the children's lives after the divorce. He calls the children every night when they are not with him. (T. 65) During the school year, they attend athletic events such as football, basketball, baseball and volleyball games together. (T.65)

Father acts as the boy's coach in baseball. (T. 388) Mother acknowledged that he did a good job coaching the boys. (T. 388) Father attended their music programs, book fairs, field trips, and class parties, when possible. (T. 65) They also engaged in recreational activities which are available in the area including the Farmington fun center and Farmington water park. (T. 66) Father has not dated anyone since the dissolution. (T. 101) He devotes his time to his work and his two sons. (T. 66; L.F. 69)

The evidence indicated that after the divorce Austin suffered from some educational and behavioral problems involving hyperactivity and a reduced attention span. (T. 10; Pet's Exh. 8) Both parties agreed that these problems needed to be addressed. They disagreed on how best to respond to these difficulties. (T. 10, 12) Mother took Austin to Dr. Rudolph, who recommended trying counseling before prescribing medication. (T. 400)

Mother chose counselor James Womack. (T. 42) Womack began counseling Austin on December 20, 2011. (Exh. 8; T. 9) Womack's initial notes indicate that issues include anger management. (Pet.'s Exh. 8) Womack testified that Austin had anger issues. (T. 10) Mother reported that Austin was not paying attention and she felt he might have "Asperger's". (T. 10) Counselor Womack testified that he did not diagnose Austin with Asperger's. (T. 10)

Both Father and Mother attended the counseling appointments with the children. (T. 40) Mother provided counselor Womack with a list of complaints about Father's behavior that she had written prior to their divorce. (Pet's Exh. 8) She also provided Womack with a letter detailing additional complaints about Father that she wanted Womack to discuss with

the boys. (Pet.'s Exh. 8) Womack testified about disputes in his waiting room involving Mother and Father. (T. 7, 17) Womack appeared to blame the parents equally for their inability to get along while in his office. (T. 44) He recommended counseling for them both. (T. 45)

Despite the issues between the parents, James Womack reported that Austin's behavior improved throughout the progression of the therapy sessions. (T. 34) He attributed this to getting to know the therapist, becoming familiar with his office, the medication, and the parents getting along better. (T. 34) The boys were discharged from therapy on April 11, 2012. (T. 36) He told the parents he thought the children were fine, both normal little kids. (T. 36) He felt like the parents needed counseling more than the boys. (T. 36)

James Womack reported that Mother made an appointment with him to see the boys almost seven months later on November 5, 2012. (T. 36) This was two months after Mother had filed a Motion to Modify the prior custody order. (L.F. 6-12) Mother asked Womack to interview the boys regarding some behaviors which she found concerning. (T. 36) Womack's notes describe Mother's concerns as follows: "both sons running around without underwear at her house. Feels ex-husband may have them do it as well as showering with them." (Pet's Exh. 8) Womack interviewed the boys. They reported that they only took their clothes off to shower and that Austin showered alone but Andrew showered with Father. (Pet's Exh. 8) Womack found no evidence of abuse. (Pet's Exh. 8) In recounting this session at the trial of this matter, Womack testified that he felt Mother's conduct at the November appointment

was suspect. (T. 37) He did not feel there had been any sexual misconduct and felt Mother might be trying to set Father up. (T. 37, 41)

Within a month of commencing counseling with James Womack, Mother set up an appointment for Austin with Dr. Bess. (Pet's Exh. 13) On January 29, 2012, Mother sent a text message to Father which read: "Conversed with austin's teacher. She believes it's time for medicine. She said he is having a problem with concentration and focus. I made him an appt for Thursday at 3 with dr. Bess." (Pet.'s Exh. 13) In response to Father's concerns, Mother texted: "I don't think we need a diagnosis. I think he need something to help him focus on his classwork." (Pet.'s Exh. 13) Dr. Bess prescribed Adderall for Austin. (T. 78)

Father was concerned about Austin taking the prescription drug Adderall. (T. 76, 89) He preferred to work with the resources available at Austin's school, including an assessment of any learning disabilities and creation of an Individual Education Plan (IEP) to address Austin's problems at school. (T. 89) Mother was opposed to an IEP indicating she wanted to avoid labeling Austin. (T. 89) At Father's request, Austin saw two additional doctors, Dr. Zereik and Dr. Callahan. (T. 94, 96) All of the physicians agreed with the prescription of Adderall during the school year. (T. 97) Dr. Callahan advised it was okay not to administer Adderall during the summer or on the weekends. (T. 97, 256) Dr. Rudolph advised that if they did not administer Adderall on the weekends it could result in a rollercoaster effect. (T. 256) While Father originally did not always administer the drugs to Austin, he later consistently administered the medication during the school year. (T. 96) Both parties agreed

not to administer the medication during the summer. (T. 97, 256)

Father was insistent that Austin's problems in school could be related to a learning disability. (T. 75) On March 5, 2013, Austin was evaluated by the Central R-III School District for an IEP. (Pet.'s Exh. 7) The IEP indicated he had a medical diagnosis of ADHD and a learning disability in the areas of reading, comprehension and grammar. (Pet.'s Exh. 7) On May 16, 2013, the IEP report indicated that Austin was making progress. (Pet.'s Exh. 7) Included in the IEP was a recommendation that Austin attend summer school so he would be better prepared for school in the Fall. (T. 71) Father was more diligent about Austin's attendance in summer school than Mother. (T.70)

Mother was hired as a teacher in the Central R-III School District for the school year commencing in August, 2002. (Pet's Exh. 6) At the time of the dissolution, she was a tenured teacher in that district. (Pet.'s Exh. 6) Mother initially received high marks in her performance reviews. (Pet's Exh. 6, pp. 18-55) This was the only long-term job Mother had ever had. (Pet.'s Exh. 6) She was qualified to teach other subjects, but she testified that special education was her "passion". (T. 362)

In March, 2011, after the parties separated but prior to their divorce, Mother applied for a teaching job in Poplar Bluff, Missouri. (T. 354; Pet.'s Exh. 18) She testified that the reason she sent this application was that she wanted to move out of the area. (T. 356) Poplar Bluff is the town where Mother's paramour, Ben Barbour, resides. (T. 356) Mother was never called for an interview for this position and, upon the advice of her attorney she did not

pursue moving during the pendency of the divorce. (T.357)

In May, 2011, two months after making an application for employment to the Poplar Bluff School District, Mother experienced her first unfavorable employment review at Central School District. (Pet's Exh. 6, pp. 56-60) On November 21, 2011, Brad Coleman, the high school principal and Mother's supervisor, entered a Memorandum in her employment records documenting concerns regarding Mother's job performance and directives for the future. (Pet's Exh. 6, p. 66; T. 344) A job improvement plan, dated November 21, 2011, and signed by Brad Coleman, was also entered into Mother's employment record. (Pet's Exh. 6, p. 67-68) Mother's employment review for May, 2012, noted many of the same deficiencies. (Pet.'s Exh. 6, pp. 61-65) On September 26, 2012, Brad Coleman again entered a detailed Memorandum in Mother's employment records documenting concerns regarding Mother's job performance and directives for the future. (Pet.'s Exh. 6, pp. 69-70) On October 18, 2012, Desmond Mayberry, District Superintendent sent a formal notice of deficiency pursuant to Section 168.116, RSMo. to Mother. (Pet.'s Exh. 6, pp.71-72) Dr. Mayberry notes that despite efforts by the administration, the deficiencies in Mother's job performance remain. (Pet.'s Exh. 6, p. 71) Mother is advised in this notice that unless she complies with all directives in the notice the District Superintendent will recommend termination of her position. (Pet.'s Exh. 6, p. 72) This letter is followed by a Memorandum dated November 5, 2012, and signed by Tammy Wadlow and Mother indicating a subsequent conference with Mother concerning her job performance. (Pet.'s Exh. 6, p. 73-74)

On March 2, 2013, Mother received another list of concerns regarding her job performance signed by Brad Coleman and Mother. This indicated a failure to improve. (Pet.'s Exh. 6, p. 75) In March, 2013, following receipt of a letter from Brad Coleman indicating that her employment contract would not be renewed, Mother immediately began applying for work at various school districts. (T. 179) Mother sent applications to Farmington, Fredericktown, Greenville, Clearwater, Doniphan, Poplar Bluff, Bloomfield, Ste. Genevieve, and Avery school districts. (T. 185)

On March 14, 2013, Mother tendered a letter of resignation to the Central R-III school district effective as of the end of the 2012-13 school year. (Pet.'s Exh. 6, p. 76) On April 19, 2013, Mother signed a contract for employment as a teacher at the Greenville School District. (T. 187)

Mother's employment problems coincide, to some extent, with her attempts to modify the original judgment of dissolution of marriage. Mother filed a Motion for Contempt and Motion to Modify on September 13, 2012, only one year after the divorce. (L.F. 6-18; Supp.L.F. 1) At that time Mother requested modification of the original judgment to award her sole legal and physical custody of the minor children, to reduce Father's weekend visitation to every other weekend Friday to Sunday, to reduce Father's Wednesday visitation to Wednesdays from 3 p.m. to 8 p.m., and to remove the seven floating holidays awarded to Father in the divorce. (L.F. 13-14) In support of her motion to modify, Mother alleged that Father was resistant to administering medication as prescribed and had asked that the child be

tested for a learning disability; that the parties could not agree on a babysitter; and that Father was making obscene gestures to her and belittling her in front of the children. (L.F. 7, 9) Father responded to Mother's Motion to Modify denying the allegations and asking that the Judgment remain unchanged. (L.F. 23-25) In the discovery process, Father asked Mother if she intended to relocate the residence of the minor children. (Pet.'s Exh. 17) In her sworn responses, signed by Mother on March 5, 2013, Mother denied that she had any intention of relocating. (Pet.'s Exh. 17)

On April 11, 2013, the trial court set a trial date on the motion filed by Mother for July 15, 2013. (L.F. 3) On May 20, 2013, Mother sent a letter to Father stating: "This letter is to inform you the boys and I will be moving from 481 Shade Tree Lane, Farmington, Missouri 63640 to 402 Main Street Silva, MO 63964 on July 27, 2013." (L.F. 33) Mother noted that "The move is due to my loss of employment…." (L.F. 33) Silva is fifty-six miles from Father's residence. (T. 61) Mother suggested the following changes to the parties' current parenting plan: "due to the distance, it would not be in the boys' best interest to have visits during the week, during the school year. Your visitation schedule will change to every other weekend, during the school year, from 6 pm on Friday to Sunday at 6 pm, and every other week in the summer." (L.F. 33)

On June 18, 2013, Father filed a Petition to Prohibit Relocation together with a Counter-Motion to Modify. (L.F. 27-33) In his Counter Motion to Modify Father requested that sole legal and physical custody be granted to him. (L.F. 32) Father based this request

upon a number of factors which included Mother's refusal to confer, discuss and make mutual decisions regarding the children's welfare, the children's preference to be with him, Austin's special schooling needs and issues, and Mother's intention to move to Silva, Missouri, changing the children's home and school. (L.F. 30-31)

At trial, Mother testified that the sole reason for relocation was her change of employment. (L.F. 33; T. 342) Father strongly believed that relocation of the children was not in their best interests. (T. 84) Father believed that the Central R-III school district was superior to the Greenville school district. (T. 87, 128-29) Austin was making progress with the IEP. (Pet.'s Exh. 7) Father has a large extended family in the Farmington area. (T. 84-86) Father also wanted Andrew to attend the PSR classes at the Catholic Church so that he could take his first communion as his brother Austin had. (T. 62-63)

Mother testified that the children often attended church at the local Baptist church with her or at the Methodist church in Poplar Bluff where her boyfriend attended. (T. 226) She believed it was important for the children to see different sides of religion. (T. 369) Mother did not attend Austin's first communion. (T. 374) She testified she would not drive Andrew to the Catholic church to attend PSR classes. (T. 372) She stated she was not sure if Andrew would make his first communion and she did not know if that was in his best interests. (T. 372)

Mother, who had years of experience as a special education teacher, admitted that change is very difficult for Austin. (T 384) She noted that children with ADHD or any

learning issue are very good with schedules and need to know what is expected from them. (T. 245) In responding to a question from the Court concerning her decision not to pursue a move to Poplar Bluff during the original divorce, Mother stated that after talking it over with her trial attorney she "felt it was in the boys' best interest to stay here." (T. 357) The Court asked Mother how that had changed and Mother responded it was "because of the job situation". (T. 357) The Court went on to ask "So – but for your loss of a job, we wouldn't be here about relocation; is that what you're saying?" (T. 357) Mother responded, "Correct". (T. 358)

When Counselor James Womack was questioned about how the boys might be affected by a change in the custody schedule, he testified that he believed it was important to keep everything consistent for children following a divorce. He testified that they had already been through enough changes as a result of a divorce. (T. 51-52)

The trial court entered its judgment in this case on August 7, 2013, finding Mother's relocation was made in good faith and was in the best interests of the children. (L.F. 55-70) The court found that the parties had demonstrated they could not participate in joint parenting of the children so that an award of sole legal custody was required. (L.F. 72-73) The court granted Mother sole legal custody of the minor children. (L.F. 73)

The court also modified the joint physical custody schedule for the children. (L.F. 74) During the school year, Father was awarded custody on the first, third, fourth and fifth Fridays from Friday at 6 p.m. until Sunday at 6 p.m., together with 18 additional overnights

based upon the Greenville school schedule. (L.F. 81, 92) During the summer, Mother was awarded custody on the second and fourth weekends and for one seven day period, with Father to have the remainder. (L.F. 82) An alternating holiday schedule was also specified by the Court. (L.F. 82) Mother's Motion for Contempt and her request for attorney's fees were denied and these rulings are not the subject of this appeal. (L.F. 75-76)

Father appealed the trial court's decision approving relocation and modifying the judgment of dissolution of marriage granting Mother sole legal custody to the Missouri Court of Appeals for the Eastern District of Missouri. That Court reversed the judgment of the trial court permitting Mother to relocate to Silva, Missouri with the minor children on the basis that the trial court's finding that relocation was in the best interests of the minor children was not supported by substantial evidence. The Eastern District ordered the case remanded to the trial court to deny the motion for relocation, to reinstate the prior visitation schedule and for a determination of legal custody in light of the new Order. Mother's motion for rehearing or transfer was denied by the Eastern District. This case was transferred to the Missouri Supreme Court pursuant to Mother's Application for Transfer directed to this Court.

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN APPROVING THE RELOCATION OF THE MINOR CHILDREN FROM FARMINGTON, MISSOURI, TO SILVA, MISSOURI, BECAUSE THE TRIAL COURT'S FINDING THAT THE RELOCATION WAS MADE IN GOOD FAITH WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT MOTHER'S WORDS AND ACTIONS DEMONSTRATED THAT HER MOTIVE FOR RELOCATING WAS TO REMOVE FATHER FROM THE CHILDREN'S DAY TO DAY LIVES INCLUDING: (1) THE ALLEGATIONS IN MOTHER'S AFFIDAVIT IN SUPPORT OF RELOCATION AND HER MOTION TO MODIFY; (2) MOTHER'S INITIAL JOB APPLICATION TO POPLAR BLUFF IN 2011; (3) MOTHER'S LACK OF ATTEMPT TO IMPROVE HER JOB PERFORMANCE; (4) MOTHER'S REFUSAL TO APPLY FOR JOBS IN CLOSE PROXIMITY TO FATHER'S RESIDENCE; (5) MOTHER'S DENIAL IN MARCH, 2013, THAT SHE INTENDED TO RELOCATE; (6) MOTHER'S PURSUIT OF MODIFICATION OF FATHER'S PHYSICAL CUSTODY SCHEDULE AND LEGAL CUSTODY ORDER BEFORE HER RESIGNATION; AND (7) MOTHER'S FAILURE TO NOTIFY FATHER OF HER INTENTION TO RELOCATE UNTIL TWO MONTHS AFTER

RESIGNING HER JOB AND ONE MONTH AFTER SIGNING A NEW EMPLOYMENT CONTRACT.

Mantonya v. Mantonya, 311 S.W.3d 392 (Mo.App.W.D. 2010).

Swisher v. Swisher, 124 S.W.3d 477 (Mo.App.W.D. 2003).

Brethorst v. Brethorst, 50 S.W.3d 864 (Mo.App.E.D. 2001).

McDonald v. Burch, 91 S.W.3d 660 (Mo.App.W.D. 2002).

Section 452.377, RSMo.

Section 168.116, RSMo.

POINT II

THE TRIAL COURT ERRED IN APPROVING THE RELOCATION OF THE MINOR CHILDREN FROM FARMINGTON, MISSOURI, TO SILVA, MISSOURI, BECAUSE THE TRIAL COURT'S FINDING THAT THE RELOCATION WAS IN THE BEST INTERESTS OF THE CHILDREN WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE GREAT WEIGHT OF THE EVIDENCE INDICATED THAT CONSIDERING ALL OF THE RELEVANT FACTORS CONTAINED IN SECTION 452.375.2, RSMO., THE BEST INTERESTS OF THE CHILDREN WOULD BE SERVED BY MAINTAINING FREQUENT CONTACT WITH BOTH PARENTS AS PROVIDED IN THE PRIOR CUSTODY PLAN AND KEEPING THE CHILDREN IN THE SAME SCHOOL DISTRICT WHERE AUSTIN HAS BEGUN MAKING PROGRESS.

Abernathy v. Meier, 45 S.W.3d 917 (Mo.App.E.D. 2001).

Lowery v. Lowery, 287 S.W.3d 693 (Mo.App.E.D. 2009).

Fohey v. Knickerbocker,130 S.W.3d 730 (Mo.App.E.D. 2004).

Mantonya v. Mantonya, 311 S.W.3d 392 (Mo.App.W.D. 2010).

Section 452.375, RSMo.

Section 452.377, RSMo.

POINT III

THE TRIAL COURT ERRED IN MODIFYING THE PRIOR JUDGMENT OF DISSOLUTION OF MARRIAGE TO CHANGE FROM THE PARTIES' SHARING JOINT LEGAL CUSTODY OF THE CHILDREN TO MOTHER RETAINING SOLE LEGAL CUSTODY OF THE CHILDREN BECAUSE THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT A DETERMINATION THAT A CHANGE HAD OCCURRED IN THE CIRCUMSTANCES OF THE CHILDREN OR THE CUSTODIAN SINCE THE PRIOR JUDGMENT AND THAT MODIFICATION WAS IN THE BEST INTERESTS OF THE CHILDREN IN THAT THE EVIDENCE DEMONSTRATED THAT ALTHOUGH THE PARTIES HAD SOME DIFFICULTIES IN AGREEING ON ALL ASPECTS OF THE CHILDREN'S LIVES THEY ARE BOTH ACTIVE AND INTERESTED PARENTS WHO ARE EQUIPPED AND ABLE TO CONTRIBUTE TO THEIR CHILDREN'S CARE AND BOTH PARENTS INDICATED A WILLINGNESS TO WORK TOWARD THAT GOAL IN THE FUTURE.

S.I.E. v. J.M. 199 S.W.3d 808 (Mo.App.S.D. 2006).

Burkhart v. Burkhart, 876 S.W.2d 675 (Mo.App.W.D. 1994).

O.J.G. v. G.W.G., 770 S.W.2d 372 (Mo.App.E.D. 1989).

Section 452.375, RSMo.

Section 452.410, RSMo.

POINT IV

THE TRIAL COURT ERRED IN MODIFYING THE PRIOR JUDGMENT OF DISSOLUTION OF MARRIAGE AWARDING SOLE LEGAL CUSTODY TO MOTHER BECAUSE THIS DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE AWARD OF SOLE LEGAL CUSTODY TO MOTHER WAS NOT IN THE BEST INTERESTS OF THE CHILDREN WHEN CONSIDERING THE DIRECTIVE CONTAINED IN SECTION 452.375.4, RSMO., BECAUSE THE EVIDENCE INDICATED THAT MOTHER FAILED TO MAKE APPROPRIATE DECISIONS IN THE CHILDREN'S BEST INTERESTS WHEN ACTING AS A JOINT CUSTODIAN WITH FATHER AND MOTHER FURTHER FAILED TO CONSULT OR WORK WITH FATHER FOR THE BENEFIT OF THE CHILDREN AS REQUIRED BY THE PRIOR JUDGMENT AND PARENTING PLAN AND FATHER WAS BETTER ABLE TO ACT AS SOLE LEGAL CUSTODIAN IN THE BEST INTERESTS OF THE MINOR CHILDREN.

Hankins v. Hankins, 920 S.W.2d 182 (Mo.App.W.D. 1996).

Section 452.375, RSMo.

Section 452.410, RSMo.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN APPROVING THE RELOCATION OF THE MINOR CHILDREN FROM FARMINGTON, MISSOURI, TO SILVA, MISSOURI, BECAUSE THE TRIAL COURT'S FINDING THAT THE RELOCATION WAS MADE IN GOOD FAITH WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT MOTHER'S WORDS AND ACTIONS DEMONSTRATED THAT HER MOTIVE FOR RELOCATING WAS TO REMOVE FATHER FROM THE CHILDREN'S DAY TO DAY LIVES INCLUDING: (1) THE ALLEGATIONS IN MOTHER'S AFFIDAVIT IN SUPPORT OF RELOCATION; (2) MOTHER'S INITIAL JOB APPLICATION TO POPLAR BLUFF IN 2011; (3) MOTHER'S LACK OF ATTEMPT TO IMPROVE HER JOB PERFORMANCE; (4) MOTHER'S REFUSAL TO APPLY FOR JOBS IN CLOSE PROXIMITY TO FATHER'S RESIDENCE; (5) MOTHER'S DENIAL IN MARCH, 2013, THAT SHE INTENDED TO RELOCATE AND HER MOTION TO MODIFY; (6) MOTHER'S PURSUIT OF MODIFICATION OF FATHER'S PHYSICAL CUSTODY SCHEDULE AND LEGAL CUSTODY ORDER BEFORE HER RESIGNATION; AND (7) MOTHER'S FAILURE TO NOTIFY FATHER OF HER INTENTION TO RELOCATE UNTIL TWO MONTHS AFTER RESIGNING HER JOB AND ONE MONTH AFTER SIGNING A NEW EMPLOYMENT CONTRACT.

Point I of this Brief addresses the issue of whether the trial court's determination that Mother's request to relocate the residence of the minor children was made in good faith was supported by substantial evidence.

Section 452.377, RSMo., applies when a custodial parent seeks to relocate the principal residence of minor children. When the non-moving parent files a timely objection to the relocation, the trial court must determine whether the proposed relocation was made in good faith and, if so, whether relocation would serve the best interests of the children. §452.377.9, RSMo. The parent seeking to relocate has the burden of proof with regard to each of these issues. *Id*.

Standard of Review

The standard of review in this case is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo.banc 1976). This Court must affirm the judgment of the trial court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. In conducting this review, the reviewing Court must view the evidence in the light most favorable to the trial court's judgment, and disregard all contrary evidence and inferences. *Mantonya v. Mantonya*, 311 S.W.3d 392, 395 (Mo.App.W.D. 2010). In reviewing determinations regarding relocation of children, "each request for relocation must be determined based on the unique and particular facts of the case presented to the trial court." *Id*. at 402.

In this case, Mother sought to relocate the residence of the children from Farmington,

Missouri, to Silva, Missouri. This was approximately fifty-six miles from Father's current residence and would necessitate a change in schools for the children. (T. 61) Father objected to the relocation on a number of grounds. (L.F. 34) Father's objections included that the move would destroy the current division of custody exercised by the parties, it would limit the children's access to their extended family, it would disrupt their education, it would be detrimental to the children's quality of life because of limited extracurricular activities and would make it more difficult for Father to maintain regular contact with the children as he has done since the divorce. (L.F. 34-35) Father contended that the Central R-III school district was superior to the Greenville school district. (T. 87) Mother responded that the move would be beneficial because she had lost her job at the Central School District, Father had insisted on a second and third opinion from physicians before administering medication to Austin for ADHD, Father had insisted on Austin being labeled as learning disabled when the label was not necessary, and the move would improve the children's standard of living because they will live near her parents and she will be able to complete her master's degree program. (L.F. 47-48) Mother also contended that the move would be beneficial because it would limit the interactions between her and Father. (L.F. 48)

The trial court approved the relocation, finding that Mother's request to relocate was made in good faith as a result of the loss of her job as a tenured teacher at the Central R-III School District and her acceptance of a contract of employment at the Greenville school district. (L.F. 56-57) The court found because Mother's new job included a substantial

reduction in salary, she could not afford to commute to the job from the Farmington area. (L.F. 57-58) The Court noted Mother's family and her boyfriend lived close to the Greenville area and would assist her with the children. (L.F. 58)

The term "good faith" is not defined in Section 452.377.9, RSMo. In *Swisher v. Swisher*, 124 S.W.3d 477, 481(Mo.App.W.D. 2003), the court discussed the appropriate meaning of the term in this context. That Court states: "[I]n reading §452.377.9, it is readily apparent that "good faith" references the relocating parent's motivation or purpose for relocating. In that regard, our appellate courts have essentially defined it as the relocating parent's motive or purpose for relocating being something other than to disrupt or deprive the non-relocating parent of contact with the children." As noted in *Brethorst v. Brethorst*, 50 S.W.3d 864, 867 (Mo.App.E.D. 2001), "section 452.377, RSMo (2000) has broadened the inquiry in a relocation case to any evidence bearing on the good faith of the custodial parent and/or the best interests of the child."

Mother's motivation for relocating in this case is evidenced by both her words and her actions. A review of both of these compels a finding that there was not substantial evidence to support the trial court's finding that the request to relocate was made in good faith and all of the relevant evidence demonstrated and compelled a finding that it was, in fact, made for the purpose of limiting Father's contact with the children on a daily basis, involvement with their school activities and input into their education and medical treatment while substituting herself as the sole decision-maker for the children.

Mother's Words

First, with regard to Mother's words, this Court need only review Mother's written response to Father's objections to her move. Mother makes numerous complaints regarding Father's actions in interacting with her, not with taking care of the children. In her Affidavit in support of relocation Mother states that a benefit to the relocation would be less "continued interaction between the parents." (L.F. 48) The trial court apparently adopts Mother's philosophy, finding that "relocation to allow Mother to be further from day-to-day dealings with Father will…be in their best interests." (L.F. 65)

Mother's Actions

In addition to Mother's words, the court must also consider Mother's actions. Her actions demonstrated that she had engaged in an organized campaign to support a move to a school district removed from Father to eliminate him from the children's daily lives. These actions include: (1) Mother's initial job application to the Poplar Bluff school district during the pendency of the divorce; (2) Mother's lack of attempts to improve her job performance from 2011 until her resignation in 2013; (3) Mother's refusal to apply for jobs in close proximity to Father's residence and the children's school; (4) Mother's denial in March, 2013, that she intended to relocate; (5) Mother's pursuit of modification of Father's physical custody schedule and conversion to sole legal and physical custody before her resignation; (6) Mother's failure to notify Father of her intention to relocate until almost two months after losing her job and more than one month after signing the new employment contract.

(1) Mother's 2011 Job Application

In March, 2011, while the parties were in the process of a divorce, Mother applied for a job with the Poplar Bluff School District. (T. 354; Pet.'s Exh. 18) This is the town where Mother's boyfriend, Ben Barbour resides. (T. 356) Her stated purpose for submitting this job application was not for a better job but because she wanted to move from the area. (T. 356) The trial court found that Mother did not "follow through" with this application; however, there was no evidence to support this finding. All of the evidence indicated that Mother was not granted an interview by the school as a result of this application. (T. 357)

Mother admitted that she had not informed Father of her plans to leave the area at that time. (T. 356) She testified that she had been advised by her attorney that it would be best for her to stay where she was. (T. 356) Mother also testified that after discussing it with her attorney they both felt it was in the boys' best interests that she stay. (T. 357)

(2) Mother's lack of effort to improve her job performance at Central

Mother testified that the only reason or motive for the move was the loss of her job at Central school district and the offer of a job at Greenville school district. (T. 357) The trial judge specifically asked Mother: "So—but for your loss of a job, we wouldn't be here about relocation, is that what you're saying?" to which Mother responded "Correct". (T. 357-58)

Many of the relocation cases involve a parent who either loses a job or wants to take a better job in the new location. This case can be distinguished from those cases because examination of Mother's behavior and actions demonstrate that her job situation was

orchestrated by her own deliberate actions and, additionally, the job at Greenville was not a better opportunity as Mother lost her tenured status and took a more than $14,000.00 annual pay reduction.

At the time of the divorce, Mother was employed as a tenured teacher at the Central school district, the same school district where Father lived and where the boys attended school. (Pet.'s Exh. 6; L.F. 56) As the trial court noted in his Judgment, termination of a tenured teacher is a difficult process with much protection being afforded to the teacher. (L.F. 56) Mother had no problems performing her job from 2002 until 2011. (Pet.'s Exh. 6; L.F. 56)

In May, 2011, two months after applying for work in Poplar Bluff, Mother experienced her first unfavorable employment review at the Central R-III School District. (Pet.'s Exh. 6, pp. 56-60) What followed were additional critical evaluations with little evidence of efforts by Mother to improve. (Pet.'s Exh. 6, pp. 66-70) Finally, on October 18, 2012, the District Superintendent of the Central School District sent Mother a formal notice of deficiency pursuant to Section 168.116, RSMo. (Pet.'s Exh. 6, pp. 71-72) This notice advised Mother that unless she complied with all directives contained therein he would recommend termination of her position. (Pet.'s Exh. 6, p. 72) This letter was followed by additional documentation of continued failures by Mother to perform her job. (Pet.'s Exh. 6, pp.73-75) On March 14, 2013, following receipt of a letter from her supervisor advising that she had failed to adequately improve, Mother submitted a letter to the school board resigning

her position. (Pet.'s Exh. 6, p. 76)

As a tenured teacher, Mother had certain due process rights prior to termination of her employment. Section 168.116.1, RSMo., provides that a permanent teacher may not be terminated without a hearing, if requested by the teacher. In this instance, Mother did not contest the proposed action by the superintendent to recommend termination of her employment. Instead, she waived all of her rights by offering a letter of resignation.

Mother offered no evidence as to why she did not respond to the directives from her supervisors at the Central R-III school district or why she did not contest the proposed termination. Many of the criticisms involved completion of IEP forms, which would be a standard part of the job for any special education teacher and one Mother had, no doubt, performed throughout her employment history at Central. Moreover, Mother continued to pursue employment as a Special Education instructor, stating that it was her "passion". (T. 362) Her current job, at the Greenville school district will, no doubt, include the same duties which she was seemingly unable to perform successfully at her prior employment.

(3) Mother's refusal to apply for jobs closer to Father

Mother testified and the trial court found that while Mother immediately sent out job applications following her resignation from the Central R-III school district, she did not apply for jobs in Kingsford, Hillsboro, Festus, Crystal City or Desoto. (T. 362) She did apply for a job in Potosi, which was much closer to Father's residence; however, when she was called for an interview she did not go because she had already accepted a job at the

Greenville school district. (T. 186, 190)

Mother's failure to pursue employment in the more populated areas much closer to the current residence of the children and of Father evidences her desire to use the loss of her job as justification for a move requiring a revision of the current custody schedule and placing distance between Father and the children.

(4) Mother's denial of her intention to relocate

In considering Mother's credibility, the trial court was required to consider that Mother had, by sworn written answers to discovery, denied any intention to relocate as late as March 5, 2013. (Pet.'s Exh. 17) At trial, Mother insisted that this response was true. (T. 353) However, Mother's employment records clearly demonstrate that the writing was on the wall with regard to Mother's future at Central R-III School District for more than a year and, on March 14, 2013, a mere nine days later, Mother resigned from her job as a tenured teacher in that district and began applying for work outside the district. (Pet.'s Exh. 6) Again, Mother's failure to disclose her intention to relocate must be considered when determining whether her request to relocate was made in good faith.

(5) Mother's pursuit of modification of the custody decree before resigning her job.

Mother filed a motion to modify the trial court's prior judgment on September 13, 2012, six months prior to resigning from her job. (L.F. 6-12) In the parenting plan she submitted with that motion, Mother requested that the court shorten Father's weekend visitation by one day/night, shorten the Wednesday visitation from an overnight to just a few

hours, eliminate Father's seven floating holidays and grant her sole legal and physical custody of the children. (L.F. 13-14) This request evidences Mother's intention to limit the children's access to Father, even prior to the loss of her job.

(6) Mother's Failure to Notify Father of the Relocation for Two Months

Finally, Mother's actions in waiting to send the notice of relocation to Father until two months after losing her job and one month after signing a contract with the Greenville school district further evidences her bad faith. While Mother sent the notice within the time period contemplated by §452.377, RSMo., her actions are certainly suspect in this case considering that the parties were already in court in this matter pursuant to her motion to modify, which was already scheduled for trial. Moreover, Mother had previously provided sworn answers in that case indicating that she had no intention to relocate the children.

As stated earlier, Section 452.377.9, RSMo., places the burden of proof upon Mother to demonstrate that her decision to relocate was made in good faith. In deciding whether a proposed relocation is made in good faith, the court must consider all of the evidence which demonstrates the moving party's motivation. This may include evidence of his or her past actions. *McDonald v. Burch*, 91 S.W.3d 660, 663-64 (Mo.App.W.D. 2002). The issue of intent must be determined from Mother's words and her actions. For all of the reasons set forth herein, the trial court's determination that Mother satisfied her burden to prove that her request for relocation was made in good faith was not supported by substantial evidence and should be reversed.

POINT II

THE TRIAL COURT ERRED IN APPROVING THE RELOCATION OF THE MINOR CHILDREN FROM FARMINGTON, MISSOURI, TO SILVA, MISSOURI, BECAUSE THE TRIAL COURT'S FINDING THAT THE RELOCATION WAS IN THE BEST INTERESTS OF THE CHILDREN WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE GREAT WEIGHT OF THE EVIDENCE INDICATED THAT CONSIDERING ALL OF THE RELEVANT FACTORS CONTAINED IN SECTION 452.375.2, RSMO., THE BEST INTERESTS OF THE CHILDREN WOULD BE SERVED BY MAINTAINING FREQUENT CONTACT WITH BOTH PARENTS AS PROVIDED IN THE PRIOR CUSTODY PLAN AND KEEPING THE CHILDREN IN THE SAME SCHOOL DISTRICT WHERE AUSTIN HAS BEGUN MAKING PROGRESS.

As noted in Point I of this Brief, §452.377.9, RSMo., places the burden on the moving party in a relocation case to prove that the relocation is made in good faith and is in the best interests of the children. Thus, even if the moving parent satisfies his or her burden that the decision to move was made in good faith, there must still be substantial evidence to support a determination that the relocation is in the best interests of the children.

Standard of Review

The standard of review in regard to this issue is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo.banc 1976). This Court must affirm the judgment of the trial court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. As noted by the Court in *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo.banc 2014), "The same standard of review applies in all types of court-tried cases." The Court in that case went on to note that "Prior statements from this and other Courts to the effect that greater deference is paid to the trial court in certain types of cases (e.g. family law) than in others are incorrect and misleading." *Id*. at 199, n. 9.

In this Point, Father's challenge is that the trial court's determination that relocation is in the best interests of the children is not supported by substantial evidence. "Substantial evidence is evidence that, if believed, has some probative force on each fact that is necessary to sustain the trial court's judgment…Evidence has probative force if it has any tendency to make a material fact more or less likely." *Ivie*, 439 S.W.3d at 199. In conducting this review, the reviewing Court must view the evidence in the light most favorable to the trial court's judgment, defer to the trial court's credibility determinations and disregard all contrary evidence and inferences. *Ivie*, 439 S.W.3d at 200; *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 626 (Mo.banc 2014); *Fohey v. Knickerbocker*, 130 S.W.3d 730, 734 (Mo.App.E.D. 2004).

Prior to the 1998 amendment to §452.377, RSMo., courts utilized a four-part test in making the determination as to whether relocation should be allowed. The Missouri

Supreme Court in the case of *Stowe v. Spence*, 41 S.W.3d 468, 469 (Mo.banc 2001), declared that the "four-factor test" would no longer be applicable in relocation cases after the 1998 amendment to §452.377, RSMo. The issues are whether the request to relocate is made in good faith and whether relocation is in the best interests of the children. §452.377.9, RSMo. In *Abernathy v. Meier*, 45 S.W.3d 917, 923 (Mo.App.E.D. 2001), the Eastern District Court of Appeals went on to specify that the determination of whether relocation is in the best interests of the children in a relocation case must be based upon consideration of the factors contained in §452.375.2, RSMo.

In this case, the trial court discussed each of the factors listed in §452.375.2, RSMo. However, for the reasons set forth herein, Father contends that the trial court's determination that relocation would serve the best interests of the children was not supported by substantial evidence and should be reversed.

§452.375.2(1)

The first relevant factor identified by §452.375.2, RSMo., involves the wishes of the parents as to custody and the proposed parenting plans submitted by the parties. Initially, in response to Mother's Motion to Modify, Father requested that custody remain as previously agreed upon by the parties. (L.F. 23-25) After receiving Mother's notice of intent to relocate, Father requested that if Mother relocated to Silva, Missouri, he be awarded custody of the boys during the school year with Mother having visitation on alternating weekends so their education would not be disrupted. He also requested that the parties continue to equally

divide the summer months. (Pet.'s Exh. 1)

In the parenting plan filed with her affidavit in support of relocation, Mother requested that she be awarded custody of the boys during the school year with Father to have alternating weekends and that the parties equally divide the summer. (L.F. 39-40) At trial, Mother again requested that she have custody of the boys during the school year, with Father to have visitation on alternating weekends; however, she testified that she would not object to Father having custody during the summer vacation with her to have two weeks and alternating weekends. (T. 250)

The trial court found that Mother's proposed parenting plan would preserve what the court described as "the existing division of labor established by the parties in their marital and post-dissolution relationships, to-wit: the children at Mother's school where it is easier for her to attend to their appointments, illnesses and other needs; and, where Father has significant time in the summer where his skills as a coach and as the "activities" parent will continue to be put to best use." (L.F. 60)

This finding by the trial court was not supported by substantial evidence. There was no substantial evidence to support the trial court's conclusion that Mother was the parent responsible for overseeing the children's schooling and taking them to medical appointments since the divorce. While there was little or no evidence as to the parties' roles **prior** to the dissolution, the evidence was undisputed that since the dissolution both parents actively participated in the children's schooling and medical appointments. Mother testified that

Father wanted to be involved in the medical decisions concerning the children following the divorce. (T. 231)

The record is replete with examples where Mother and Father both attended medical and counseling appointments with Austin. Mother testified that she primarily took care of the children when they were sick. (T. 219) However, the evidence clearly indicated that Father attended most of the medical appointments and much of Father's inability to participate in medical appointments was a result of Mother's refusal to consult or communicate with Father prior to scheduling appointments for the children. (T. 115) In one instance, upon being confronted by Father about scheduling medical appointments without discussing it with him, Mother responded: "I'm not supposed to check times with you. I'm supposed to inform you." (Pet.'s Exh. 13) This evidence was undisputed.

The evidence clearly indicated that Mother did not make the most considered decisions for the children's benefit. While Mother is certainly the parent who insisted that Austin receive medication for ADHD, she did so not at the initial recommendation of a physician but as a result of a statement by Austin's teacher. (Pet.'s Exh. 13) It was Father who insisted on seeking additional medical opinions to confirm the diagnosis. Mother's response was "I don't think we need a diagnosis. I think he need something to help him focus on his classwork." (Pet.'s Exh. 13) It was Father who insisted that Austin be evaluated by the school to get help for a learning disability. (T. 89) Mother's response was to complain that Father was unnecessarily "labeling" Austin. (T. 89; L.F. 48)

Secondly, while Mother was employed by the same **school district** that the children attended, she was not on the same **campus**. Mother taught special education at the high school while the children attended the elementary campus. (Pet.'s Exh. 6; T. 68) Thus, there was not substantial evidence to support the trial court's conclusion that she was on the scene or immediately available. Both parents were teachers in the Farmington area until Mother lost her job.

Finally, the trial court's findings are erroneous because they are based upon a false assumption which is not supported by the evidence. The trial court assumes that Mother will be relocating her residence to Silva, Missouri, regardless of its ruling with regard to the relocation of the children. (L.F. 60) This erroneous assumption forces the Court to choose between which parent should have custody of the children during the school year and the summer, instead of considering whether denying the request to relocate, thereby preserving the original custody arrangement, would serve the children's best interests. (L.F. 60) In response to direct questions from the Court about what she would do if the Court did not approve relocation of the children's residence, Mother testified that she would remain in the Farmington area and commute to her job in Greenville until she could find more appropriate employment. (T. 360, 399) Thus, according to Mother's own sworn testimony, she would not relocate her residence if the Court did not approve the relocation of the children.

For all of these reasons, the proper consideration for the trial court in analyzing the factor contained in §452.375.2(1), RSMo., was whether the children's best interest would be

served by relocation, as requested by Mother, or whether relocation should be denied and the custody remain the same, as Father had originally proposed prior to his receiving Mother's notice of relocation. Considering the fact that Mother had taken a job resulting in a substantial reduction in income, as well as the fact that the job would likely include the same or similar duties as the position she had previously been unable to fulfill in the Central School District, Mother's employment at the Greenville school will likely be of short duration and if the relocation was denied, she would seek more appropriate employment closer to the area where the children reside. For that reason, the Court's conclusion that this factor favored relocation was not supported by substantial evidence.

§452.375.2(2)

The second factor identified in §452.375.2(2), RSMo., is the "needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child." In considering this factor, the trial court acknowledged the need of the children for a frequent, continuing and meaningful relationship with both parents. (L.F. 61) The Court also acknowledged that the prior custody arrangement was entered into by agreement so that each parent, at that time, believed it was in the best interests of the children. (L.F. 61) The trial court found that "Mother's main reason for now requesting a change is due, not to a specific need of either child, but due to Mother's needs related to loss of her job…." (L.F. 61) That finding is supported by Mother's testimony at the trial that she believed remaining

in the Farmington area was in the best interests of the children at the time of the dissolution and, but for the loss of her job, she would not be asking to move. (T. 357-58)

The trial court goes on to analyze the children's familiarity with the Silva area; however, that analysis is not relevant to this factor, which is the need of the children for a continuing and meaningful relationship with both parents. (L.F. 61) The children's counselor, James Womack, called as a witness by Mother, testified that he believed both parents should have active, meaningful and frequent contact with the children (T. 45)

The trial court recited a number of inappropriate interactions and actions between the parents, some attributable to Mother and others attributable to Father. (L.F. 63-64) Based upon this recitation, the trial court concluded that neither parent was capable of actively performing their functions as a parent if they involve dealing with the other parent. (L.F. 65) For that reason, the Court found that the relocation to allow Mother to be further from Father would reduce the stress on the children and be in their best interests. (L.F. 65)

In effect, the trial court's findings with respect to this factor are self-contradictory. First, the court determines that the children need frequent contact with both parents. The Court acknowledges that both parents fall short of what they should be doing to get along with one another. The Court then concludes that allowing Mother to remove the children further from Father on a day to day basis would serve their best interests.

In this case, it is undisputed that Father was very devoted to his children. The original joint custody plan, agreed to by the parties, provided Father with custody during the school

year every other weekend from Friday at 5 p.m. to Monday at 8 a.m.; every Wednesday from 3:15 a.m. to 7:15 a.m. Thursday; alternating holidays, including seven additional overnights, and alternating weeks in the summer. (Pet.'s Exh. 19) Mother agreed that Father was an interested parent.(T. 380) She testified that Father exercised all the visitation he was allowed. (T. 380) The Court found Father to be "an involved parent who sees his children as much as allowed and who pays his child support." (L.F. 66-67) Counselor, James Womack, testified that he believed it was a good thing to keep the prior visitation arrangement consistent for the children. (T. 51-52)

As noted by the Court in *Lowery v. Lowery*, 287 S.W.3d 693, 697 (Mo.App.E.D. 2009), "It is the declared public policy of this state that it is in the best interest of a child to have frequent, continuing, and meaningful contact with both parents after the parents have dissolved their marriage." Thus, the trial court's conclusion in analyzing §452.375.2(2), that the children's best interests would be served by relocation, which will afford them less frequent contact with their Father, is not supported by substantial evidence and is, furthermore, based upon a proposition that is against the public policy of this State.

§452.375.2(3)

The third factor considered by the court was the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests. (L.F. 65-66) The court finds that the children have "appropriate" relationships with their parents and friends. (L.F. 65) The only problem noted was the issue of the children

disparaging the weight of Mother's boyfriend. (L.F. 66) The Court does not consider as part of this factor, the children's relationships with Father's relatives or their friends from school. There was no substantial evidence that this factor supported the trial Court's finding that relocation was in the best interests of the children.

§452.375.2(4)

The next relevant factor involves which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent. The trial court found that neither parent is superior in this regard. (L.F. 66) Father would agree that Mother did not introduce any evidence to support a finding that she was more likely to provide frequent, continuing and meaningful contact between the children and Father. All of the evidence actually reflected adversely on Mother's ability to allow the children frequent, continuing and meaningful contact with Father.

First, and perhaps most obviously, there is the issue of the relocation itself. While Mother attempts to portray herself as an innocent victim in the decision to relocate, there is no evidence to support this conclusion. Mother testified that the only reason for the relocation was the loss of her job. (T. 357-58) The evidence indicated that during the original dissolution action Mother contemplated a move to Poplar Bluff, Missouri, to remove herself and the children from Father. (T. 356; Pet.'s Exh. 18) This plan went as far as Mother's applying for a job with the Poplar Bluff School District. (T. 355-56; Pet.'s Exh. 18) Mother testified that she decided not to pursue this job opportunity further at the advice of her

attorney. (T. 357) However, she admitted that she never actually received a call for an interview as a result of that job application. (T. 357)

Moreover, the timing of Mother's employment problems at Central is suspect. She testified, and her job record supports, that Mother was able to perform her work at Central without complaint or incident until the year of her dissolution. Thereafter, for two years, her employment records demonstrate continued critiques of her performance by her supervisors and the failure of any attempt to rectify the same. (Pet.'s Exh. 6) Many of her failures include accurate completion of IEP forms, which would be a standard part of her job as a special education teacher. (Pet.'s Exh. 6)

The evidence is uncontradicted that Mother voluntarily resigned from this employment in March, 2013. (Pet's Exh. 6) She signed the contract with the Greenville school district one month later, without making application to school districts closer to Father's residence. (T. 185, 187) The work Mother would be performing at Greenville would be the same as the position at Central that she had been unable to perform.

Mother hid the issue of her employment problems and impending discharge from Father as long as possible. She answered in sworn interrogatories on March 5, 2013, that she had no intention to relocate and nine days later submitted her letter of resignation and began submitting job applications. (Pet.'s Exh. 17; T. 185) Mother did not notify Father of her intention to relocate until more than three months after she had accepted the contract of employment with Greenville. (L.F. 33)

Additionally, Mother has previously demonstrated a rigid unreasonableness in handling Father's periods of custody. During one instance when Father was exercising one of his seven floating holidays, which were described as "7 overnights per year", Father returned the children at 5 p.m. Mother took the position that the "extra day" should have ended at 3:15 p.m. Instead of resolving the issue with Father, Mother notified her attorney, Father's attorney and the Guardian ad Litem in the original divorce of what she believed to be a violation. (Pet.'s Exhs. 19, 21)

On one occasion, prior to the divorce, Father went to the babysitter's residence to pick up the boys for lunch. Mother summoned the police. When the police arrived, Mother began yelling that he was not to take the children. (T. 411-12) Because there was not yet a formal order for custody/visitation, the police acquiesced to Mother's wishes and removed the children from Father's car. (T. 412) Likewise, following the divorce, when Father sent his brother and sister to the babysitter's home to pick up Andrew for a scheduled visitation, the police had to be summoned before Mother would send Andrew out of the house. (T. 418-19)

Based upon Mother's conduct both in the past and in the present, all of the evidence indicates that Mother is not likely to allow Father frequent, continuing and meaningful contact with the boys. In fact, all of the evidence relevant to this issue supports a conclusion that a primary motive for Mother's proposed relocation was to remove the boys further from their Father and she will allow no contact which is not specifically awarded to Father as part of a judgment.

§452.375.2(5)

The fifth factor identified in §452.375.2, RSMo., is the children's adjustment to the child's home, school and community. This factor is given little consideration by the trial court, warranting only one paragraph in a thirty page opinion. (L.F. 67) In conclusory fashion, the trial court simply states that the children are adjusted to their present home, school and community and are involved with activities with their school, community and church. (L.F. 67) However, the trial court also notes that the children are familiar with the Greenville/Silva area where Mother plans to relocate. (L.F. 67)

Father would respectfully point out to this Court that considering the educational challenges faced by the parties with their oldest child, Austin, this factor may be one of the most important ones to consider in determining the best interests of the children.

There is much discussion by everyone, including the Court, that Austin suffers from ADHD. Austin has received counseling, seen at least three physicians and a counselor for this condition. He takes prescription medication for this disorder. Mother sought the medication following the recommendation of Austin's teacher. (Pet.'s Exh. 13) Father was, and remains, reasonably apprehensive about Austin taking this prescription medication. However, he administers the medication in compliance with the doctor's orders. (T. 79)

As a long-time educator, Father wanted Austin evaluated by the school for an Individual Education Plan (IEP) to assist with the schooling issues. (T. 89) Father testified that he believed this would provide strategies and assistance that might prevent the necessity

of medication in the future. (T. 89) Mother resisted this approach, despite her long-time background with IEP's. (T. 89) She told Father that she did not want Austin "labeled". (T. 89) Mother made this same complaint in her affidavit in support of her relocation. (L.F. 48)

At Father's insistence, Austin was evaluated for specialized educational services and received an Individualized Education Program (IEP) for second grade in the Central R-III School District. (Pet.'s Exh. 7) The first evaluation meeting was conducted on March 4, 2013. (Pet.'s Exh. 7) The initial evaluation indicated a medical diagnosis of ADHD and a learning disability in the area of reading comprehension and grammar. Austin tested at slightly below his grade level at that time. (Pet.'s Exh. 7) Two month later, on May 16, 2013, the IEP report notes that Austin was making progress toward his goal. (Pet.'s Exh. 7) At the recommendation of the school, Austin attended summer school to help him with transitioning into third grade. (T. 68) Father was more diligent about Austin's attendance in summer school than was Mother. (T. 70-71)

Counselor, James Womack, testified that he was aware of the IEP at the school and that it was working well. (T. 49) The following exchange occurred between Father's attorney and Counselor Womack:

> "QUESTION: How do you feel about a child leaving the central school district and going to one south of here to change schools? Is that a good thing or a bad thing from a counselor—
>
> ANSWER: I think the younger a child is, the more consistent their

environment needs to be.

QUESTION: Now, what do you mean, it's good to have the child in the same home where the child's been born and reared, the same thing about being in the same school district, the same teachers and building?

ANSWER: Yes, I – I would say the less change for a child, the better."

(T. 49)

As demonstrated by the uncontroverted evidence in this case, Father's circumstances have remained consistent throughout the children's lifetimes. He still resides in the home they grew up in. (T. 54) He has worked for the same school district for 21 years. (T. 55) As noted by the Court in *Petty v. Petty*, 760 S.W.2d 555, 557 (Mo.App.W.D. 1988). "A good environment and a stable home is considered to be the most important consideration in custody cases."

Mother, on the other hand, does not have a stable lifestyle. According to her own testimony, she was forced to resign from her position as a tenured teacher. She accepted employment fifty miles away as an untenured teacher with a reduction in salary of more than $14,000.00 annually. (T. 362-63) She did not have any concrete plans for how she would handle this employment if the Court disapproved her relocation. (T. 359-60)

Despite her contention that she was concerned about Austin's educational issues, she intended to move him from a school where an IEP had just been established and he was beginning to make progress. She was also moving him fifty miles away from his treating

physician. Mother's only "evidence" regarding the quality of the Greenville school district was a 2009 Article which had been reprinted by a local newspaper regarding Greenville High School and a Facebook chat with a school administrator. (T. 210, 363-64) Despite the fact that Mother was employed in the Special Education department of Greenville High School, she did not know who Austin's IEP instructor would be if he attended Greenville school. (T. 385) She had not spoken to any of the teachers to see who he would be assigned to. (T. 385)

For all of the reasons set out above, when considering the factor of adjustment to home, school and community, there was no substantial evidence that this factor would support a finding that relocation was in Austin's best interests. Since Andrew was just starting Kindergarten and did not have documented medical issues, there is no relevant evidence either way with regard to Andrew; however, both parties asked that the children stay together so whatever applied to Austin should equally apply to Andrew.

§452.375.2(6)

The sixth factor deals with the mental and physical health of all individuals involved. §452.375.2(6), RSMo. In analyzing this factor, the trial court noted that there was no evidence of any mental or physical health issues with regard to Mother, Father or Andrew. (L.F. 67) The Court noted that Austin suffered from ADHD and that Father has not accepted the diagnosis and insisted upon second and third opinions. (L.F. 67-68) The Court went on to conclude "that Mother is more likely to administer the ADHD medicine." (L.F. 68)

The evidence in this case unequivocally demonstrated that Father was concerned

about medicating his young son. However, it was equally clear that once it was apparent that all the physicians agreed with the decision to medicate, Father administered the medication as instructed. (T.79) Even the physicians differed in whether it was necessary to administer the medication on the weekends. (T. 256)

There was no evidence that Father ignored his son's medical or educational difficulties. It was Father who sought testing for educational disabilities and, at his insistence, Austin was tested and an IEP was instituted by the school. (T. 89) After that, Austin's records document some improvement. (Pet.'s Exh. 7) Father should not be condemned for his conservative attitude toward medication. The first physician consulted by Mother for the problem recommended that the parties try counseling prior to medication. (T. 400) Although Mother enrolled Austin in counseling, very shortly thereafter, she began administering medication. (T. 400)

Moreover, as noted above, all substantial evidence indicated that Austin's medical condition and issues were likely to be exacerbated by a change of environment and schools. Counselor Womack, who testified at the request of Mother, testified that consistency was key to treatment and it was better to avoid changes. (T. 52) Mother also acknowledged that change would be difficult for Austin; however, she still sought to move him from the area and school with which he was familiar and making progress. (T. 384) Mother testified that she believed she was in a better position to judge what was best for her son than the licensed counselor. (T. 254)

§452.375.2(7)

The next factor to consider is the intention of either party to relocate. Clearly Mother does intend to relocate and, as more fully discussed throughout this Point, there is not substantial evidence to support a finding that such relocation is in the best interests of the children.

§452.375.2(8)

The last factor is the wishes of the child as to the child's custodian. The Court makes little comment in regard to this issue, noting that "Neither child testified. Both children love both parents." (L.F. 69) While these findings are clearly supported by substantial evidence in this case, the Court did not seem to consider that because both children love both of their parents their best interests would not be served by an alteration in the visitation/custody plan which would eliminate much of the day to day contact between the boys and their Father. The trial court attempts to "compensate" for Father's loss of custody every other Sunday night through Monday morning and every Wednesday night through Thursday morning by awarding Father three out of four weekends per month and most of the summer. (L.F. 74. 81-83) This also eliminates much of Mother's time during the summer, relegating her to every other weekend. (L.F. 81-82)

Since the evidence indicates, and the trial court found, that the children love and are attached to both parents, there is clearly not substantial evidence that this factor would support the trial Court's finding that their best interests would be served by relocation.

Other Issues

The only other issue discussed by the trial court with regard to its determination of the children's best interests was the issue of Andrew's participation in the PSR program provided by the Catholic Church leading up to the administration of his first communion. (L.F. 69-70) The Court found that Andrew's participation in this program was important to him so he could share this common experience with his brother, Austin. (L.F. 70) The Court ordered Mother to enroll Andrew in either the same PSR program attended by Austin or in the PSR program closest to Mother's residence. (L.F. 70)

There was no evidence of the existence of a PSR program administered closer to Mother's new residence that Andrew could attend and still maintain his school schedule. Mother testified she would not drive Andrew to Farmington to attend PSR classes. (T. 372) Moreover, it is unclear whether Mother would be able to do so after he finished school for the day since these classes were conducted on Wednesday evenings.

Section 452.375.4, RSMo., provides that it is the declared public policy of this state that frequent, continuing and meaningful contact with both parents after parents have separated or dissolved their marriage is in the best interest of the child. In the case of *Fohey v. Knickerbocker*, 130 S.W.3d 730, 731 (Mo.App.E.D. 2004), the appellate court reviewed the decision of a trial court allowing relocation of a child from Missouri to Texas. The evidence in that case indicated that the child's father was involved in her life and saw her frequently. *Id*. The child was also doing well in the Lutheran preschool program where she

was enrolled. *Id*. at 732. Mother testified that she had the opportunity for a better job in the state of Texas. *Id*. at 733. Mother believed that moving to Texas for this job opportunity would benefit the child because they would be better off financially. *Id*. The trial court approved the relocation as being in the best interests of the child. *Id*. The appellate court reversed the judgment of the trial court. *Id*. at 740. The appellate court noted that the move would reduce the child's contact with her father. The appellate court noted:

> "[T]he trial court was in the unenviable position in this case of having to choose between the mother's need and desire to relocate and [the child's] best interest. It might be in the mother's best interest to relocate but that is not the standard which governs. It was the mother's burden to prove the relocation was in the best interest of the child." *Id*.

The appellate court reversed the judgment of the trial court in that case on the basis that it was not supported by substantial evidence. *Id*.

While the *Fohey* Court involved a relocation of substantial distance, that is not always the controlling factor. In the case of *Mantonya v. Mantonya*, 311 S.W.3d 392, 394 (Mo.App.W.D. 2010), Mother sought to move the children only fifteen miles. The relocation in that case would not have affected Father's visitation schedule; however, it would have resulted in a change of schools. *Id*. at 401. Father contended that he believed it would be in the children's best interests to continue attending the same school. *Id*. Father did not have any

specific information concerning the new school district proposed by Mother; however, the Court noted that Mother did not provide any evidence concerning the new school district. *Id*. at 401-02. Because Mother had the burden to prove relocation was in the children's best interests, the appellate court affirmed the decision of the trial court denying Mother's request to relocate. *Id*. at 402.

In this case, Mother did not provide substantial evidence concerning the benefit of transferring the children to the Greenville school district. She testified that relocation was not in the best interests of the children at the time of the original dissolution in September, 2011. (T. 356) She stated the only reason that relocation was now being requested is because she had lost her job. (T. 357-58) At that point, the trial court appropriately pointed out to Mother that "This isn't about what's convenient for the parents….This is about what's in the child's – children's best interests." (T. 358)

Moreover, Mother's new job is not a step up to a better job. It is the same position she held and was previously incapable of performing adequately at the Central School District. Moreover, she lost her tenured status and her salary was reduced by more than $14,000.00 annually. (T. 362-63)

Mother contended that she would be able to complete her Master's program if allowed to relocate. (L.F. 48) This contention is not supported by substantial evidence. The evidence clearly indicated that while living in the Farmington area where she could have attended college to achieve her Master's degree with her employer paying half the cost, Mother did

not do so. (T. 350-51) No such benefits were available from the Greenville school district. (T. 350)

The only evidence offered by Mother that the rural Greenville school district offered greater benefits to her children was a reprint of a 2009 article from U.S. News & World Report which states that 60% of Greenville students are proficient in Algebra and 64% in English. (T. 365) Mother also testified that the small class size was very important to her sons; however, the only information she had regarding this issue was a Facebook communication she had with the Superintendent who stated he believed the elementary class size was 14 to 1 in Greenville. (T. 193, 367) The class size in Central, according to Mother, was 18 to 1. (T. 193) Mother produced no evidence to demonstrate the effect of having four fewer students in the class.

Despite the fact that she would be teaching in the special education program at the high school, Mother was not sure who Austin's IEP program instructor would be. (T. 385) When questioned about Counselor Womack's opinion that Austin should remain in the Central School District, Mother stated that she disagreed and believed she was in a better position than the licensed counselor to make this determination. (T. 254)

Clearly, Mother wants to relocate the children to the Greenville school district. The issue for the court to determine is whether there is substantial evidence to support the trial court's determination that this relocation is in the best interests of the children and not just in the best interests of Mother. The only unbiased witness in this regard was Counselor James

Womack. He was chosen by Mother and called to testify as her witness. Womack testified that a change in the custody/visitation schedule would not be good for Austin. (T. 52) Additionally, the IEP in place at Central School District for Austin noted progress during the two months it had been utilized. (Pet.'s Exh. 7)

Giving full weight and credibility to Mother's evidence, including her own statements, the evidence clearly demonstrates that Mother's decision to relocate arises from a combination of her desire to remove herself and the children further from Father and a reaction to her loss of a job, not to anything which would be more beneficial for the children in the new location. Moreover, Mother's testimony indicated that other job opportunities may exist in areas closer to the children's current home which would not require a move. Her testimony was that if the children were not allowed to relocate she would commute to the Greenville school job until she was able to obtain employment in the area. (T. 369-60) While this might be more difficult for Mother, there is no evidence it was impossible or would not serve the best interests of the children. Moreover, any difficulties Mother may experience if the children are not allowed to relocate are certainly attributable to her own actions and not those of any other person.

Because the determination of the trial court that relocation was in the best interests of the children was not supported by substantial evidence, it should be reversed and remanded with directions to deny the request to relocate and reinstate the prior custody order.

POINT III

THE TRIAL COURT ERRED IN MODIFYING THE PRIOR JUDGMENT OF DISSOLUTION OF MARRIAGE TO CHANGE FROM THE PARTIES' SHARING JOINT LEGAL CUSTODY OF THE CHILDREN TO MOTHER RETAINING SOLE LEGAL CUSTODY OF THE CHILDREN BECAUSE THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT A DETERMINATION THAT A CHANGE HAD OCCURRED IN THE CIRCUMSTANCES OF THE CHILDREN OR THE CUSTODIAN SINCE THE PRIOR JUDGMENT AND THAT MODIFICATION WAS IN THE BEST INTERESTS OF THE CHILDREN IN THAT THE EVIDENCE DEMONSTRATED THAT ALTHOUGH THE PARTIES HAD SOME DIFFICULTIES IN AGREEING ON ALL ASPECTS OF THE CHILDREN'S LIVES THEY ARE BOTH ACTIVE AND INTERESTED PARENTS WHO ARE EQUIPPED AND ABLE TO CONTRIBUTE TO THEIR CHILDREN'S CARE AND BOTH PARENTS INDICATED A WILLINGNESS TO WORK TOWARD THAT GOAL IN THE FUTURE.

After considering and approving Mother's request to relocate to the Silva/Greenville area, the trial court considered the competing motions to modify filed by Mother and Father. (L.F. 72) The trial court found that based upon the relocation allowed by the court and other factors, modification of the prior judgment was warranted. (L.F. 72-73) Clearly, if the relocation is allowed, the prior shared physical custody arrangement would not be appropriate

in light of the distance between the households. The issue of whether the trial court's decision allowing relocation was supported by substantial evidence is discussed in Points I and II of this Brief and will not be revisited in this Point. Suffice it to say that the Court did make an attempt to equalize the physical custody times between the parents while taking into account the fifty-six mile commute between the two residences.

However, in addition to modifying the physical custody schedule, the trial court also modified the prior judgment to award Mother sole legal custody of the children. The trial court found that the award of sole legal custody was necessary in this case because "the parents have proven that they are not able to participate in joint parenting". (L.F. 73) The Court justified its decision by referring to actions by Father which the Court concludes were attempts to "alienate the children's affection towards Mother, in combination with Father's unresponsive attitude toward the ADHD issue and all of the other evidence of the parents' inability to jointly parent the children…." (L.F. 73) Father contends that modification of the prior Judgment from joint legal custody to sole legal custody for Mother was not supported by substantial evidence and should be reversed.

Modifications of custody judgments are governed by §452.410, RSMo., which provides "the court shall not modify a prior custody decree unless…it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child." Review of the

trial court's decision in regard to this issue is the same as the review standard set out in *Murphy v. Carron*, in that the judgment will be affirmed so long as it is supported by substantial evidence, is not against the weight of the evidence and does not erroneously declare or apply the law. *S.I.E. v. J.M.*, 199 S.W.3d 808, 815 (Mo.App.S.D. 2006).

It is clear from a review of the record in this case that neither parent has been perfect in his or her actions as joint custodians of these children. Counselor James Womack testified that he believed BOTH parents had acted inappropriately and he believed they could benefit from counseling. (T. 38) When specifically asked if he believed either parent was "more guilty of not considering the welfare of the children over the other parent", Womack responded "No, I think both of them care about their kids." (T. 45) Likewise, in detailed findings, the trial court made note of numerous behaviors on the part of both parents that the court deemed inappropriate. (L.F. 63-64) Following that lengthy recitation, the trial court noted that "both parents have engaged in near continual episodes of inappropriate behavior in the presence of the children." (L.F. 65)

Likewise, the parties themselves acknowledged that they had fallen short of what they should have done in co-parenting these children. Father acknowledged that he needed to work on his behavior by consulting with Mother prior to making determinations for the welfare of the children. (T. 135) Mother acknowledged that both she and Father had been guilty of not communicating with the other. (T. 381) Mother testified that she believed the children needed parents who could work together. (T. 390)

Section 452.375.4, RSMo., provides that "it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children, and to resolve disputes involving their children amicably through alternative dispute resolution. In order to effectuate these policies, the court shall determine the custody arrangement which will best assure both parents participate in such decisions…so long as it is in the best interests of the child." Courts have characterized this requirement as a "preference for joint custody." *Burkhart v. Burkhart*, 876 S.W.2d 675, 679 (Mo.App.W.D. 1994).

In this case, Father proposed an award of joint legal custody. (Pet.'s Exh. 1) Mother requested that she be awarded sole legal custody in her original motion to modify in this case. (L.F. 9) According to Mother's testimony, this was prior to any contemplation on her part of relocating. However, as noted by the Court in *O.J.G. v. G.W.G.*, 770 S.W.2d 372, 375 (Mo.App.E.D. 1989), "Just because there is no agreement on joint custody, the court is not without authority to award it….The desire of the parents is only one of several factors to be weighed by the trial court in its sound discretion." In fact, Missouri courts have found that "one of the parents should not be able to veto a joint custody award by failing to agree or failing to cooperate with the joint custody determination." *Id*.

While the evidence demonstrated that both parents had difficulty dealing with the other, it is evident that both parents have a great regard for the welfare of their children. Both parents acknowledge their shortcomings and agree they need to do better. Their

background, as teachers, indicates that they should have the ability to do so if they are so motivated.

There is no evidence in this case of any change in the circumstances of the parents or the children except for Mother's proposed move. Even if that move is approved, a 56 mile distance between the two households would not be sufficient to eliminate the ability of these two parents to act as joint legal custodians of their children.

For the reasons set forth herein, the decision of the trial court modifying the prior Judgment to award Mother sole legal custody of the minor children is not supported by substantial evidence and should be reversed and remanded with directions that the parties remain joint legal custodians of their children.

POINT IV

THE TRIAL COURT ERRED IN MODIFYING THE PRIOR JUDGMENT OF DISSOLUTION OF MARRIAGE AWARDING SOLE LEGAL CUSTODY TO MOTHER BECAUSE THIS DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE AWARD OF SOLE LEGAL CUSTODY TO MOTHER WAS NOT IN THE BEST INTERESTS OF THE CHILDREN WHEN CONSIDERING THE DIRECTIVE CONTAINED IN SECTION 452.375.4, RSMO., BECAUSE THE EVIDENCE INDICATED THAT MOTHER FAILED TO MAKE APPROPRIATE DECISIONS IN THE CHILDREN'S BEST INTERESTS WHEN ACTING AS A JOINT CUSTODIAN WITH FATHER AND MOTHER FURTHER FAILED TO CONSULT OR WORK WITH FATHER FOR THE BENEFIT OF THE CHILDREN AS REQUIRED BY THE PRIOR JUDGMENT AND PARENTING PLAN AND FATHER WAS BETTER ABLE TO ACT AS SOLE LEGAL CUSTODIAN IN THE BEST INTERESTS OF THE MINOR CHILDREN.

As noted in Point III, after considering and approving Mother's request to relocate to the Silva/Greenville area, the trial court modified the prior Judgment modifying the joint legal custody order to an order for sole legal custody for Mother. (L.F. 72) The issue of whether there was substantial evidence to support a finding that a substantial change of circumstance had occurred to require modification of the prior legal custody order from joint

custody to sole custody is more fully discussed in Point III of this Brief. In this point, Father addresses the issue of whether the trial court's determination awarding sole legal custody of the children to Mother is supported by substantial evidence. Father contends that in the event an award of sole legal custody was warranted, the evidence required an award of sole legal custody to Father and, for that reason, the trial court's ruling was not supported by substantial evidence and should be reversed.

The trial court found that the award of sole legal custody was necessary in this case because "the parents have proven that they are not able to participate in joint parenting". (L.F. 73) The trial court awarded sole legal custody of the minor children to Mother, finding that she "has a proven track record of acting in the best interests of the children…." (L.F. 73) This finding is in direct contrast to the remarks by the judge at the end of the trial when, citing the testimony of Counselor Womack and other "independent witnesses", he indicated that BOTH parents had behaved poorly and engaged in behavior that was harmful to the children. (T. 463) Apparently the evidence compelled the trial court to warn that it "makes me wonder whether or not I ought to start looking around for somebody else if you all can't manage to conduct yourselves correctly…." (T. 463)

Section 452.375.4, RSMo., provides that "it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children, and to resolve disputes involving their children amicably through alternative

dispute resolution. In order to effectuate these policies, the court shall determine the custody arrangement which will best assure both parents participate in such decisions…so long as it is in the best interests of the child." *Hankins v. Hankins*, 920 S.W.2d 182, 186 (Mo.App.W.D. 1996).

In this case, Father proposed an award of joint legal custody and as set forth in Point III of this Brief, he still contends that this would serve the best interests of the children. However, in the event this Court determines that an award of sole legal custody to one parent is necessary in this case, this Court must still determine whether substantial evidence exists to support the trial court's finding that an award of sole legal custody to Mother serves the best interests of the children. When analyzing the directive contained in Section 452.375.4, RSMo., in conjunction with the factors contained in Section 452.375.2, RSMo., it is clear that the award of sole legal custody of the minor children to Mother is not supported by substantial evidence.

While the evidence demonstrated that both parents had difficulty dealing with each other, it is evident that Father is the responsible parent who puts the interests of the children ahead of all others. There are numerous examples in the evidence where Mother acted without consultation with Father in circumstances that resulted in many of the breakdowns in communication and greatly affect the welfare of the children.

Likewise, there was no substantial evidence to support this finding in favor of Mother. The uncontradicted evidence demonstrates that, on many occasions, Mother made

appointments with physicians without consulting with Father. An example of Mother's behavior was provided in Petitioner's Exhibit 16 consisting of text messages between Mother and Father. Mother sent a message to Father on August 30, 2012, stating that Austin had a doctor's appointment the following day. Father asked Mother why she had not informed him about the appointment when she made it the week before to allow him to adjust his schedule. Mother response was: "I am only required to keep you informed". (Pet.'s Exh. 16) When Father asked Mother why she waited a week to advise him of the appointment, which was to be the following day, Mother's response was "There is nothing in writing stating how many days notice you are to be given." (Pet.'s Exh. 16) Likewise, all of the evidence in the record demonstrates that Mother did not inform Father about her employment difficulties or her decision to move and relocate the boys' home until more than two months after she had signed a new employment contract. (L.F. 33)

Mother's behavior clearly indicated that she did not consider or respect Father's opinion or his role as a co-parent. When Andrew was injured at a local ball park, Mother wanted to take him immediately to the emergency room for treatment and Father wanted to keep an eye on the injury and see how it developed before deciding on treatment. (T. 117) Instead of waiting or discussing it calmly, Mother's response was to summon the police. (Pet.'s Exh. 12) The police report indicates that when the officer arrived at the public ball park Father was holding his son and speaking to him in a soft voice to calm him down while Mother was "speaking with an elevated voice and pacing as she talked." (Pet.'s Exh. 12)

Ultimately, Andrew was taken to the emergency room for assessment. No fracture was found. (T. 121) Father later took Andrew to see a surgeon in St. Louis for a second opinion and that doctor found a "slight fracture". (T. 121)

Mother also made an appointment and took the boys to see a counselor, without Father's knowledge. (T. 36, 39) At that appointment, Mother intimated that Father may have been sexually inappropriate with the boys based upon their behavior. (T. 40) The counselor found that nothing inappropriate had occurred and testified that he believed Mother may have been trying to set Father up. (T. 41)

In one instance, prior to the original dissolution, when Father attempted to pick up the boys at the babysitter's home to take them to lunch Mother summoned the police, yelling that there was no custody order. (T. 410-11) She prevented Father from taking the children to lunch. In another instance, after the divorce, Father's sister and brother arrived at the babysitter's home to pick up Andrew for a scheduled visit with Father. They were required to get the police involved before Andrew was sent out of the house. Both Mother and the baby sitter were inside. (T. 418-19)

Since the public policy of this State requires that parents participate in decisions regarding their children, in circumstances where joint custody is not warranted, it is important that the parent receiving sole custody understand the importance of keeping the other parent informed and taking their feelings into account. Mother's prior actions, when she was required to act as a joint custodian, clearly demonstrate that she will be unable to

include Father or consider his feelings regarding the care and treatment of the children at all as their sole legal custodian.

In deciding that Mother would be the better sole legal custodian of the children, the trial court mentions "Father's unresponsive attitude toward the ADHD." (L.F. 73) This finding by the trial court is not supported by the evidence in any respect. It is clear from a review of the evidence that Father took the issue of Austin's educational difficulties very seriously. When discussing the possibility of Austin needing medication, Father sought two additional opinions from medical experts. (T. 94) In fact, the trial court criticizes Father for seeking these additional medical opinions. (L.F. 68) Mother, on the other hand, sought to medicate her son because of the recommendation of his teacher. (Pet.'s Exh. 13) Mother indicated that she did not believe her son needed a DIAGNOSIS, just medication. (Pet.'s Exh. 13) In this case, the great weight of the evidence indicates that Father was the parent who responded properly to his son's educational challenges, seeking appropriate medical advice and then insisting upon an IEP to address these issues.

Moreover, Mother's actions in unilaterally deciding to relocate the children and remove them from the school they are familiar with is evidence of her inability to act in the children's best interests. It is clear from Mother's conduct and her testimony that she will do what benefits MOTHER, not what benefits the children. The trial court reminded Mother about the appropriate standard in this case during direct questioning from the Court. The Court advised Mother "This isn't about what's convenient for the parents….This is about

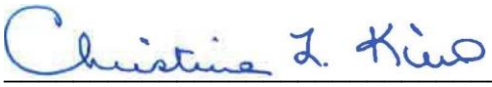
what's in the child's --- children's best interest." (T. 358) Mother's inability to make reasonable decisions in the children's best interests requires that Father be named as their sole legal custodian.

For the reasons set forth herein, the decision of the trial court modifying the prior Judgment to award Mother sole legal custody of the minor children is not supported by substantial evidence and should be reversed and remanded with directions that Father be named their sole legal custodian.

CONCLUSION

For all of the reasons set forth herein, the Judgment of the trial court should be reversed and remanded with directions as set forth herein.

Respectfully submitted,



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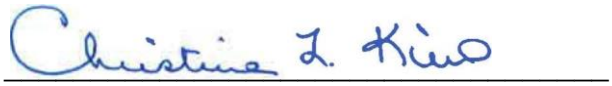
CERTIFICATE OF COMPLIANCE

Comes now the undersigned and certifies:

1. Appellant's Substitute Brief includes the information required by Rule 55.03.

2. Appellant's Substitute Brief complies with the limitations contained in Rule 84.06.

3. Appellant's Substitute Brief, excluding cover page, signature blocks, and certificate of service, contains 16,095 words as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Appellant's Brief was prepared.



Christina L. Kime

IN THE MISSOURI SUPREME COURT

PAUL L. PASTERNAK,	)	
	)	
Appellant,	)	
	)	Appeal No. SC94488
	)	
DENISE M. PASTERNAK,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Substitute Brief of Appellant was filed through the e-filing system with the Supreme Court of Missouri this 12th day of December, 2014, to be served by operation of the Court's electronic filing system on the attorney for Respondent: Lawrence G. Gillespie, Gillespie, Hetlage & Coughlin, LLC, 120 South Central Avenue, Suite 650, Clayton, Missouri 63105-1705, lgillespie@ghc-law.com.

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